

2005

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Recommended Citation

Jackie Lu, *How Terror Changed Justice: A Call to Reform Safeguards That Protect Against Prosecutorial Misconduct*, 14 J. L. & Pol'y (2006).
Available at: <https://brooklynworks.brooklaw.edu/jlp/vol14/iss1/12>

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HOW TERROR CHANGED JUSTICE: A CALL TO REFORM SAFEGUARDS THAT PROTECT AGAINST PROSECUTORIAL MISCONDUCT

*Jackie Lu**

“Every victory in the courtroom brings us closer to our ultimate goal of victory in the war on terrorism. The Department of Justice will continue its aggressive battle in the courts to ensure the safety and security of all Americans.”¹

INTRODUCTION

As Justice Sutherland stated in *Berger v. United States*, the prosecutor “is a representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”² As a representative of the government with the objective of doing “justice,” a prosecutor has the ability to wield the full resources of government to seek search warrants and wiretaps, to pursue indictments, and to grant immunity from

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¹ Press Release, U.S. Att’y Gen., Statement of Att’y Gen. John Ashcroft on Detroit Terror Case (June 3, 2003) [hereinafter *Ashcroft on Detroit Terror Case*], available at http://www.usdoj.gov/opa/pr/2003/June/03_ag_331.htm.

² 295 U.S. 78, 88 (1935) (reversing a conspiracy conviction because proof against the defendant was weak and prosecutor engaged in misconduct by misrepresenting facts and making improper insinuations during trial, thus prejudicing the defense).

prosecution.³ United States Attorneys, working under the Department of Justice, are responsible for prosecuting all offenses against the United States, defending the United States in all civil actions, and collecting debts owed to the federal government.⁴ United States Attorneys investigate and prosecute criminal activities such as violent crime, drug trafficking, public corruption, and domestic and international terrorism.⁵

Since September 11, 2001, the war on terror has been the Department of Justice's (DOJ) first priority.⁶ Assistant U.S. Attorneys (AUSAs) are largely responsible for the investigation, indictment, and prosecution of terror suspects.⁷ An AUSA may use a wide variety of traditional investigative tools to help construct a case.⁸ After September 11th, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) greatly broadened the powers of federal law enforcement officials.⁹ The DOJ has shown,

³ Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1576 (2003).

⁴ 28 U.S.C. § 547 (2004).

⁵ U.S. GEN. ACCT. OFF., U.S. ATTORNEYS: PERFORMANCE-BASED INITIATIVES ARE EVOLVING 2 (2004) [hereinafter *Initiatives Report*], available at <http://www.gao.gov/new/items/d04422.pdf>.

⁶ U.S. DEP'T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 3 (July 2004) [hereinafter *PATRIOT Act at Work*], available at <http://www.fas.org/irp/agency/doj/patriot0704.pdf> (quoting Attorney General John Ashcroft who stated in a speech given on Oct. 25, 2001, "[t]he fight against terrorism is the first and overriding priority of the Department of Justice").

⁷ U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-90.100, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ (last visited Nov. 26, 2004). The manual states "prosecution of national security cases will ordinarily be handled by the USAO in the district where venue lies . . . the Assistant Attorney General shall retain general supervisory authority over the conduct of the case from its inception until its conclusion, including appeal." *Id.*

⁸ For instance, an AUSA may gather witnesses through offers of leniency or through compulsion orders requiring witnesses to testify.

⁹ For example, an AUSA may now request roving wiretaps (that include multiple phones or communication devices) or delayed notification warrants, and can also use greater surveillance records. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). See also *PATRIOT Act at Work*, *supra* note

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at least in one instance, that such increased investigatory and prosecutorial powers may involve too much responsibility to adequately supervise.

The story of the “Detroit sleeper cell” provides an example of the misuse of prosecutorial powers in a terrorism case. In June 2003, Karim Koubriti and Abdel Ilah El Maroudi were found guilty of conspiring to provide material support and resources to terrorism efforts.¹⁰ Then-acting Attorney General John Ashcroft stated that the convictions were a victory and that “every victory in the courtroom brings us closer to our ultimate goal of victory in the war on terrorism.”¹¹ Soon after, the defendants, in their motion to set aside the verdict and for a new trial, alleged that the Government suppressed evidence, knowingly used false testimony, and improperly vouched for and bolstered the testimony of witnesses.¹² During a hearing on the motion, Judge Rosen discovered that the prosecution did withhold exculpatory and impeachment material and thus ordered the Government to conduct a review to determine whether there were additional suppressed documents.¹³ On September 2, 2004, the DOJ issued a sixty-page report on the prosecutorial misconduct of Richard Convertino, the AUSA who spearheaded the prosecution. The DOJ report also recommended that the court dismiss the terrorism charges against Karim Koubriti and Abdel Ilah El Maroudi without prejudice.¹⁴

6.

¹⁰ Another co-defendant, Ahmed Hannan, was found guilty of conspiracy to commit immigration document fraud. Barry Tarlow, *Rico Report: Terrorism Prosecution Implodes: The Detroit ‘Sleeper Cell’ Case*, 29 CHAMPION 61, 68 (2005).

¹¹ *Ashcroft on Detroit Terror Case*, *supra* note 1.

¹² See Bennett L. Gershman, *How Juries Get it Wrong—Anatomy of the Detroit Terror Case*, 44 WASHBURN L.J. 327, 338-39 (2005) (detailing the events leading up to the dismissal of terrorism charges).

¹³ *See id.*

¹⁴ The government investigation was the result of a post-trial court order issued after government lawyers in the U.S. Attorney’s Office in Detroit brought evidence to the attention of defense counsel. *See United States v. Koubriti*, 336 F. Supp. 2d 676, 678-81 (E.D. Mich. 2004) (dismissing the terrorism-related charges in Count I of the indictment because of “pervasive” prosecutorial

After a nine-month investigation, the DOJ report concluded that the “prosecution failed to disclose matters, which viewed collectively, were ‘material’ to the defense.”¹⁵ The DOJ memorandum addressed the many missteps in the prosecution’s disclosure and the prosecution’s misrepresentation of the facts.¹⁶ The DOJ report, however, failed to explain how one prosecutor was permitted to argue fault-ridden theories in such a highly-publicized case.

Later investigations by the *New York Times* uncovered the DOJ’s complicit nature in the wrongful handling of the Detroit case.¹⁷ Convertino may have been a rogue lawyer in part, but according to an internal memorandum, the DOJ knew that the evidence was weak to begin with and charged the men with “the hope that the case might get better.”¹⁸ Furthermore, senior DOJ officials believed that Convertino was withholding information from the DOJ, but the only effort made to rectify the matter was to “rein” Convertino in.¹⁹ Nonetheless, these attempts at departmental oversight of Convertino failed.²⁰

In the post-9/11 world, there are two major elements contributing to the increase in terrorism prosecutions. The first element is the government’s goal of obtaining terrorism

misconduct). The terrorism-related charges were dismissed based on findings resulting from the post-trial investigations of both the Department of Justice and the court. *Id.* at 681. The court reviewed documents, both classified and unclassified, before dismissing the conviction. *Id.*

¹⁵ Government’s Consolidated Response Concurring in the Defendant’s Motions for a New Trial and Government’s Motion to Dismiss Count One Without Prejudice and Memorandum of Law in Support Thereof, at 3, *United States v. Koubriti*, No. 01-CR-80778 (E.D. Mich. Aug. 31, 2004).

¹⁶ *Id.*

¹⁷ Danny Hakim & Eric Lichtblau, *Trial & Errors: The Detroit Terror Case*, N.Y. TIMES, Oct. 7, 2004, at A1.

¹⁸ *Id.* (quoting Barry Sabin, the DOJ’s counterterrorism chief).

¹⁹ *Id.* “Senior Justice Department officials said in interviews that they did not believe Mr. Convertino was sharing important information with them . . . [o]ne official said Washington had directed supervisors in Detroit to ‘rein him in’ before the trial started.” *Id.*

²⁰ *See id.*

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convictions to demonstrate its ability to achieve results in the war on terror.²¹ The second element, which is also a tool of the first, is the PATRIOT Act's broadened definition of terrorism.²² Federal prosecutors may now criminally charge those who provide material support to terrorists.²³ This not only includes those who harbor terrorists, but also individuals who supply technical support such as expert advice and false documentation.²⁴ These political elements of the nation's fight against terrorism create a heightened incentive to prosecute terror suspects, thus leading to a greater risk of improper conduct on the part of prosecutors.

With the many terrorism cases that lie ahead, it is time to reevaluate prosecutorial accountability.²⁵ Notwithstanding many

²¹ Terrorism cases may also increase in light of the government's new strategy of charging "enemy combatants" such as Jose Padilla. *See Padilla v. Hanft*, 432 F.3d 582, 584-85 (4th Cir. 2005). Beginning in May 2002, the government held American citizen Jose Padilla as an enemy combatant. He was detained on such charges as taking up arms against the United States in Afghanistan and conspiring to perform domestic terrorism. In February 2005, the District Court for South Carolina decided Padilla's habeas corpus petition. *Padilla v. Hanft*, 389 F. Supp. 678 (D.S.C. 2005). The district court held that the government could not indefinitely detain an American citizen without charging him with a crime. *Id.* at 692. The Fourth Circuit reversed shortly after, and Padilla petitioned the Supreme Court for certiorari. *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005). In an attempt to short circuit a Supreme Court review of the issue, the government requested the transfer of Padilla to civilian authorities so that he may be prosecuted for alleged offenses that were different from those offenses he was militarily held for. *See Padilla v. Hanft*, 423 F.3d 582, 583-84 (4th Cir. 2005). The government also requested the withdrawal of the Fourth Circuit decision reversing the district court. *Id.* The Fourth Circuit denied the government's request. *Id.* The Supreme Court granted the transfer, but will still consider Padilla's petition for certiorari. *Hanft v. Padilla*, No. 05A578, 2006 WL 14310 (Jan. 4, 2006).

²² USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

²³ 18 U.S.C. § 2339A (2005). The statute prohibits any person from providing "currency . . . lodging, training, safehouses, false documentation or identification, . . . weapons, lethal substances, explosives, personnel, . . . and other physical assets, except medicine or religious materials." *Id.*

²⁴ *Id.*

²⁵ *See* Trac: FBI, "FBI Criminal Referrals for Prosecution Declining," <http://trac.syr.edu/tracfbi/latest/current/>. Since 9/11, while general criminal

generations of laws governing prosecutorial conduct, the current system for oversight is insufficient. Federal prosecutorial conduct is regulated by the U.S. Constitution, civil liability, the McDade Amendment of 1998,²⁶ the DOJ United States Attorneys' Manual and the DOJ's Office of Professional Responsibility (OPR). Yet, these safeguards are insufficient to prevent misconduct in terrorism cases that invoke the mantra of national security.

Part I of this Note details the federal prosecutor's role in the war on terror. Part II examines current judicial and statutory restraints on federal prosecutorial conduct and discusses professional standards.²⁷ Part III details the shortcomings of those restraints, which are especially troublesome given the deference prosecutors are granted in terrorism cases. The lack of attorney sanctions by the DOJ's Office of Professional Responsibility will also be discussed. Part IV will urge a reformulation of OPR standards and a reconsideration of the Federal Prosecutors Ethics Act (proposed in 1999) as a foundation for reform, and suggest that substantial and public sanctions may be appropriate to ensure accountability.²⁸

I. FEDERAL PROSECUTORS & THE WAR ON TERROR

Since the end of 2001, the top strategic goal of the DOJ has been to "protect America against the threat of terrorism."²⁹ Under the auspices of the Attorney General, the FBI and DOJ have increasingly focused on the investigation of terrorist activity and the prosecution of terrorism suspects.³⁰ The ninety-four United

enforcement actions have declined, criminal matters classified as terrorism, anti-terrorism and internal security were up from 390 in fiscal year 2001 to 2,534 in fiscal year 2003. *Id.*

²⁶ Citizens Protection Act (McDade Amendment), 28 U.S.C. § 530B (2004) (subjecting AUSAs to a state's attorney ethics guidelines).

²⁷ Professional restraints include the American Bar Association's Model Rules of Professional Conduct and the DOJ U.S. Attorneys' Manual.

²⁸ Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999).

²⁹ 2003 ATT'Y GEN. ANN. REP., § 1.2-1.3A, available at <http://www.usdoj.gov/ag/annualreports/ar2003/p2sg1.htm>.

³⁰ *Id.*

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States Attorneys' offices, with approximately 5000 attorneys, have a large role in the DOJ's anti-terrorism strategy.³¹ The offices "are part of a national network that coordinates the dissemination of information and the development of a preventive, investigative, and prosecutorial strategy among federal law enforcement agencies, primary state and local police forces, and other appropriate state agencies in each of the ninety-four federal judicial districts."³²

The increased emphasis on terrorism prosecution is highlighted by disclosed DOJ statistics. In 2003, the FBI investigated 23,785 terrorist cases, more than double the number investigated in 2001.³³ This increase correlates to the increase in terrorism and terrorism-related convictions between 2001 and 2003. In 2001, the DOJ reported just twenty-nine convictions for terrorism and terrorism-related activity, whereas in 2003 the number swelled to 103 convictions for terrorism and 558 convictions for terrorism-related activity.³⁴ Furthermore, according to DOJ fiscal year forecasts, the Department expects to increase the number of hours and amount of money spent on preventing terrorism and protecting America.³⁵

United States Attorneys' Offices are faced with increasing pressure to demonstrate achievements in prosecuting terror cases.³⁶ In accordance with the Government Performance and Results Act (GPRA), the DOJ must set goals and objectives in order to measure performance.³⁷ For the fiscal year 2005, the DOJ's first

³¹ *Initiatives Report, supra* note 5, at 3.

³² *Id.*

³³ *Id.*

³⁴ *Id.* Terrorism convictions include "offenses involving acts (including threats or conspiracies to engage in such acts) that are violent or dangerous to human life and that appear motivated by an intent to coerce, intimidate, or retaliate against a government or civilian population." Terrorism-related activities include "terrorism-related hoaxes and terrorist financing." *Id.*

³⁵ *Initiatives Report, supra* note 5, at 28-29. The majority of the 2005 budget (\$1.5 billion) will be applied to "enforc[ing] federal laws and represent[ing] the rights and interests of the American people." *Id.* at 28.

³⁶ *Id.* at 4-5.

³⁷ Government Performance and Results Act, 5 U.S.C.S. § 306 (2004);

strategic goal was to prevent terrorism and promote the nation's security.³⁸ Thus, emphasis is on indicators that measure any progress towards accomplishing this goal.

The DOJ has developed performance measures for U.S. Attorneys in particular, and the Executive Office of United States Attorneys (EOUSA)³⁹ is working towards implementing tools to measure individual U.S. Attorneys' Offices.⁴⁰ For instance, in the fiscal year 2005 congressional budget submission, the DOJ included the percentage of cases favorably resolved.⁴¹ With respect to the goal of protecting America against the threat of terrorism, this specifically means the number of terrorism-related convictions.⁴² Although the theory of such results-oriented performance-based measurements is to promote efficiency, productivity, and accountability, a potential byproduct of requiring such measurements is to encourage prosecutions despite possible weakness in the evidence. This is a serious consequence because a prosecutor's obligation as a "minister of justice" rests on his or her ability to weigh evidence to ensure that it is sufficient to warrant prosecution.⁴³

Initiatives Report, *supra* note 5, at 1 (noting that the GPRA requires agencies to establish goals, measure performance, and report accomplishments annually).

³⁸ *Initiatives Report*, *supra* note 5, at 1.

³⁹ Executive Office for United States Attorneys Home Page, <http://www.usdoj.gov/usao/eousa> (noting that the Executive Office of the United States Attorneys was created on April 6, 1953 as a liaison between DOJ and the ninety-four U.S. Attorneys' Offices nationwide) (last visited Jan. 22, 2006).

⁴⁰ *Initiatives Report*, *supra* note 5, at 5.

⁴¹ *Id.*

⁴² *Id.* at 31.

⁴³ Green, *supra* note 3, at 1587-88. See also MODEL RULES OF PROF'L CONDUCT, R. 3.8(f) cmt. 1 (2004); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 51-52 (1991). The result of improper prosecutions in terrorism cases is even more worrisome when one considers that juries are likely to be swayed towards conviction if the defendant is charged with a crime that implicates a serious national security risk.

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II. CURRENT OVERSIGHT

Since 2001, there has been a change in culture at the DOJ that has trickled down to the U.S. Attorneys' Offices. The pressure to prosecute terrorism cases and the greater prosecutorial discretion tests the safeguards against prosecutorial misconduct. In order to critically assess those safeguards, this section will briefly review the judicial, statutory, and professional standards that protect against misconduct.

A. Judicial Constraints

There are several courtroom constraints on the prosecutor's conduct. First, federal courts may compensate defendants for any due process violations on the part of the prosecutor: judges may suppress evidence, censure prosecutors or dismiss indictments or trials. Second, federal defendants who are subjected to prosecutorial misconduct may have a cause of action for a civil claim. Claims alleging a constitutional rights violation may be brought against a state prosecutor under 42 U.S.C. § 1983 or corresponding *Bivens* claims against federal prosecutors; however, prosecutors acting within their prosecutorial duties may be immune from such liability in whole or in part.⁴⁴ Third, a claim can be brought under the Federal Tort Claims Act (FTCA).⁴⁵ Lastly, the Hyde Amendment,⁴⁶ a federal statute, allows for awards of attorneys' fees when there is a finding of prosecutorial misconduct.

During a trial, due process concerns may protect defendants against prosecutorial misconduct. For instance, courts may disadvantage a prosecutor who fails to disclose exculpatory

⁴⁴ 42 U.S.C. § 1983 (2004). A *Bivens* claim is a suit "brought directly under the Constitution against federal officials." *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

⁴⁵ 28 U.S.C. §§ 2671-2680 (2005).

⁴⁶ Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 619, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006, historical and statutory notes) [*hereinafter* Hyde Amendment].

evidence, uses false evidence, or makes improper arguments.⁴⁷ The suppression of exculpatory evidence or the use of perjured testimony by a prosecutor may lead to a dismissal of an indictment or a new trial.⁴⁸ Findings of egregious prosecutorial misconduct could warrant overturning a conviction.⁴⁹ Furthermore, the “relational paradigm” between prosecutors and judges deters misconduct.⁵⁰ Prosecutors who repeatedly appear before the same judges have a reputation to uphold, and thus the threat of reputational sanctions act to ensure that prosecutors adhere to due process.⁵¹ But aside from prejudicing the government’s case against the wronged defendant or informally rebuking the prosecutor, a prosecutor who acts improperly is unlikely to be

⁴⁷ See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 732 (2001) (referencing the areas in which prosecutorial misconduct does occur).

⁴⁸ See *United States v. Koubriti*, 336 F. Supp. 2d 676, 682 (E.D. Mich. 2004); *Levin v. Clark*, 408 F.2d 1209 (D.C. Cir. 1967) (mandating a new trial because prosecutor withheld evidence that could have raised a reasonable doubt for the jury). Under the exclusionary rule, incriminating evidence obtained in violation of the Fourth Amendment’s search and seizure clause may be excluded from trial. U.S. CONST. amend. IV; Fed. R. Crim. P. 41(h); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974) (stating that the exclusionary rule is used to deter unlawful police conduct but that it is not a constitutional right and thus the rule will only apply to evidence that may incriminate the victim of the search).

⁴⁹ In a racketeering case involving 175 counts of criminal activity and thirty-five defendants, the convictions were overturned when the judges learned that the prosecutor had not disclosed exculpatory material. JIM MCGEE & BRIAN DUFFY, *MAIN JUSTICE* 219 (1996). The Chief U.S. District Court judge in Chicago, Marvin Aspen, stated that he regretted overturning the convictions because of the “misguided zeal” of a prosecutor who was “willing to abandon fundamental notions of due process of law and deviate from acceptable standards of prosecutorial conduct.” *Id.*

⁵⁰ Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449, 461 (2005) “Individual line prosecutors appear on an ongoing basis before federal district judges. They must act in a way that preserves their credibility and reputation if they hope to secure the district judge’s good will in a range of determinations such as detention hearings, evidentiary rulings, and sentencing.” *Id.*

⁵¹ *Id.* at 459-62.

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directly liable to the defendant unless the defendant brings a proper civil suit against the prosecutor.

Defendants have a statutory right to bring suits against prosecutors for constitutional violations. Under Title 42 U.S.C. § 1983, every person who acts under state law to deprive another of “any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress”⁵² Although this statute appears to afford wronged defendants a right to redress for prosecutorial misconduct, the statute is applied narrowly to prosecutors because of prosecutors’ unique role in the criminal justice system.

To effectively maintain the criminal justice system, it is necessary to provide both state and federal prosecutors a certain degree of immunity from civil actions.⁵³ Without immunity, the constant threat of personal liability could temper a prosecutor’s effectiveness in seeking justice.⁵⁴ Furthermore, a prosecutor could suffer from a deluge of frivolous misconduct claims, imposing “unique and intolerable burdens,” upon an honest prosecutor.⁵⁵

The leading case regarding prosecutorial immunity is *Imbler v. Pachtman*.⁵⁶ In *Imbler*, the Supreme Court held that a state

⁵² 42 U.S.C. § 1983. This section works “in harmony with general principles of tort immunities and defenses.” *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

⁵³ *Imbler*, 424 U.S. at 424.

⁵⁴ *Id.* at 424-25.

⁵⁵ *Id.* at 425-26 (referring to the duty of state prosecutors).

⁵⁶ *Id.* at 409. Paul Imbler was convicted of murder, but was later granted habeas relief because of the prosecutor’s use of false testimony and suppression of evidence on the part of the police. Imbler sued the prosecutor under 42 U.S.C. § 1983 but despite the grant of the writ of habeas relief—which recognized the prosecutor’s misconduct—the Supreme Court held that prosecutors must have absolute immunity in order to ensure the proper function of the criminal justice system. *Id.* at 415-16, 426. The Court defined the difference between “absolute immunity” and “qualified immunity” as follows: “[a]n absolute immunity defeats a suit at the outset, so long as the official’s actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivation of his actions, as established by the evidence at trial.” *Id.* at 419 n.13.

prosecutor is absolutely immune from liability under 42 U.S.C. § 1983 if the acts are within the scope of his prosecutorial duties—specifically, conduct related to seeking prosecution and presenting the case.⁵⁷ The Court reasoned that “attaining the [criminal justice] system’s goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence.”⁵⁸ The Court further stated that the potential for personal liability may influence a prosecutor’s decision to introduce relatively questionable witnesses or evidence, thus limiting the trier-of-fact’s ability to weigh all the evidence in determining guilt or innocence.⁵⁹ The Court, however, recognized that such immunity leaves the defendant without “civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty,” but the Court reasoned that the defendant’s right to a fair trial is protected by the “remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies.”⁶⁰ Additionally, the Court emphasized that the public is not left powerless because a prosecutor may be criminally punished for willful deprivations of constitutional rights under 18 U.S.C. § 242 or disciplined by a bar association.⁶¹ Yet, as will be

⁵⁷ See *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). See also *Burns v. Reed*, 500 U.S. 478 (1991) (upholding prosecutor’s immunity from liability for conduct in probable-cause hearing but asserting partial immunity with respect to giving legal advice to police officers during investigations). Although *Imbler* and *Burns* address § 1983 claims brought against state prosecutors, the same analysis is used to determine the liability of a federal prosecutor under a *Bivens* claim. *Moore v. Valder*, 65 F.3d 189, 192 (D.C. Cir. 1995), *cert. denied*, 519 U.S. 820 (1996).

⁵⁸ *Imbler*, 424 U.S. at 426.

⁵⁹ *Id.*

⁶⁰ *Id.* at 427.

⁶¹ *Id.* at 429. See also 18 U.S.C. § 242 (2005). The statute provides for criminal punishment for willful deprivation or violation of Constitutional rights or federal law under color of law. It does not provide a private right of action. For the most part, this statute is used to punish police brutality. See, e.g., *Screws v. United States*, 325 U.S. 91 (1945); *Williams v. United States*, 341 U.S. 97 (1951). In *United States v. Lanier*, 520 U.S. 259, 272 (1997), the Supreme Court held that the defendant should only be criminally prosecuted if he had “fair

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discussed in Part III, such protections may be ineffective, especially in cases involving national security.

The Supreme Court further developed the doctrine of prosecutorial immunity in *Burns v. Reed*.⁶² In *Burns*, the Court distinguished advocacy duties from investigatory duties and refused to extend absolute immunity to the latter.⁶³ The Court specifically held that giving legal advice to the police prior to the initiation of a prosecution was not an activity protected by absolute immunity.⁶⁴ The Court has defined investigatory activities as those usually performed by a detective or police officer that occur prior to the establishment of probable cause for arrest.⁶⁵ Advocatory activities, on the other hand, are related to the “initiation of a prosecution, the presentation of the state’s case in court, or actions preparatory for these functions.”⁶⁶

A defendant may also sue the United States as sovereign under the Federal Tort Claims Act (FTCA). The FTCA provides that the United States may be held liable, with exceptions, for the negligent or wrongful acts of government employees.⁶⁷ The FTCA has a “discretionary function exception” granting immunity to

warning” that his conduct violated a constitutionally protected right. The “fair warning test” is similar to the “qualified immunity test” used in civil actions in which liability attaches only if “[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Id.* at 270 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). If this interpretation is applied to prosecutorial misconduct during the trial phase, it can be argued that the prosecutor would have no fair warning that he would be criminally liable under § 242. The utilization of § 242 as a way to discipline prosecutorial misconduct during trial may not be a realistic protection.

⁶² 500 U.S. 478, 496 (1991).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Buckley v. Fitzsimmons*, 509 U.S. 259, 273-75 (1993); *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995); 28 U.S.C. § 2680(a) (2004) (holding that the United States may be liable because the federal prosecutor used inappropriate investigative techniques when he intimidated and coerced witnesses).

⁶⁶ *Buckley*, 509 U.S. at 278.

⁶⁷ 28 U.S.C. §§ 2671-2680 (2005).

prosecutors performing advocatory duties,⁶⁸ qualified immunity only applies when the prosecutor's conduct goes beyond these duties.⁶⁹ Acts such as "deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is 'exculpatory' and 'material'" have been defined as discretionary and thus fall within the exception to liability.⁷⁰ Thus, there is a similar analysis for determining whether the United States will be liable under the FTCA for the wrongdoing of a prosecutor and whether a prosecutor will be civilly liable under § 1983 or a *Bivens* action, namely, when the prosecutor is performing advocatory duties there is absolute immunity, and when he or she is performing investigative duties, qualified immunity applies.

The 1997 Hyde Amendment is another possible mechanism for redressing victims of prosecutorial misconduct.⁷¹ Under the Amendment, Congress enables a federal court to award reasonable attorneys' fees and costs to an acquitted defendant "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless such circumstances make such an award unjust."⁷² Few parties have met this bar. The DOJ's Office of Professional Responsibility (OPR) reviews claims brought under the Hyde Amendment. Between 1997 and 2000, there were 95 claims filed under the statute.⁷³ Defendants prevailed in two cases and settled in two cases.⁷⁴

In addition to potential civil liability for constitutional

⁶⁸ 28 U.S.C. § 2680(a) (2005).

⁶⁹ *Moore*, 65 F.3d at 217.

⁷⁰ *Id.* at 197.

⁷¹ Hyde Amendment, *supra* note 46.

⁷² *Id.*

⁷³ U.S. GEN. ACCT. OFF., FOLLOW-UP INFORMATION ON THE OPERATIONS OF THE DEP'T OF JUSTICE'S OFFICE OF PROFESSIONAL RESPONSIBILITY 41 (2001) [hereinafter GAO FOLLOW-UP ON OPR], available at <http://www.gao.gov/new.items/d01135r.pdf>. "According to OPR officials, OPR reviews every claim filed under the Hyde Amendment to determine if any facts or issues arising from Hyde-related matters warrant inquiry by OPR." *Id.* at 41.

⁷⁴ *Id.*

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violations, federal prosecutors may be disciplined for violations of professional standards set forth by state bar associations and internal standards of the DOJ. The OPR oversees the professional conduct of federal prosecutors and investigates allegations of misconduct.

B. McDade Amendment and Professional Standards

Analysis of the statutory professional standards for federal prosecutors begins with the McDade Amendment of 1998.⁷⁵ The McDade Amendment subjects U.S. Attorneys to state laws and rules and local federal court rules regarding professional standards.⁷⁶ The movement towards the McDade Amendment dates back to a controversy over a 1989 memorandum from then-Attorney General Richard Thornburgh.⁷⁷ The memorandum was issued in response to the Second Circuit case of *United States v. Hammad*.⁷⁸ The AUSA investigating a Medicaid and mail fraud case against the Hammad brothers directed an informant to meet with the suspect to gather evidence. The court held that because the Hammads had already retained counsel, and because the informant was acting as the alter-ego of the prosecutor, the prosecutor violated an American Bar Association Disciplinary Rule, which states that an attorney may not contact a person represented by counsel without the knowledge and permission of that person's counsel.⁷⁹

⁷⁵ 28 U.S.C. § 530B (2004).

⁷⁶ *Id.* (providing that “[a]n attorney for the Government shall be subject to the 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”). A majority of states have adopted the *Model Rules of Professional Conduct*. See generally MODEL CODE OF PROF’L CONDUCT (2004).

⁷⁷ Memorandum from Att’y Gen. Richard Thornburgh to all Dep’t of Just. Litigators (June 8, 1989), *quoted in* *In re Doe*, 801 F. Supp. 478, 486-90 (D.N.M. 1992) [hereinafter *Thornburgh Memorandum*].

⁷⁸ 858 F.2d 834 (2d Cir. 1988).

⁷⁹ *Id.* at 840. MODEL CODE OF PROF’L RESP. DR7-104(A)(1) (1983). DR 7-104 states: “During the course of his representation of a client a lawyer shall not:

The DOJ feared that following the decision in *United States v. Hammad*,⁸⁰ the Second Circuit's extension of the "no contacts" rule to pre-indictment criminal investigations would hamper undercover investigations.⁸¹ The Attorney General disseminated a memorandum stating that neither DR 7-104 nor the ABA's parallel Model Rule prohibited "contact with a represented individual in the course of authorized law enforcement activity."⁸² Further, the memorandum stated that the DOJ would resist on Supremacy Clause grounds any disciplinary action against federal prosecutors by state authorities pertaining to this issue.⁸³

Former Attorney General Janet Reno, Thornburgh's successor, issued a formal regulation that codified the Thornburgh memorandum.⁸⁴ The regulation was viewed as an attempt by the DOJ to preempt the field of attorney discipline.⁸⁵ The ABA

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." *Id. Compare with* MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983) "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id.*

⁸⁰ *Hammad*, 858 F.2d at 834.

⁸¹ See Note, *Federal Prosecutors, State Ethics Regulation, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2083-84 (2000). *But see Hammad*, 858 F.2d at 840 (rejecting a bright-line rule regarding the application of the no contacts rule to pre-indictment investigations and limiting its holding to the facts of the case).

⁸² Thornburgh Memorandum, *supra* note 77.

⁸³ *Federal Prosecutors, State Ethics Regulation, and the McDade Amendment*, *supra* note 81, at 2084-85 (citing *In re Doe*, 801 F. Supp. 478, 483, 489 (D.N.M. 1992)).

⁸⁴ See 28 C.F.R. § 77 (1999). The regulation gave the DOJ greater authority over the rules regulating its attorneys. *Id.*

⁸⁵ See Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 961-62 (1996) (noting that the DOJ allowed for public comments regarding the proposed regulation and that those comments addressed the dubiousness of DOJ authority to create special rules for prosecutors).

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Standing Committee on Ethics and Professional Responsibility issued an opinion addressing the new regulation.⁸⁶ The opinion stated:

[W]hen an agency promulgates regulations purporting to authorize conduct in derogation of other law, those regulations must be grounded in a statute which contemplates regulations of the kind issued. A general grant of regulatory authority to an agency is not sufficient to support the issuance of regulations that permit what other law forbids.⁸⁷

Courts also reacted negatively to the DOJ's mandate.⁸⁸ In *United States v. McDonnell Douglas Corporation*, investigative agents of the DOJ made ex parte contact with present and former lower-level employees of McDonnell Douglas Corporation without the consent of the corporation's counsel.⁸⁹ In response to a McDonnell Douglas motion, the district court ordered a protective order barring such ex parte contacts because they violated the Supreme Court of Missouri's no-contact rule.⁹⁰ The Eighth Circuit affirmed; the court found no statutory authority for the DOJ's creation of a rule that exempted federal prosecutors from local ethics rules.⁹¹ The court held the regulation invalid and without federal preemption power.

In addition to the local and state ethics rules, prosecutors must also abide by internal guidelines established by the DOJ and

⁸⁶ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).

⁸⁷ *Id.*

⁸⁸ *See United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (holding that ex parte contacts by the federal prosecutors were barred by Missouri Supreme Court Rule 4-4.2 and that 28 C.F.R. § 77 (repealed 1999) was invalid and thus without power to supercede the local rule). *See also United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993) (stating that the Thornburgh memorandum was merely the "unilateral statement of Justice Department policy by the Attorney General").

⁸⁹ 132 F.3d at 1253.

⁹⁰ *Id.* The Supreme Court of Missouri's ethical rules have been adopted by the United States District Court for the Eastern District of Missouri. *Id.*

⁹¹ *Id.* at 1257.

enforced by the OPR. The United States Attorneys' Manual (Attorneys' Manual) dictates the policies, procedures and standards of conduct for prosecutors.⁹² The Attorneys' Manual offers guidelines for discretionary decisions such as initiating federal criminal prosecutions,⁹³ communicating with represented parties,⁹⁴ and declining criminal prosecutions.⁹⁵ The Attorney's Manual provides only internal guidelines and does not affect prosecutors' immunity defenses to suit because it makes clear that it does not "create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."⁹⁶

With respect to prosecutorial misconduct, § 1-4.100 of the Attorney's Manual mandates that department employees should report any "non-frivolous allegation of misconduct" to the "appropriate supervisor."⁹⁷ The supervisor "shall evaluate whether the misconduct at issue is serious" and if so, shall report the allegation to the OPR and to legal counsel in the Executive Office of United States Attorneys (EOUSA).⁹⁸ This framework establishes three levels of assessment: the complaining employee must determine the seriousness of possible misconduct by a co-worker, the supervisor then assesses the seriousness of the conduct, and finally the OPR and EOUSA investigate the allegations.⁹⁹

Statements by a judge that allege prosecutorial misconduct are also subjected to a hierarchical internal review.¹⁰⁰ First, department attorneys are required to report to their supervisors "any statements by a judge or magistrate indicating a belief that misconduct by a Department employee has occurred, or taking under submission a claim of misconduct."¹⁰¹ Second, the supervisor is to report to the

⁹² U.S. Attorneys' Manual, *supra* note 7, at § 1-4.100.

⁹³ *Id.* at § 9-2.030.

⁹⁴ *Id.* at § 9-13.200.

⁹⁵ *Id.* at § 9-2.020.

⁹⁶ *Id.* at § 1.1.00.

⁹⁷ *Id.* at § 1-4.100.

⁹⁸ U.S. Attorneys' Manual, *supra* note 7, at § 1-4.100.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at § 1-4.120

¹⁰¹ *Id.* at § 1-4.210.

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OPR any “evidence or *non-frivolous* allegation of *serious* misconduct.”¹⁰²

The OPR is responsible for reviewing and investigating allegations of professional misconduct or violations of internal guidelines by a federal prosecutor.¹⁰³ First, the OPR will commence an inquiry to determine if the allegation is credible by speaking with the attorney in question.¹⁰⁴ Second, the OPR will determine which inquiries are worth investigating further and assign an Assistant Counsel who will conduct interviews of the attorney, the complainant and any other witnesses.¹⁰⁵ Lastly, the Assistant Counsel prepares a report of the findings and characterizes any prosecutorial misconduct into two levels: intentional misconduct or reckless disregard of professional obligations.¹⁰⁶ A recommendation of a range of disciplinary action

¹⁰² *Id.* (emphasis added).

¹⁰³ See U.S. GEN. ACCT. OFFICE, DEP’T OF JUST.: INFO. ON OFFICE OF PROF’L RESP.’S OPERATIONS (2000) [hereinafter GAO INFO ON OPR]. See also Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 186 (2004). The former chief counsel of the OPR, Michael Shaheen, once stated, “We believe that we are the only component in the department that is the ultimate check on behalf of the Attorney General against prosecutors and misconduct by them . . . and abusing the machinery that they have at their disposal, which is awesome.” MCGEE & DUFFY, *supra* note 49 (quoting Shaheen).

¹⁰⁴ GAO INFO ON OPR, *supra* note 103, at 6-7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 12.

An attorney engages in intentional misconduct when (1) the attorney acts with the purpose of violating an obligation imposed by law, applicable rule of professional conduct, or department policy or regulation or (2) acts knowing that the natural and probable consequences of his or her action is to violate the obligation. An attorney acts in reckless disregard of an obligation when the attorney (1) knows or should know of the obligation, (2) knows or should know that his or her conduct involves a substantial likelihood that the obligation will be violated, and (3) nonetheless engages in the conduct, which is objectively unreasonable under the circumstances.

Id.

is also prepared.¹⁰⁷ The head of the attorney's office enforces the disciplinary actions recommended by the OPR.¹⁰⁸ If for any reason the head of the office wishes to deviate from the OPR's recommendations, he or she must request approval from the Deputy Attorney General.¹⁰⁹

When misconduct is found to be intentional, the state bar where the attorney is admitted is notified.¹¹⁰ Between 1997 and March 2000, forty of the forty-nine cases of prosecutorial misconduct were reported to a state bar association.¹¹¹ During that same period, the OPR received 3913 complaints.¹¹²

Rather than finding professional misconduct, the OPR may find that the attorney used "poor judgment."¹¹³ A poor judgment finding does not result in OPR disciplinary action; however, the matter may be referred to the head of the office where the attorney works to determine if in-house disciplinary measures are appropriate.¹¹⁴

III. DEFICIENCY OF CURRENT OVERSIGHT

A. Heightened Due Process Concerns and Greater Power and Discretion for AUSAs

Terrorism cases, which involve national security, confidential information, and publicity, produce a different dynamic for the prosecutor and the judge as overseer. First, due process protections

¹⁰⁷ *Id.* at 7.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ GAO INFO ON OPR, *supra* note 103, at 12.

¹¹⁰ *Id.* at 13.

¹¹¹ *Id.* at 8.

¹¹² *Id.*

¹¹³ *Id.* An attorney exercises poor judgment when, "faced with alternative courses of actions, the attorney chooses a course of action that is in marked contrast to the action that the department may reasonably expect an attorney exercising good judgment to take." *Id.*

¹¹⁴ GAO INFO ON OPR, *supra* note 103, at 13.

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during trial are tempered by the high stakes involved. Second, the extrinsic pressures on line-prosecutors to successfully prosecute these cases may encourage improper conduct. Third, the tools used in terrorism cases, particularly the Classified Information Procedures Act,¹¹⁵ the Special Administrative Measures statutes¹¹⁶ and the Freedom of Information Act,¹¹⁷ lessen the judge's and the defense attorneys' abilities to oversee prosecutorial conduct and assail attorney-client privilege.

In terrorism cases, which involve matters of national security, judicial oversight may be limited.¹¹⁸ Judges are likely to be deferential to the government's position when determining a due process violation.¹¹⁹ Additionally, with limited disclosure of evidence, certain types of abuse may be particularly worrisome, such as: abuse of prosecutorial discretion in indictment, misrepresentations to the court, improper remarks to the grand jury or during trial, and failure to comply with federal requirements regarding the discovery and disclosure of evidence.¹²⁰

¹¹⁵ 18 U.S.C.S. app. 1-16 (2005).

¹¹⁶ Prevention of Acts of Violence & Terrorism, 28 C.F.R. § 501.3 (2004); National Security Cases, 28 C.F.R. § 501.2 (2004).

¹¹⁷ 5 U.S.C. § 552 (2002).

¹¹⁸ Contrary to the theory that the judiciary usually applies deference to the government position, Attorney General John Ashcroft, in a speech to the Federalist Society, noted that "intrusive judicial oversight and second-guessing of presidential determinations" are putting national security at risk in this "time of war." Dan Eggen, *Ashcroft Decries Court Rulings; Second-Guessing Bush on Security Raises Risk, He Says*, WASH. POST, Nov. 13, 2004, at A06.

¹¹⁹ Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 399-402 (2004). See *Hamdi v. Rumsfeld*, 296 F.3d 278, 279, 283 (4th Cir. 2002) (2004) (holding that the district court should have applied deference to the government's security interests when the district court allowed Hamdi's habeas petition which questioned his status as enemy combatant) *rev'd*. 542 U.S. 507 (2004). See generally Heidee Stoller, et al, *Developments in Law and Policy: The Costs of Post 9-11 National Security Strategy*, 22 YALE L. & POL'Y REV. 197, 224-33 (2004).

¹²⁰ See generally Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449, 469-84 (2005).

Furthermore, the external pressures involved in terrorism cases may lead a prosecutor to disregard the threat of reputational sanctions.¹²¹ Top level officials at the DOJ, in particular former Attorney General Ashcroft and Attorney General Gonzales, have pursued terrorism cases with a particular public zeal. A prosecutor may choose to subvert professional and ethical rules to win his or her case out of fear that losing would not only be a loss in the courtroom but a loss in thwarting terrorism generally.

The Classified Information Procedures Act (CIPA)¹²² diminishes oversight of prosecutorial conduct because it limits access to the government's evidence and witnesses.¹²³ Under CIPA, the government may move the court to redact classified material from potentially discoverable documents or to "substitute either a statement admitting relevant facts that the classified information would tend to prove or a summary of the information."¹²⁴ As a result, the prosecution's evidence can largely go un-reviewed by the court and defense counsel. Without such review, an important safeguard against misrepresentations of evidence by the prosecutor is debilitated.¹²⁵ The beyond-a-reasonable doubt standard "arguably suffice[s] to protect the innocent,"¹²⁶ but where the evidence is largely comprised of classified materials, there can be an unusual reliance on the prosecutor's statements and presentation of the facts which limits the defense counsel's ability to present a proper defense.¹²⁷

In an ongoing terrorism case, *United States v. Aref & Hossein*,

¹²¹ *Id.* at 465-69. *See supra* Part II.A.

¹²² 18 U.S.C.S. app. 3 §§ 1-16 (2005).

¹²³ *See* Cameron Stracher, *Eyes Tied Shut: Litigating For Access Under CIPA in the Government's "War on Terror,"* 48 N.Y.L. SCH. L. REV. 173, 185 (2004).

¹²⁴ *Id.* at 184.

¹²⁵ *See* Zacharias, *supra* note 43, at 51-52 ("[The adversarial system allows] attorneys to keep an eye on one another and on the judge to make sure that they all perform their assigned roles in proper and ethical fashion.").

¹²⁶ *Id.* at 57.

¹²⁷ *See* Hanft v. Padilla, 432 F.3d 582, 586 (4th Cir. 2005) (alluding to possible misrepresentations by the government in its arguments for maintaining Padilla's "enemy combatant" status).

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the prosecution invoked CIPA to prevent the release of certain classified information.¹²⁸ Originally, the prosecution proposed limited defense access to classified information and only under the supervision of a DOJ security employee serving under the Court.¹²⁹ The judge later held that the defense counsel would have access to the classified information at any time, but only in certain secured areas. The court also held that the DOJ security employee would be prohibited from listening to defense counsels' conversations and from reporting to the prosecution which materials defense counsel viewed.¹³⁰ Furthermore, the judge required the prosecution to present, in an *in camera* hearing, the classified information and the "security significance . . . so the court could balance the defendants' right to access the material against the Government's interest in non-disclosure."¹³¹ Although the judge in this case did recognize that the proposed CIPA request should be limited, the element of deference to the government's assessment of the security significance is likely to remain in future terrorism cases.¹³²

¹²⁸ No. 04-CR-402 (N.D.N.Y. filed Aug. 9, 2004). The two defendants are charged with attempting to launder money for terrorism, providing material support to a foreign terrorist organization, and importing firearms without a license. Media sources revealed that a key document, allegedly linking defendants to terrorists in Iraq, was mistranslated. Brendan Lyons, *Extension Denied in FBI Sting Case*, ALB. TIMES UNION, Jan. 15, 2005, at B4.

¹²⁹ John Caher, *Defense Attorneys Get Wide Access in Terrorism Case*, N.Y.L.J., Nov. 18, 2004, at col. 6.

¹³⁰ *Id.*

¹³¹ *Id.* See generally Ralph V. Seep, Annotation, *Validity and Construction of Classified Information Procedures Act*, 103 A.L.R. FED. 219, § 2(b) (2006) "[C]ourts have applied a three step analysis: (1) an inquiry as to whether the evidence is relevant; (2) if the evidence is relevant, a determination whether it is material; and (3) a balancing of the defendant's need for access to the information in the preparation of his defense against the government's need to keep the information from disclosure by reason of its potential harm to national security interests." *Id.*

¹³² See *United States v. Moussaoui*, 65 Fed. Appx. 881, 887 n.5 (4th Cir. 2003) "Intervenors maintain that we need not defer to the classification decisions of the Government. Implicit in this assertion is a request for us to review, and perhaps reject, classification decisions made by the executive branch. This we decline to do." *Id.*

In terrorism cases, the adversarial system, an element in ensuring a defendant's due process rights, is vulnerable.¹³³ This threat is apparent when the government requests "Special Administrative Measures" (SAMs) for a federal prisoner.¹³⁴ SAMs impose specific conditions and restrictions on a prisoner.¹³⁵ There can be limits on prisoner communications when "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons"¹³⁶ These limits on communication can apply to interactions between a defendant and his counsel, thus impinging on the attorney-client privilege and harmfully affecting the adversarial system.¹³⁷

In *United States v. Reid*, SAMs were imposed to restrict Reid's attorney-client privilege.¹³⁸ The SAMs limited communication between Reid, pre-cleared defense counsel and defense counsel staff and third parties.¹³⁹ Part of the SAMs Restriction Document required the defense counsel to sign an affirmation acknowledging receipt of the document.¹⁴⁰ Reid's attorneys informed the government that they would not sign the affirmation and the government promptly cut off communication between defense

¹³³ *See id.*

¹³⁴ Prevention of Acts of Violence & Terrorism, 28 C.F.R. § 501.3 (2004); National Security Cases, 28 C.F.R. § 501.2 (2004). SAMs may be implemented when it is reasonably necessary to "prevent disclosure of classified information upon receiving written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of such information would pose a threat to the national security and that there is a danger that the inmate will disclose such information." *Id.*

¹³⁵ 28 C.F.R §§ 501.2, 501.3.

¹³⁶ 28 C.F.R § 501.3.

¹³⁷ 28 C.F.R. § 501.3(d). *See generally* Marjorie Cohen, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233 (2003).

¹³⁸ 214 F. Supp. 2d 84 (D. Mass. 2002). Richard Reid later pled guilty to eight offenses. *See U.S. v. Reid*, 369 F.3d 619, 620 (1st Cir. 2004).

¹³⁹ *See Reid*, 214 F. Supp. 2d at 87-88.

¹⁴⁰ *See id.* at 88.

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counsel and Reid.¹⁴¹ To diffuse the conflict between the defense counsel and the prosecutors, the court held that the SAMs affirmation was not required of defense counsel.¹⁴² The court, after highlighting the importance of adversarial proceedings, stated that the affirmation imposed “as a condition of the free exercise of Reid’s Sixth Amendment right to consult with his attorneys fundamentally and impermissibly intrudes on the proper role of defense counsel.”¹⁴³

Although the court in *Reid* attempted to protect communications between the defendant and his counsel, the power of SAMs and the required attorney affirmations may go unfettered in other courts. This is particularly worrisome because restrictions on communication between defense counsel and clients result in the sacrifice of a proper defense.¹⁴⁴ The court in *Reid* also noted that affirmations may have a “chilling effect” on defense attorneys in terrorism cases.¹⁴⁵ The court pointed to the case in which defense attorney Lynne Stewart was charged with violating the affirmation she had signed when she communicated statements from her imprisoned client to the press.¹⁴⁶ After the Lynne Stewart conviction, defense attorneys may be tempered in their advocacy pursuit by the looming threat of criminal liability for violations of an affirmation agreement.

Furthermore, the fact that defense counsel has limited communication with his client may influence the behavior of the prosecutor. For instance, under the Model Rules of Professional Conduct, the prosecutor is required to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known

¹⁴¹ *See id.*

¹⁴² *See id.* at 91.

¹⁴³ *Id.* at 94.

¹⁴⁴ *See* U.S. v. Reid, 214 F. Supp. 2d 84, 94 (D. Mass. 2002).

¹⁴⁵ *Id.* at 95.

¹⁴⁶ *Id.* *See* United States v. Sattar, 272 F. Supp. 2d 348, 369-70 (S.D.N.Y. 2003).

to the prosecutor”¹⁴⁷ But where a prosecutor knows that it is unlikely defense counsel will be made aware of exculpatory evidence, the prosecutor may be tempted to not adhere strictly to the rule.

Relevant information pertaining to a defendant’s case may also be curtailed by recent restrictions on the Freedom of Information Act (FOIA).¹⁴⁸ The objective of FOIA is “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”¹⁴⁹ However, under Attorney General John Ashcroft, a stricter policy of disclosure was implemented.¹⁵⁰ The new policy changed discretionary disclosures: agencies would have to consider national security, effective law enforcement, and personal privacy before using its discretion to disclose information.¹⁵¹

Not only is less information voluntarily disclosed due to the new policy, but courts have upheld government claims of exceptions to FOIA when there is a request for information regarding terrorist suspects.¹⁵² Thus, where the government might

¹⁴⁷ MODEL RULES OF PROF’L CONDUCT, R. 3.8(d) (2003).

¹⁴⁸ 5 U.S.C. § 552 (2002). *See* *Ctr. for Nat’l Sec. Stud. v. U.S. Dep’t of Just.*, 331 F.3d 918, 928 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004) (holding that the information requested by plaintiffs with respect to detainees after 9/11 was exempt from FOIA because the records were compiled for ongoing law enforcement purposes). The circuit court stated, “in the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.” *Id.* at 927.

¹⁴⁹ *Rose v. Dep’t of Air Force*, 495 F.2d 261, 263 (1974).

¹⁵⁰ The Attorney General usually issues a policy regarding FOIA at the beginning of a new administration. Former Attorney General John Ashcroft issued a memorandum on October 12, 2001, roughly a month after 9/11, replacing former Attorney General Janet Reno’s 1993 FOIA memorandum and her policy of “presumption of disclosure.” U.S. GEN. ACCT. OFF., FREEDOM OF INFO. ACT: AGENCY VIEWS ON CHANGES RESULTING FROM NEW ADMIN. POL’Y GAO-03-981, at 1 (2003).

¹⁵¹ There are nine categories of exemptions to FOIA; however, agencies may disclose information even if the information could be exempted. Ashcroft’s policy was to limit this agency discretion. *Id.*

¹⁵² *See Ctr. for Nat’l Sec. Stud.*, 331 F.3d at 928; *ACLU vs. U.S. Dep’t of*

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normally be compelled by judicial decree to disclose such information in response to a FOIA request, in terrorism cases, broader interpretation of FOIA exemptions have sufficiently thwarted parties' attempts to discover information that could be useful to a proper defense.

For example, in *Center for National Security Studies v. United States Department of Justice*, the government invoked the law enforcement exemptions contained in FOIA to bar disclosure of the names of post-September 11 investigation detainees and their attorneys and details of the detention/arrest and charges.¹⁵³ The law enforcement exemption provides that information may be withheld if it is "compiled for law enforcement purposes."¹⁵⁴ The court applied a deferential review of the DOJ's claim of law enforcement purpose and held that the terrorism investigation was one of the DOJ's "chief 'law enforcement duties' at this time."¹⁵⁵

In summary, the limitations on information and restrictions on the defense attorneys' access to their clients and potential witnesses compromise the process of building a coherent, well-organized and successful defense. Furthermore, the impartial party overseeing the adversarial process may also be uninformed.¹⁵⁶ Without a defensive counterbalance and a well-informed judicial overseer, the due process protections against prosecutorial transgressions are largely defeated.

B. Statutory Guidelines

In addition to the assault on traditional judicial safeguards against due process violations in terrorism cases, the statutory framework of the McDade Amendment¹⁵⁷ does not enhance the

Just., 321 F. Supp. 2d 24, 35 (D.C. Cir. 2004).

¹⁵³ 331 F.3d at 922, 928.

¹⁵⁴ Exemptions 7(A), 7(C), and 7(F).

¹⁵⁵ *Ctr. for Nat'l Sec. Stud.*, 331 F.3d at 926.

¹⁵⁶ *See United States v. Koubriti*, 336 F. Supp. 2d 676, 678-81 (E.D. Mich. 2004).

¹⁵⁷ Citizens Protection Act (McDade Amendment), 28 U.S.C. § 530B (2004).

protection of a defendant's rights. Although the Amendment was enacted with the intention of preventing prosecutorial misconduct, its application has met much criticism.¹⁵⁸ The Amendment does not adequately reflect the uniqueness of the federal prosecutor's role.¹⁵⁹ The statute requires that prosecutors abide by "state laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties"¹⁶⁰ Yet, confusion arises when the state rules conflict with the federal rules of procedure.¹⁶¹ Pursuant to the McDade Amendment, a prosecutor may be disciplined if he or she follows a federal rule of procedure that conflicts with a state ethics rule.¹⁶² The statute offers no substantive guidance for a prosecutor who practices in multiple jurisdictions, it is rarely enforced, and when applied, courts have construed it in an inconsistent manner.

The statute also subjects the prosecutor to state laws and rules of *all* the states in which he or she performs attorney duties.¹⁶³ When assigned to federal cases that involve investigations across several states, it would be difficult for a prosecutor to abide by the numerous and conflicting state ethics laws and rules.¹⁶⁴ The DOJ

¹⁵⁸ See Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should be Repealed*, 19 GA. ST. U. L. REV. 395 (2002); *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra* note 81. The bill had weak support initially but it finally passed with little debate as part of a larger omnibus spending bill.

¹⁵⁹ See generally Ryan E. Mick, Note, *The Federal Prosecutors Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251 (2001). Mick's note addresses the general ethical guidelines and the responsibilities of prosecutors. It also recommends the proposed Federal Prosecutors Ethics Act (FPEA) over the McDade Amendment.

¹⁶⁰ 28 U.S.C. § 530(B).

¹⁶¹ *Federal Prosecutors, State Ethics Regulation, and the McDade Amendment*, *supra* note 81 at 2089 (noting specifically states such as Oregon and Florida that have adopted a no-contact rule, that bars contact between law enforcement agents and suspects, and the resulting impediment on the federal prosecutorial power to use cooperating witnesses, wiretaps and undercover agents).

¹⁶² *Id.*

¹⁶³ 28 U.S.C. § 530(B).

¹⁶⁴ *Federal Prosecutors, State Ethics Regulation, and the McDade*

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attempted to resolve possible confusion by defining the phrase “where such attorney engages in that attorney’s duties’ to mean either (1) if a case is pending, the rules of ethical conduct adopted by the court before which the case is pending or (2) if there is no case pending, the rules of ethical conduct that would be applied by the attorney’s state of licensure.”¹⁶⁵ This interpretation does not eliminate the problem that arises when the court ethics rules conflict with the state ethics rules because the statutory text of the McDade Amendment does not support the DOJ’s interpretation.¹⁶⁶ Thus, following *McDonnell Douglas*, in which the Eighth Circuit held that DOJ rules do not have federal preemption power, the DOJ’s interpretation is not likely to be binding on a court addressing this issue.¹⁶⁷

Furthermore, the amendment may be applied inconsistently. In *United States v. Colorado Supreme Court*, the Tenth Circuit held that the McDade Amendment applied to state ethical or professional rules, but not to procedural or substantive rules that conflict with federal law.¹⁶⁸ The determination, however, between

Amendment, supra note 81 at 2092-93. Prior to the Amendment, prosecutors were required to abide by the rules of the jurisdiction of the litigation. *Id.*

¹⁶⁵ GAO INFO ON OPR, *supra* note 103, at 18.

¹⁶⁶ See 28 U.S.C. § 530(b); *United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1256 (8th Cir. 1998). The Attorney General does not have the express or implied “authority to exempt lawyers representing the United States from local rules of ethics which bind all other lawyers appearing in that court of the United States.” *Id.*

¹⁶⁷ See, *McDonnell Douglas Corp.*, 132 F.3d at 1257.

¹⁶⁸ 189 F.3d 1281 (10th Cir. 1999). See *United States v. Lowery*, 166 F.3d 1119, 1124-25 (11th Cir. 1999) (stating that even if prosecutors violated a Florida state rule of professional conduct, such conduct would not warrant suppression of the resulting evidence because federal evidentiary law and not state law determines admissibility of evidence); *Stern v. U.S. Dist. Ct. for the Dist. of Mass.*, 214 F.3d 4, 20 (1st Cir. 2000) “The potential for conflict between state and federal law therefore should have been obvious, but section 530B does not speak to the issue. Instead, Congress directed the Attorney General to fill out the details of enforcement by regulation . . . These regulations dispel the notion that section 530B grants states and lower federal courts the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law.” *Id.*

procedural and professional rules is not straightforward.¹⁶⁹ The Court looked to four factors in determining whether a rule is one of ethical conduct.¹⁷⁰ The factors are: (1) whether the professional conduct is generally recognized by “consensus within the profession as appropriate;” (2) whether the rule comes in a broad commandment form; (3) whether the rule is broad and vague in nature (if so, it is likely to be a rule of ethics because procedural and substantive laws must be specific); and (4) whether the rule is directed at the attorney herself and whether members of the profession “would agree that the violating attorney ought to be held personally accountable.”¹⁷¹ After applying these factors, the Court held that a Colorado Rule of Professional Conduct restricting a prosecutor’s ability to subpoena a lawyer to present evidence about a past or present client was an ethical rule, and thus the McDade Amendment would apply and the prosecutor would be subject to the local rule.¹⁷²

Enforcement of the Amendment is thereby weakened due to the confusion created in its application. Despite the McDade Amendment’s potential for sanctions, in the handful of cases that exist, courts have not sanctioned the prosecutors; instead opting for such remedies as reporting the misconduct to the state bar association for disciplinary proceedings, reporting the incident to the OPR, or specifically ameliorating the effect of the misconduct on the case before the court.¹⁷³

Lastly, the McDade Amendment is not a forceful means of regulating prosecutorial misconduct because it is rarely enforced

¹⁶⁹ See *Colo. Sup. Ct.*, 189 F.3d at 1287-88.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1288-89.

¹⁷³ See *U.S. v. Bowman*, 277 F. Supp. 2d 1239, 1243 (N.D. Ala. 2003); *United States v. Grass*, 239 F. Supp. 2d 535, 549 (M.D. Penn. 2003) (holding that suppression of evidence because of possible violation of Pennsylvania’s no-contact rule was not an appropriate remedy in the case and that an alternative remedy would be to file a complaint with the state disciplinary board); *United States v. Lowery*, 166 F.3d 1119, 1124 (11th Cir. 1999) (holding that any violation of state bar rules could not provide a basis for a federal court to suppress testimony that was otherwise admissible).

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by state bar associations or by the OPR. Although individual state bars may hold undisclosed disciplinary hearings on McDade violations, there are few publicly disclosed violations.¹⁷⁴ The OPR should comply with the McDade Amendment and it does have a process for determining violations,¹⁷⁵ but the OPR does not maintain information on the number of times the OPR encountered conflicting ethical rules in its investigations, nor does it report the frequency of misconduct findings in those instances.¹⁷⁶ The lack of internal OPR information highlights a deficiency in application of the amendment.

*C. The War on Terror Raises Concerns About the DOJ's
Internal Disciplinary System*

The DOJ United States Attorneys' Manual and the internal rules of the OPR do not encourage maximum accountability on the part of federal prosecutors. First, there is a cumbersome reporting process. Second, OPR investigations rarely result in actual findings of misconduct that warrant more than a mere verbal censure. Lastly, when the misconduct does reach a level in which sanctions other than censure would be appropriate, such as dismissal or suspension, the OPR does not impose or oversee the punishment, but relies instead on the individual attorneys' offices or state bar associations.

1. Internal Inefficiency in Supervision

The hierarchical structure, although a necessary system, is encumbered by bureaucracy. For instance, according to the DOJ

¹⁷⁴ See GAO INFO ON OPR, *supra* note 103, at 18.

¹⁷⁵ The OPR applies state bar rules when investigating possible cases of prosecutorial misconduct. GAO FOLLOW-UP ON OPR, *supra* note 73, at 5. For example, if an attorney is handling a case in Virginia but is a member of the Ohio bar, the OPR will assess which of the two states has the most stringent laws. *Id.* Thus, once a misconduct investigation is opened, the prosecutor will be subject to the more stringent laws. *Id.*

¹⁷⁶ *Id.*

rules with respect to allegations of prosecutorial misconduct during judicial proceedings, the supervisor must investigate the prosecutor's behavior to determine if there is evidence of misconduct and whether the misconduct is serious enough to report to the OPR.¹⁷⁷ By the time a serious allegation is brought to the attention of the OPR, it will take up to a year for an OPR investigation and action.¹⁷⁸ This delay leaves the defendant with an appeal as the only alternative.

In terrorism cases especially, this multi-layer method of internal attorney supervision is vulnerable to political grandstanding and inter-office rivalries.¹⁷⁹ The national importance of terrorism cases can make them very attractive to the media, which increases the pressure felt by the office to be successful. Thus, in terrorism cases with the potential of high publicity, due process and conservatism are often subverted by a keen desire to win a conviction.¹⁸⁰ In addition to internal department demands, strong external political pressure, and a prosecutor's own competitive nature, may influence whether a prosecutor closely adheres to professional and ethical rules.

The Detroit terror case demonstrates the deficiency of such

¹⁷⁷ U.S. Attorneys' Manual, *supra* note 7, at § 1-4.120. Additionally, between 1997 and 2000, DOJ employees reported misconduct less each year—the number of reports declined from 42% of all complaints in 1997 to 25%. GAO INFO ON OPR, *supra* note 103, at 9.

¹⁷⁸ *Id.* at 10-11.

¹⁷⁹ There are 94 separate U.S. Attorneys' Offices, each headed by a president-appointed U.S. Attorney. Although the offices are all under the direction of the Attorney General, the U.S. Attorneys serve the different communities to which they are appointed. Thus, there is an inherent disjointedness and a "degree of tension will always exist between the local and national mandates of U.S. Attorneys." *Initiatives Report*, *supra* note 5, at 13-14.

¹⁸⁰ See Hakim & Lichtblau, *supra* note 17. See also MCGEE & DUFFY, *supra* note 49, at 210 (noting that "new administrations seeking to remedy a social ill or win favor with voters could and did commandeer the Justice Department's authority in ways that put constitutional rights in jeopardy"). McGee and Duffy detail the DOJ's "War on Crime"—specifically the drug war of the 1990s—and the increasing pressure on federal prosecutors to get results. *Id.*

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internal oversight.¹⁸¹ During the case, at the highest departmental level, Attorney General John Ashcroft demonstrated a intense interest in prosecuting this case.¹⁸² Additionally, the Washington counter-terrorism supervisors were willing to prosecute the weak case and were fully aware that there was a possibility the prosecutor in charge was not disclosing evidence.¹⁸³ At the immediate level, Convertino's direct supervisor in the Detroit office, Keith Corbett, did not rein in Convertino as directed by the Washington office.¹⁸⁴ The lack of supervision by Corbett was perhaps reactionary: in an email to another top prosecutor, Corbett stated, "[i]n the 25 years that I have worked for the Department of Justice, I have never seen anything approaching this level of micromanagement."¹⁸⁵ It appears that politics and egos fueled the prosecution which may have led to the mismanagement of the case and the three-year imprisonment of Mr. Koubriti, one of the four immigrants accused.¹⁸⁶

2. Lack of a Formalized Disciplinary Process

According to the DOJ's 2003 annual report, the OPR "seeks to assure Congress, the courts, the state bars and the public generally that Department attorneys . . . comply with obligations and standards imposed by law, applicable rules of professional conduct, or Department regulations or policy."¹⁸⁷ Failures to

¹⁸¹ See Hakim & Lictbau, *supra* note 17.

¹⁸² See *United States v. Koubriti*, 305 F. Supp. 2d 723, 765 (E.D. Mich. 2003) (admonishing Attorney General Ashcroft for public statements to the press regarding the case in violation of professional rules of conduct and a court order prohibiting public disclosure of information).

¹⁸³ See Hakim & Lichtblau, *supra* note 17.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (quoting e-mail from Corbett to Collins). The *New York Times* obtained a departmental review of the Detroit office that stated there was an "us versus them" attitude between Corbett and Joseph Capone, the senior terrorism prosecutor from Washington.

¹⁸⁶ Danny Hakim, *Defendant is Released in Detroit Terror Case*, N.Y. TIMES, Oct. 13, 2004, at A16.

¹⁸⁷ Att'y Gen., FY 2003: Performance and Accountability Report 1 (2003),

comply with these standards and rules would result in “appropriate discipline” and referral to state bars.¹⁸⁸ According to the one statistic offered by the DOJ, in 2003, there were ninety-eight investigations completed; only thirteen resulted in findings of misconduct.¹⁸⁹ There is no information about the disciplinary process of the thirteen cases because the OPR refers such misconduct to the individual’s particular Attorneys’ Office.¹⁹⁰

Although the OPR supposedly “seeks to assure” the public that DOJ employees are accountable to rules and laws, the OPR’s track record of enforcement is lackluster. Between 1997 and 2000, there were sixty cases in which the OPR found no attorney misconduct despite serious judicial criticism or findings of misconduct.¹⁹¹ Furthermore, the OPR does not track attorneys who resign or retire as a result of an OPR investigation.¹⁹² Although the OPR may continue to investigate attorneys who retire, no disciplinary actions could be imposed.¹⁹³

Because OPR refers cases of prosecutorial abuse to individual United States Attorneys’ Offices, there is an inconsistency in punishments.¹⁹⁴ Although the OPR gives punishment recommendations to each prosecutor’s supervisor, from records disclosed between 1997 and 2000, supervisors have consistently

available at <http://www.usdoj.gov/ag/annualreports/ar2003/p2sg1.htm>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* Before 2001, there were regular, thorough reports by the OPR. This level of disclosure ended with the 2000 annual report.

¹⁹⁰ *See id.*

¹⁹¹ GAO FOLLOW-UP ON OPR, *supra* note 73, at 6. Although the OPR had originally reported sixty cases in which it found no misconduct despite judicial findings, it reviewed these cases and determined that in eighteen of those cases, the OPR did criticize the attorneys’ conduct. *Id.* at 7.

¹⁹² *Id.* at 3. OPR officials state that it would be impossible to show a cause-and-effect relationship between a pending investigation and an attorney’s resignation. *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2 “Administrative disciplinary actions that can be taken when professional misconduct is found can range from oral reprimand to termination of employment, depending on the circumstances of each case, such as the nature and severity of the offense and the experience level of the subject attorney.” *Id.*

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opted to give the minimum punishment recommended.¹⁹⁵

OPR's policy of referring cases of intentional prosecutorial misconduct is also questionable. As of March 2000, there were several closed cases dating back to as far as 1996 where the OPR had not yet informed the appropriate state bar.¹⁹⁶

3. *Nondisclosure of Attorney Misconduct*

Findings of prosecutorial misconduct are often not disclosed in the attorney's files.¹⁹⁷ If there was an official personnel action, such as suspension or removal, a form documenting the action would be permanently placed in the attorney's folder.¹⁹⁸ Otherwise, a written reprimand is placed in the folder for a period not to exceed three years and the "retention period begins the day that the reprimand is delivered to the employee, even if it is not actually filed in the official personnel folder until later."¹⁹⁹ More importantly, the reprimand is to be removed from the official personnel folder when the employee leaves the DOJ.²⁰⁰ The OPR has a confidentiality policy regarding information that it has received and maintains about DOJ attorneys.²⁰¹ Thus, it is possible

¹⁹⁵ See *id.* at 17, 22. For example, the recommendation for *Brady* violations was oral admonishment to written reprimand. In two separate cases, both prosecutors received only an oral admonishment. *Id.* Oral admonishments do not become a part of the attorney's personnel file, whereas written reprimands do become a part of the file. *Id.*

¹⁹⁶ GAO FOLLOW-UP ON OPR, *supra* note 73, at 9. Specifically, the OPR records state that, with respect to certain cases of intentional misconduct, "OPR intends to refer the matter to the appropriate state bar in the form of a public summary once the summary has been reviewed and approved within Justice's prescribed review process." *Id.*

¹⁹⁷ *Id.* at 2-3. The attorney's personnel folder is governed by Office of Personnel Management (OPM) regulations. *Id.*

¹⁹⁸ *Id.* at 3 (known as a Standard Form 50).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* Copies of the reprimand *may be* maintained for both statistical purposes and to support more "serious discipline for later offenses." *Id.*

²⁰¹ 28 C.F.R. § 0.39b (2005). This regulation states, "[T]he Counsel and the internal inspection unit shall maintain the confidentiality of the employee or applicant unless the employee or applicant consents to the release of his or her

for a prosecutor to leave the U.S. Attorney's Office and still practice law without record of his past misconduct.²⁰²

Additionally, records of attorneys' conduct and investigations by the OPR may be exempt from requests for information under the Freedom of Information Act.²⁰³ In *Jefferson v. Department of Justice*, the plaintiff, a federal prisoner, brought a FOIA suit against the OPR seeking records regarding his prosecuting attorney, AUSA Jeffrey Downing.²⁰⁴ Jefferson had accused Downing of prosecutorial misconduct but the OPR found no basis for any action.²⁰⁵ Jefferson requested "all records created and/or received by OPR" with respect to Downing.²⁰⁶ The OPR responded that it "'is the policy of the Office when responding to FOIA requests from third-party individuals to refuse to confirm or deny the existence of records concerning Department of Justice employees, absent their consent or 'an overriding public interest.'"²⁰⁷

When Jefferson brought suit, the government refused disclosure of the AUSA's records by invoking one of FOIA's law enforcement exemptions, Exemption 7(C).²⁰⁸ Exemption 7(C) applies to "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an

identity or the Counsel determines that the disclosure of the identity is necessary to resolve the allegation." *Id.*

²⁰² See *id.* Only the most flagrant cases of misconduct require actual suspension or removal, thus it should be mandatory that such findings remain in the personnel record so that future employers are made aware of potential professional unfitness.

²⁰³ 5 U.S.C. § 552(b)(2), (6) (2002). See *Jefferson v. Dep't of Justice, Office of Prof'l Responsibility*, 284 F.3d 172, 179 (D.C. Cir. 2002) (holding that although the law enforcement record exemption of FOIA would protect certain records from disclosure, the government does not have a blanket exemption).

²⁰⁴ 284 F.3d. at 174.

²⁰⁵ *Id.* at 175.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Jefferson*, 284 F.3d at 175. There are nine exemptions to the FOIA. 5 U.S.C. § 552(b) (2002).

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unwarranted invasion of personal privacy.”²⁰⁹ The court in *Jefferson* held that the government could not claim a blanket exemption and remanded the case back to the trial court for findings as to whether the non-disclosed documents did in fact fall under the law enforcement exemption.²¹⁰ The court held that records received “in connection with government oversight of the performance of duties by its employees” do not fall within the law enforcement exception.²¹¹ OPR files that could lead to civil or criminal sanctions, however, would fall within this exception.²¹²

Under *Jefferson*, if the OPR has compiled information regarding violations of only internal DOJ guidelines, the information would be subject to a FOIA disclosure.²¹³ Yet, this standard may be considered overly broad because where there is a violation of a DOJ guideline, there is often a violation of a corresponding court rule or state ethics rule, which could lead to civil or criminal liability. Therefore, the OPR could claim that such files were not only compiled for internal sanction purposes, but to effectuate state or court laws or the McDade Amendment.²¹⁴ Furthermore, there is another bar to disclosure: once it can be determined that certain files are not for law enforcement purposes, there must be an analysis of whether the “public interest in disclosure of any law enforcement records was outweighed by [the prosecutor’s] privacy interests.”²¹⁵

²⁰⁹ 5 U.S.C. § 522(b)(7)(c) (2002).

²¹⁰ *Jefferson v. Dep’t of Justice, Office of Prof’l Responsibility*, 284 F.3d 172, 179 (D.C. Cir. 2002).

²¹¹ *Id.* at 178-79 (quoting *Weisberg v. United States Dep’t of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973)).

²¹² *Id.* at 284 F.3d at 177.

²¹³ *See id.* Courts have found that failure to comply with internal guidelines of an agency do not give rise to a cause of action. *See* Ellen S. Podgor, *supra* note 103, at 191-92 (citing *United States v. Lee*, 274, F.3d 485, 492 (8th Cir. 2001) and *Sullivan v. United States*, 348 U.S. 170 (1954)).

²¹⁴ *See* discussion *supra* Part II.B.

²¹⁵ *Jefferson*, 284 F.3d at 178.

IV. RECOMMENDATIONS

The usual safeguards that promote ethical and professional conduct on the part of prosecutors are undermined in terrorism cases. The overarching gravity of national security and the resulting deference to the prosecutors' roles in terrorism cases makes it difficult for the judiciary, defense counsel, and external state bars to regulate the federal prosecutors' conduct. This Note recommends greater transparency by the OPR and a stricter internal disciplinary process in combination with particular Congressional oversight in terrorism cases.²¹⁶

Improvements in OPR policy are fundamental. Judges may report misconduct in their opinions or directly notify the OPR. Judges, however, are limited by the information available to them.²¹⁷ The OPR on the other hand, may review all the evidence (including grand jury testimony), speak with colleagues and supervisors, and question the prosecutor. The OPR has the best access to determine whether the prosecutor's processes were legitimate with respect to indictment, discovery, contact with witnesses, and representations in court.

A. The OPR

With respect to terrorism cases, OPR should play an active role. The OPR's current policy is to passively wait for complaints to arise.²¹⁸ Additionally, the OPR will not investigate if the issue is still before the courts.²¹⁹ This delay often results in inadequate

²¹⁶ Although many scholars and professionals have called for a reformulation of how prosecutors are supervised, this section will deal primarily with how to prevent prosecutorial misconduct within terrorism cases. For a discussion of the debates surrounding supervision of federal prosecutors, see Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003). The call for transparency is not a novel recommendation. See Zacharias, *supra* note 47 at 773-74.

²¹⁷ MCGEE & DUFFY, *supra* note 49, at 218.

²¹⁸ GAO INFO ON OPR, *supra* note 103, at 6.

²¹⁹ *Id.*

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investigations because evidence of possible misconduct becomes stale.²²⁰ OPR can actively handle terrorism cases by appointing an OPR official to oversee these cases on a periodic basis. For example, when a CIPA exception is invoked, the OPR official would be empowered to review such a decision.

Although this level of OPR supervision may antagonize prosecutors and U.S. Attorneys, it is necessary to reformulate the role of the OPR. OPR jurisdiction over the conduct of DOJ attorneys should be presupposed. A culture of professionalism and respect for ethics rules, internal guidelines, and federal statutes should be the norm.

B. Congressional Oversight

The OPR has a duty to maintain its commitment to deterring prosecutorial misconduct. In the past, the OPR's commitment to this goal apparently "rose and fell in direct proportion to the personal interest an attorney general devoted to the issue."²²¹ Because the commitment to deterring prosecutorial misconduct should not depend on the whims of a particular Attorney General, Congress should have oversight.²²²

The Federal Prosecutors Ethics Act, proposed in January 1999

²²⁰ *Id.* Furthermore, "[a] complaint may be closed administratively if, for example, it . . . lacks sufficient evidence to warrant an inquiry." *Id.*

²²¹ MCGEE & DUFFY, *supra* note 49 at 277. Attorney General Janet Reno emphasized disclosure of prosecutorial misconduct and OPR proceedings unlike her predecessors and successors. *Id.*

²²² Although critics may question whether Congress has the power for such oversight of United States Attorneys, Congressional oversight is essential to the balance of powers. Although there may be those who argue that Congressional oversight of DOJ attorneys would hamper the attorneys' effectiveness in pursuing justice, Congressional oversight would protect against threats to civil liberties. As the DOJ continues to consolidate its powers with respect to criminal prosecutions—this is seen with federal sentencing and limited disclosure in terrorism cases—the judiciary and Congress need to be vigilant in supervision. The *Federalist Papers* clearly highlighted the threat of too much power in one branch: "this accumulation of powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

by Senator Orrin Hatch of the Senate Committee on the Judiciary, recommended such congressional oversight.²²³ Two important elements of the Ethics Act required the Attorney General to “establish a range of penalties for engaging in such prohibited conduct, including reprimand, demotion, dismissal, suspension from employment, referral of ethical charges to the bar, and referral of evidence related to the conduct to a grand jury.”²²⁴ The Attorney General would also be required to “report annually to specified congressional committees on the activities and operations of DOJ’s Office of Professional Responsibility.”²²⁵

The Ethics Act should be reconsidered. It makes two important reforms that would reinforce the current judicial, statutory, and internal guidelines that protect against federal prosecutorial misconduct.²²⁶ First, as addressed above, there would be a formalized disciplinary process by formulating penalties for each type of misconduct.²²⁷ Second, the Ethics Act would increase the DOJ’s accountability as a whole by mandating that the Attorney General report annually to Congress regarding the operations of the OPR.²²⁸

Congress has the expertise and the ability to oversee OPR investigations pertaining to possible misconduct in terrorism cases.

²²³ The Ethics Act was first proposed as an alternative to the McDade Amendment. As discussed in Part II.B., *supra*, the McDade Amendment subjects federal prosecutors to state ethics laws and rules. The Ethics Act, on the other hand, would require federal prosecutors to abide by state ethics rules only to the extent that the rules or laws do not conflict with the effectuation of federal law or policy. For instance, a major criticism of the McDade Amendment was that many state rules and laws bar attorneys from contacting represented witnesses. This no contact rule is contrary to federal law and would ultimately interfere with the prosecutor’s ability to efficiently investigate and prosecute a case. Under the Ethics Act, prosecutors would still be subject to general state ethics rules but with certain exceptions—such as in the case of the no contact rule.

²²⁴ Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

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A congressional committee with authority to review confidential national security documents may review the validity of the indictments, the evidence presented, and contact with protected witnesses.

CONCLUSION

The safeguards against prosecutorial misconduct are significantly weaker in terrorism cases. By invoking the importance of national security, the government has sought to limit information and judicial processes in terrorism cases. Federal prosecutors, who are essentially foot soldiers in terrorism cases, should be supervised in order to ensure fairness in terrorism prosecutions. For this reason, it is necessary to reevaluate the DOJ's internal oversight of its attorneys and to reformulate the way prosecutors are sanctioned. The DOJ has historically guarded the ability to discipline its attorneys. Thus, external supervision by Congress is necessary to protect against the DOJ's inherent bias.