Written Statement of
Tim Evans

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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

Re: H.R. 3386
("Ethical Standards for Federal Prosecutors Act of 1996")
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National Association of Criminal Defense Lawyers' Director, Tim Evans of Fort Worth, Texas, has practiced criminal law for over 25 years.

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

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

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

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

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

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

BROAD-BASED APPLAUSE FOR H.R. 3386

H.R. 3386 is a much-needed, long overdue measure to reign in professed self-policing prosecutors run amuck, and to end the reign of prosecutorial imperialism begat by the roundly condemned “Thornburgh Memorandum” of June 1989. We support the bill and its effort to re-confirm the basic principle of fairness that prosecutors must abide by the rules of ethics just like all other lawyers.
NACDL joins the federal courts, the (unanimous) Conference of Chief Justices of the 50 State Supreme Courts, the American Corporate Counsel Association, and numerous other national, state, and local authorities and organizations, in staunch condemnation of DOJ’s attempt to opt itself out of the fundamental state and federal court rules of attorney practice forbidding all lawyers from communicating directly with opposing parties who are already represented by counsel. See e.g., Attachment A (Unanimous 1994 Resolution by the State Court Chief Justices, in opposition to Reno Justice Department’s elevation of “Thornburgh Memorandum” to status of Federal Regulations); Attachment B (resolution condemning Reno Regulations, by Illinois State Bar Association); Attachment C (condemnation of Reno Regulations by General Motors); Attachment D (condemnation of Reno Regulations by University of Pennsylvania Law School Professor and Director of Center on Professionalism, Curtis R. Reitz); Attachment E (Joint Organizational Letter of October 24, 1995, at pp. 4-6, calling for congressional disapproval of “Thornburgh Memorandum”/Reno Regulations).

FEDERAL PROSECUTORS: ABOVE THE LAW?

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

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

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

Why? Because in America, until June 1989, anyway, attorney conduct rules have always applied equally to private practitioners and government lawyers alike, including the powerful prosecutors. The particular rule at issue here, which forbids a lawyer from communicating with another lawyer’s client, has been on the books for almost 90 years, and is no exception. But instead of following the rules by which all other lawyers must abide, under DOJ’s self-aggrandizing regulations, attorneys for the federal government claim to be subject only to "rules of conduct adopted by the Attorney General." In other words, the prosecutors’ own boss, rather than neutral state or judicial authorities, would be responsible
for regulating, or not, the prosecutors' conduct. H.R. 3386 would overturn this DOJ attempt at self-aggrandizement; deservedly so.

**FAILURE OF DOJ SELF-POLICING**

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

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

Things have not gotten better since 1990. In 1993, federal judges reversed the convictions of 13 alleged members of the El Rukn street gang on conspiracy and racketeering charges after learning that assistant U.S. attorneys had plied "informants" with alcohol, drugs, and sex in federal offices in exchange for their "cooperation," and had knowingly used perjured testimony. Finally, after two years, the DOJ's OPR did recommend that one prosecutor be terminated, but even that prosecutor has remained on the DOJ payroll.
Likewise, that same year, Judge Richard Posner of the Seventh Circuit Court of Appeals (a Reagan-appointee) observed: “[t]he increase in the number of federal prosecutors in recent years has brought with it problems of quality control.” *U.S. v. Van Engel*, 15 F.3d 623, 626 (1993), *cert. denied*, 114 S.Ct. 2163 (1994). Judge Posner (now the Chief Judge for the Seventh Circuit) went on to describe and condemn a campaign of harassment waged against a respected criminal defense attorney who was forced to abandon his representation of a client in order to defend himself:

The Department of Justice wields enormous power over people’s lives, much of it beyond effective judicial or political review. With power comes responsibility, moral if not legal, for its prudent and restrained exercise; . . . . On meager grounds the U.S. Attorney’s office launched a sting operation against the lawyer for an individual under criminal investigation by the same office. Although the operation produced zero evidence or leads to evidence of illegal conduct, it dragged on for two years. *Id.* at 629.

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

Indeed, how *can* this be? There is real concern that public fear about crime has prompted many federal prosecutors to “cut corners.” In numerous cases, such as in the *Kojayan* case, prosecutors either withhold material evidence or lie about it (or both), with no consequence from their superiors of the department (Main Justice). In *Kojayan*, for example,
the U. S Attorney “supervising” the lawless prosecutor actually defended the conduct of the assistant before the Ninth Circuit. And the problem seems to be rooted “at the top.” Is the DOJ’s answer to systematic prosecutorial misconduct really the one professed in the Press Release issued by then-Chief of the Criminal Division, Jo Ann Harris during my testimony before the House Waco hearings -- that unconstitutional behavior by federal prosecutors, subverting material evidence, to say nothing of “mere” unethical behavior, is but “prosecution 101" among DOJ lawyers? See Attachment G (internal agency memoranda revealed through House Waco Investigatory Hearings of 1995; and official mischaracterization of same in DOJ “prosecution 101” Press Release). Clearly, the problems begat and/or reflected in DOJ’s claim for self-aggrandized, self-policing, persist.

**DOJ’S SUPREMACY CLAUSE ARGUMENT**

As I’ve noted, the current DOJ regulations date back to 1989, when then-Attorney General Richard Thornburgh issued an internal memorandum advising his federal prosecutors that the extent to which they were bound by the practice rules of the states where they are licensed is strictly up to DOJ to decide, as a matter of internal policy. The purported basis for this bald claim was that the Supremacy Clause of the United States Constitution empowered the federal executive branch to self-police itself, thereby “trumping” generations-old state (and local federal court) licensing rules about communicating with represented parties.
First, absent congressional delegation of such supreme powers, the Supremacy Clause fails. Further, Federalism renders this argument an empty rationale. See e.g., Attachments A and B.

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

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


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

In reviewing the trial court’s decision in _Lopez_, the federal appellate court stated:

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

_U.S. v. Lopez_, 4 F.3d 1455 (9th Cir. 1993). See also _U.S. v. Ferrara_, 54 F.3d 825 (D.C. Cir. 1995) (Buckley, J.) (overruling DOJ’s latest self-aggrandizing regulations by holding that
the New Mexico State disciplinary did indeed have the power, indeed, the responsibility, to investigate one of its licensed lawyers, assistant U.S. Attorney G. Paul Howes, for misconduct).

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

Moreover, the Supremacy Clause fails completely to recognize the Separation of Powers problems inherent in DOJ’s proclamation that its lawyers need not abide by the local practice rules of the federal courts in which they practice. The current regulations’ subversion of the local rules of practice of the federal courts is something the Supremacy Clause cannot even arguably justify. *See e.g.*, Attachment D. These local federal court rules frequently, if not almost always track the state rules of the state in which the federal court is located. And they are all essentially the same. The DOJ’s protestations notwithstanding, there is simply no crazy, chaotic plethora of different rules of conduct. Moreover, all attorneys are responsible for knowing the rules of the courts in which they practice. These rules are certainly no more ambiguous than any of the others. Again, all other lawyers manage. We should expect no
less from those who wield the power to take one's life, liberty and/or property.¹

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

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

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

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

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that [he] shall win a case, but that justice shall be done . . . . He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Nor should his boss, the nation's Top Prosecutor, be able to make it otherwise.
actually elevated the dangerous internal memorandum precedent to a regulatory status, in the Reno Regulation.

CONCLUSION

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

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

Tim Evans
Director
National Association of Criminal Defense Lawyers

2 See id.
CONFERENCE OF CHIEF JUSTICES

RESOLUTION XII

Proposed Rule Relating to Communications with Represented Persons

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

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

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

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

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

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

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

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

(1) Lawyers employed by the Department are required by federal statutory law to be a member of the bar of a state, territory or the District of Columbia.
(2) Every lawyer admitted to practice by a state supreme court, including federal and state government lawyers, must abide by and be governed by that court’s ethical rules.

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

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

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

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

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

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

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

WHEREAS, by letter dated August 1, 1994, the Department replied for the first time to the substance of the Comment and proposal for resolution of the issue which had been sent by the Conference to the Department on March 31, 1994, and in such letter the Department: (a) rejected the positions set forth in the Comment; (b) rejected the proposal of the Conference for resolution of the dispute without offering any counter-proposal; and (c) informed the Conference that the Department “has decided to proceed with our own regulation [and] expect the Final Rule to be published in the Federal Register at the end of this week.”
WHEREAS, the legitimate law enforcement concerns of the Department can be accomplished by communication and cooperation with the Conference rather than by the Department’s unilateral adoption of the Proposed Rule which is: (a) contrary to ethical considerations; (b) violates principles of federalism and separation of powers; and (c) is promulgated without appropriate authority.

NOW, THEREFORE, BE IT RESOLVED as follows:

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

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

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

ATTACHMENT B
RESOLUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adopted by the Illinois State Bar Association's Board of Governors this 18th day of November, 1994.
ATTACHMENT C
ATTACHMENT C
April 1, 1994

VIA FAX

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

Dear Mr. Terison:

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

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

Introduction

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

The proposed rule would stand on its head the minimum ethical rule imposed on every other practicing attorney. The Department, on the one hand, cannot express a "commitment" to the ethical standard detailed in DR 7-104(A)(1) of the ABA Code of Professional Responsibility, and Rule 4.2 of the Model Rules of Professional Conduct, and on the other hand, then proceed to excuse the very thrust of the conduct proscribed by those standards: all in the name of
investigative efficiency. The standard the Department imposes on itself should meet or exceed, not fall short of, the behavior demanded of the least common denominator in the profession. The Department should reconsider the inherently inconsistent implications of this proposed rule, both in its theory and its application, before proceeding any further.

Artificial Distinction Between Represented Persons and Represented Parties

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

The strain of the government's own explanation for the proposed different classes of unindicted persons and companies during the "negotiation" of an agreement reveals the fundamental flaw with its approach. The government recognizes that: "In this context, the prosecutor's superior legal training and specialized knowledge could be used to the detriment of the unacquainted layperson." 54 U.S. 191, 2193 (March 9, 1994). However, proposing a rule which would place a prosecutor possessing these same "unfair" advantages in a position to exploit that disparity and extract from a represented person the predicate information fundamental to the "negotiation" of a plea or settlement is the ultimate in exalting form over substance. An attorney does not check his skills at the door when he proceeds with an "interview" instead of a negotiation. The distinction cannot be logically reconciled. In short form, the government is asserting that ethics are tolerable as long as the result it desires is achieved, but those ethics should not be allowed to interfere with obtaining the result. Ethics and integrity can't be so conveniently "compromised" in the name of investigative efficiency.

The stated rationale for this proposed leniency in the ethical standard demanded of all other attorneys can be distilled down to an argument about results and efficiency. Certainly, it would be easier for government prosecutors to be given license to end-run counsel and contact represented persons at their own discretion as an investigation unfolds. However, the assertion that somehow the closer relationship between prosecuting attorneys
and the agents investigating cases today justifies a surgically altered ethical standard -- indeed makes such an amputation of the body of the basic ethical standard an indispensable element of government investigations -- is mystifying. Certainly, these government attorneys can continue to work closely with agents on cases as they deem appropriate without gutting the ethical strictures demanded of the profession. Other than to forego an unfair advantage over intimidated, frightened potential defendants or their employees, what other real issue is at stake for government attorneys living by the minimum standard expected of all other attorneys within the profession?

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

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

Moreover, in its application, the proposed rule works an equally untenable strain upon the attorneys it seeks to assist. The hair-splitting distinctions for different classes of represented persons will undoubtedly result in different treatment of similarly situated potential defendants depending on the conscience of the individual government attorney. With all due respect to the salutary stated desire of the Department to eliminate "uncertainty and confusion," the proposed rule would have just the opposite effect. Rather than providing the bright line intended, the government attorney will be required to wrestle with sub-issues, largely driven by his own integrity, in assessing the status of an individual or company, and his own motives in choosing the timing of those decisions about status. It creates a larger ethical swamp for individual attorneys in the government than the one the proposed rule is intended to drain.
With all due respect to the good intentions of the Department, its suggestion that it will police itself under the rubric of "policy" considerations is not comforting to those subject to the potential abuses of the proposed rule. Ethics are not always convenient or efficient. They are, however, more indispensable than any efficiency to the Department their abolition would create.

Organizations and Employees

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

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

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

Consequently, the assumptions upon which the Department's stated rationale for its distinction about classes of employees, reserving for ethical treatment only anticipated government attorney communications with the so-called control group, are just plain wrong. There is no factual support for the assertions contained in the stated premise based on the real world conduct among large companies like General Motors. Likewise, the government's own theories of attribution have been applied to the conduct of low-level employees when the government is pursuing a criminal prosecution against a company. Unless the
Department is now suggesting a radical departure from its own theories of attribution, and will seek prosecution only when members of the so-called control group act, the employee class distinction in the proposed rule is not logical. The Department can't have it both ways.

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

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

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

**Conclusion**

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

Respectfully submitted,

Michael J. Robinson
Attorney

MJR:kjp
ATTACHMENT D
ATTACHMENT D
April 4, 1994

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

Attn: John Dwyer, Esq.

Re: Proposed Rule on Communications With Represented Persons

Dear Mr. Dwyer:

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

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

The proposed rule fails to recognize that the primary law governing government attorneys are these federal rules adopted by federal courts. The regulation, whatever its power may be to preempt state law, does not purport to preempt rules of federal court. Very likely every federal district court has in force a local rule that governs communications with represented persons, whether by incorporating into federal law a version of the Code of Professional Responsibility or of the Rules of Professional Conduct or by adopting its own rule on this subject.
Preemption of state law, whatever that may mean in this context, does not affect or change controlling federal law. If the proposed regulation were to be promulgated, it would result in an immediate confrontation between the executive branch and the judicial branch. Government attorneys who follow the proposed rule will violate federal courts' rules. The Department of Justice should not instruct or authorize its attorneys to violate or ignore controlling federal law. The proposed rule is fatally deficient.

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

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

The Department of Justice should withdraw the proposed rule.

Sincerely,

Curtis R. Reitz
Biddle Professor of Law
Director, Center on Professionalism
ATTACHMENT E
October 24, 1995

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

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

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

Dear Representatives Zeliff and Thurman:

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

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

Recent Congressional hearings on the Waco and Ruby Ridge tragedies and the controversy surrounding them further highlight the need for consistent and strong oversight of federal law enforcement practices. Accordingly, we set forth below a description of those issues that have become the focus of questions regarding abusive federal law enforcement practices.
Execution of Search Warrants and "Dynamic Entry"¹

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

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

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

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

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

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

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

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

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

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

¹ By "dynamic entry" we mean forcible, no-knock entry.
upon such claims for the issuance of warrants or as the basis for other enforcement operations.

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

II. Other Fourth Amendment Concerns

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

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

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

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

H.R. 666, the Exclusionary Rule Reform Act of 1995 (introduced by Congressman McCollum) was adopted by the House of Representatives in February 1995. This legislation would expand police powers beyond those conferred by the Supreme Court’s decision in United States v. Leon, 468 U.S. 897 (1984), which created a "good faith" exception to the exclusionary
rule for illegal searches and seizures based on a flawed warrant. H.R. 666 would codify a "good faith" exception to the exclusionary rule for all types of warrantless searches and seizures -- effectively removing the only check on excessive uses of the search and seizure power of the police. The adoption of amendments in the House of Representatives that would exclude the ATF and the Internal Revenue Service from this invitation to abuse does not make the legislation acceptable. The rights of citizens will continue to be vulnerable to abuses from the 100+ federal law enforcement agencies not excluded by the amendment.

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

**Necessary Reforms**

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

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

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

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

**III. Prosecutorial Misconduct**

Federal prosecutors have a constitutional obligation to reveal exculpatory information to the defense. Questions have been raised about serious breaches of this obligation by federal prosecutors in the Waco case. For example, the Waco hearings in the House revealed that ATF agents were instructed by prosecutors to stop their routine shooting review for fear that exculpatory material would be generated that would have to be disclosed to the accused Branch
Davidians. The April 14, 1993 Treasury interoffice memorandum on “Preliminary Investigative Plan” from the Assistant General Counsel for Enforcement provides in part:

- DOJ does not want Treasury to conduct any interviews or have discussions with any of the participants, who may be potential witnesses; the prosecutors do not want us to generate additional Jencks, Brady or Giglio material or oral statements which could be used for impeachment.

  PROB: our information will be limited to what the TRs ask, which will focus on the gunfight and not necessarily on the other major topics in which we are interested; we may not have the first-hand information that we need to conduct our review;

  -- at some point we are going to have to interview the crucial witnesses and perhaps may have to take statements; while we may be able to wait for some of them to have testified in the criminal trial, the passage of time will dim memories;

- DOJ does not want us to make any findings or draw any conclusions from what we review; the prosecutors are concerned that anything negative, even preliminary, could be grist for the defense mill;

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

March 1, 1993

Troy WAR Interview

ATF initiates a shooting review. David Troy and Bill Wood interview Rodriguez and Mastin (3/1), Chojnacki (3/3), Cavanaugh (3/3), Saraby (3/2). Troy tells Review they immediately determined that these stories did not add up. They communicated information to both Hartnett and Conroy on the day or day after each interview. Conroy gave Troy’s handwritten notes to Hartnett. (Note -- Johnston at this point advised Hartnett to stop the ATF Shooting review because ATF was creating Brady Material. Because Chojnacki had not yet been interviewed, Johnston authorized that interview but notes were created.)

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

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

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

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

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

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

Necessary Reforms

1. When confronted with crisis situations involving groups with religious or ideological convictions, the Attorney General should be certain that law enforcement has sought the expertise of a cross-section of qualified scholars. In cases dealing with religious groups, such as at Waco, law enforcement should seek the expertise of qualified scholars on religion.
2. Guidelines should be promulgated to eliminate religious or other viewpoint bias in federal law enforcement investigations and practices, including public affairs announcements and other comments before and during trial.

V. The Use of Lethal Force

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

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

Necessary Reforms

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

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

VI. Accountability and Checks and Balances

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

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

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

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

**Necessary Reforms**

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

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

**VII. Posse Comitatus Act**

The hearings on Waco have raised serious questions regarding the use of Special Agents by federal law enforcement in violation of the Posse Comitatus Act. The Posse Comitatus Act, as amended, 18 U.S.C. §1385, reads:
Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned no more than two years, or both.

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

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

Necessary Reform

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

VIII. The Need for a National Commission

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

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

Sincerely,

Ira Glasser,
Executive Director
American Civil Liberties Union

Malcolm Wallop,
Chairman
Frontiers of Freedom

Gerald H. Goldstein, Immediate Past
President & Legislative Committee Chair
National Association of Criminal Defense
Lawyers

Laura W. Murphy, Director
Washington National Office
American Civil Liberties Union

Tanya K. Metaksa, Executive Director
National Rifle Association
Institute for Legislative Action

William B. Moffitt,
Treasurer
National Association of Criminal Defense
Lawyers

David B. Kopel,
Research Director*
Independence Institute*

John M. Snyder, Public Affairs Director
Citizens Committee for the Right to Keep
and Bear Arms

*For identification purposes only.
Erich Pratt,
Director of Government Affairs
Gun Owners of America

Eric E. Sterling,
President
The Criminal Justice Policy Foundation

Nancy Ross,
Partner
Ross and Green

Joseph P. Tartaro,
President
Second Amendment Foundation

James X. Dempsey,
Deputy Director
Center for National Security Studies

Mark Gissiner, President
International Association for Civilian
Oversight of Law Enforcement

Ronald E. Hampton,
Executive Director
National Black Police Association

Conrad Martin,
Executive Director
Fund for Constitutional Government

David C. Condliffe,
Executive Director
The Drug Policy Foundation

cc: Members of the Leadership
Members of the Subcommittee
ATTACHMENT F
There are now approximately 7,000 lawyers at the Department of Justice. The law and its enforcement are not always as effective as they could be. There is a need for the Department of Justice to keep up with the times and to seek new and innovative ways to combat crime. This includes expanding the powers of the Department of Justice to meet the challenges of the 21st century. The Department of Justice must also ensure that its enforcement activities are transparent and accountable.

Many of the problems that the Department of Justice faces today are a result of the increased powers and responsibilities that it has taken on. The Department of Justice is required to investigate and prosecute a wide range of crimes, from terrorism to cybercrime. This requires a significant amount of resources and personnel, and the Department must ensure that it is effectively utilizing its resources.

The Department of Justice must also ensure that its operations are transparent and accountable. This includes ensuring that its investigations and prosecutions are conducted fairly and without bias. The Department must also ensure that it is complying with all applicable laws and regulations.

Committee on Government Operations

THIRTY-FIFTH REPORT

Mr. Conyers, from the Committee on Government Operations,

November 27, 1996—Ordered to be printed.

LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED

Federal Prosecutorial Authority in a Changing Legal Environment

101-966

Report

2 Session 101st Congress

Union Calendar No. 579
I think that the issue of the protection of the President's activities falls directly within the purview of the law and that the President's actions are not covered by the Constitution. The Constitution does not provide for an independent judiciary, but it does provide for an independent judiciary. The President is not subject to the same constraints as the other branches of government. The President is the Commander-in-Chief of the armed forces and has the power to declare war. The President is also the head of the executive branch of government and has the power to make appointments to the federal judiciary. Therefore, the President is not subject to the same constraints as the other branches of government.

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not been within the subject of formal Federal Criminal Procedure. The present writer believes that any person who has been required to testify at a proceeding in which both Federal law enforcement authorities and Federal courts have been involved, has an obligation to disclose the extent to which the procedures followed by the Government were consistent with the principles of due process established by the Constitution and the laws of the United States.

This section of the report is included for the purpose of emphasizing the importance of the rule of law in the administration of justice. It is with this in mind that the writer has presented the arguments in favor of the procedures followed by the Government. It is hoped that this will serve as a reminder to all who have participated in the administration of justice that the rule of law must be fully observed.
OUR OTHER DECISIONS

Sensationalizing their claims, the plaintiffs argue that the Department was incorrect in its decision to make the changes. This is because the Department did not follow the proper procedures, and the changes were made without proper notice to the public. The Department has a duty to provide proper notice before making changes to its regulations, and the plaintiffs argue that the Department did not do this.

However, the Department argues that it did follow the proper procedures. It claims that the changes were made in response to the need for improved efficiency and effectiveness of its operations. The Department also argues that it is not required to provide notice before making changes to its regulations.

The court will have to determine whether the Department followed the proper procedures in making the changes. It will also have to determine whether the changes were made in response to the need for improved efficiency and effectiveness of its operations, as the Department claims, or whether they were made for other reasons.

In the meantime, the plaintiffs have filed a motion for summary judgment, arguing that the Department did not follow the proper procedures. The court will have to decide whether to grant this motion, which will determine the outcome of the case.

The Department has also filed a counter-motion for summary judgment, arguing that the plaintiffs have not shown that the Department did not follow the proper procedures. The court will have to decide whether to grant this counter-motion, which will also determine the outcome of the case.
...
Responsible for what is to be done?

Robert B. H. MacMillan

Senior Vice President, Chief Financial Officer

March 6, 1968

To: All Employees

from: Robert B. H. MacMillan

Subject: A Change in Corporate Policy

This memorandum is to inform you of an upcoming change in our corporate policy. The Board of Directors has voted to approve the following new policy:

1. Every employee will be required to submit a written report of all financial transactions exceeding $1,000.

2. All employees will be subject to random audits of their financial records.

3. Employees will be required to sign a confidentiality agreement stating that they will not disclose any information about the company's financial affairs.

These changes are being implemented to ensure the integrity of our financial records and to maintain a transparent environment. Please review the new policy carefully and adhere to the new requirements.

Robert B. H. MacMillan
Senior Vice President, Chief Financial Officer
According to the Department's memorandum of practice, simply because a witness's deposition was taken by a party engaged in litigation for the purpose of obtaining evidence for use in a lawsuit does not mean that the witness is automatically disqualified from testifying. The Department's standards are based on whether the witness has been directly or indirectly influenced by the party taking the deposition. If the witness has not been influenced, their testimony can still be admissible in court.

In the case of Mr. Johnson v. Smith, the witness was not influenced by the party taking the deposition and therefore their testimony was admissible. In another case, the witness had been influenced by the party taking the deposition and their testimony was not admissible.

The Department's standards are designed to ensure that witnesses are not biased by the party taking their deposition. This is to ensure that the testimony is fair and impartial and is not influenced by the party taking the deposition. If a witness is influenced by the party taking the deposition, their testimony may be inadmissible in court.

In conclusion, the Department's standards are designed to ensure that witnesses are not biased by the party taking their deposition. This is to ensure that the testimony is fair and impartial and is not influenced by the party taking the deposition. If a witness is influenced by the party taking the deposition, their testimony may be inadmissible in court.

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**Facts:**

- In the case of Mr. Johnson v. Smith, the witness was not influenced by the party taking the deposition and therefore their testimony was admissible.
- In another case, the witness had been influenced by the party taking the deposition and their testimony was not admissible.

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**Conclusion:**

The Department's standards are designed to ensure that witnesses are not biased by the party taking their deposition. This is to ensure that the testimony is fair and impartial and is not influenced by the party taking the deposition. If a witness is influenced by the party taking the deposition, their testimony may be inadmissible in court.

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**ATTORNEY SUBMISSIONS**

- **In the case of Mr. Johnson v. Smith,** the witness's deposition was taken by a party engaged in litigation for the purpose of obtaining evidence for use in a lawsuit. The witness was not influenced by the party taking the deposition and therefore their testimony was admissible.
- In another case, the witness had been influenced by the party taking the deposition and their testimony was not admissible.

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**The Department's standards are designed to ensure that witnesses are not biased by the party taking their deposition. This is to ensure that the testimony is fair and impartial and is not influenced by the party taking the deposition. If a witness is influenced by the party taking the deposition, their testimony may be inadmissible in court.**
The Department of Defense is responsible for ensuring the national security of the United States. The Department is composed of three components: the Department of the Army, the Department of the Navy, and the Department of the Air Force.

The Department of Defense has been directed by Congress to develop a comprehensive plan for the acquisition of military equipment. The plan must include a detailed description of the equipment to be acquired, the projected costs, and the anticipated benefits of the equipment.

The plan must also identify the priorities for the acquisition of equipment, and the criteria for selecting equipment to meet those priorities. The plan must be reviewed by Congress, and must be updated at least every five years.

The Department of Defense is responsible for implementing the plan, and for ensuring that the equipment acquired meets the needs of the military.

In addition to the acquisition of equipment, the Department of Defense is responsible for conducting research and development in order to identify new technologies that can be used to improve the effectiveness of the military.

The Department of Defense is also responsible for overseeing the procurement of services, such as supplies and equipment, that are not acquired by the acquisition of equipment.

The Department of Defense must also ensure that the equipment acquired is maintained in proper working order, and that it is used in a manner that is consistent with the mission of the military.

The Department of Defense is responsible for ensuring that the equipment acquired is secure, and that it is not compromised in any way.

The Department of Defense must also ensure that the equipment acquired is subject to audit, and that the results of the audit are made available to Congress and the public.

The Department of Defense must also ensure that the equipment acquired is used in a manner that is consistent with the laws and regulations of the United States, and that it is not used in violation of those laws and regulations.

The Department of Defense must also ensure that the equipment acquired is subject to environmental impact assessments, and that the results of those assessments are made available to Congress and the public.
null
The Recommissioning Panel on the Commission in 1976 issued a report, including recommendations for the conduct of the Department of Justice and the Department of Prisoner Aid and Rehabilitation.

The report noted that, in line with the recommendations of the panel, the Department of Justice had made significant improvements in its administration and had taken steps to address some of the issues raised in the report. The panel also recommended that the Department of Prisoner Aid and Rehabilitation should be merged with the Department of Justice.

The report concluded that, while progress had been made, further work was needed to address some of the issues raised in the report. The panel recommended that the Department of Justice should continue to work towards implementing the recommendations of the report, and that the Department of Prisoner Aid and Rehabilitation should be merged with the Department of Justice.

The report also noted that, in order to ensure the effective implementation of the recommendations of the report, it would be necessary to provide additional resources and support to the Department of Justice and the Department of Prisoner Aid and Rehabilitation.
The committee endorses these efforts [the issuance of press releases] by the Department to report to the public on its actions. The Committee acknowledges that there may be Privacy Act considerations in some types of information release. Particularly where a case has already been subject to publicity, however, it is appropriate for the Department to state what has resulted from its investigation. Where proper administrative action has been taken or no misconduct found, the Department enhances its credibility with the public by announcing such results. 124

Here’s how Mr. Dennis responded:

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

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

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

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

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

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

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

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

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

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

Mr. DENNIS. Absolutely.

Mr. Wise. And the reason for it.

Mr. DENNIS. All right. 125

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

B. STATUTORY DEVELOPMENTS

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

1. Fee Forfeiture Provisions

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

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

124 H. Rept. 95-1520 at 27.
125 18 U.S.C. Sec. 1963 et seq.
126 21 U.S.C. Sec. 891a et seq.
ATTACHMENT G
MEMORANDUM FOR RONALD K. NOBLE  
ASSISTANT SECRETARY FOR ENFORCEMENT  

FROM: Sarah Elizabeth Jones  
RE: ATF Statements and Issues concerning ATF Knowledge of the Loss of the Element of Surprise  
DATE: September 17, 1993  

March 1, 1993  

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

March 2, 1993  
Killorin UPI  
"I think we lost the element of surprise."  

March 3, 1993  
Hartnett Reuters Tr. Report CNN/LSTN  
Answered question "when the undercover agent heard this phone call, did he realize at the time that this was a tip? "He did not realize this was a tip at the time."  

March 4, 1993  
Hartnett L.A. Times  
("An undercover operative who had penetrated the cult overhead Koresh receiving the call but was not aware that he knew about the raid. At the time the phone call was made to the compound the undercover agent did not realize that the raid had been compromised."
WASHINGTON, D.C. -- Jo Ann Harris, Assistant Attorney General for the Criminal Division of the Justice Department issued the following statement today:

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

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

-30-

95-409
NACDL is the preeminent organization in the United States advancing the mission of the nation’s criminal defense lawyers to ensure justice and due process for persons accused of crime. A professional bar association formed in 1958, NACDL’s 9,000 direct members — and 76 state and local affiliates with another 22,000 members — include private criminal defense lawyers, public defenders, judges and law professors committed to preserving fairness within America’s criminal justice system.

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