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McDade-Murtha Amendment: Legislation in the 107th Congress Concerning Ethical Standards for Justice Department Litigators

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Summary

The McDade-Murtha Amendment, 28 U.S.C. 530B, requires Justice Department litigators to observe the ethical standards established by the state and local federal court rules wherever they perform their duties. The Amendment was passed in an apparent effort to find an effective preventive and corrective mechanism for prosecutorial abuse. Critics argue that the Amendment can work to impede effective federal law enforcement efforts. They point particularly to state and local federal court provisions governing no contact rules, grand jury practices, and professional honesty.

Several amendments to McDade-Murtha have been offered during the 107th Congress. Each has a provision designed to allow federal litigators to initiate, direct, and advise undercover investigations notwithstanding ethical prohibitions against false statements and deceitful conduct. The proposals are in response to an Oregon Supreme Court decision that refused to recognize a law enforcement exception to its state professional honesty requirements. All but one of the proposals simply add the undercover exception to McDade-Murtha.

H.R. 1437, however, repeals McDade-Murtha and returns federal litigators to their pre-existing ethical situtation with several adjustments, *i.e.*:

- an explicit law enforcement undercover exception to any otherwise applicable honesty rule;

- a specific prohibition against the exclusion of otherwise admissible evidence based solely upon a prosecutor's ethical violations;

- a study designed to resolve conflicts over the no contact rule (a proscription against attorneys dealing with the clients of another unbeknownst to their attorneys); and

- a study designed to resolve other conflicts between federal law enforcement interests and state standards of professional responsibility.

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Introduction

The McDade-Murtha Amendment, 28 U.S.C. 530B, instructs Department of Justice litigators to adhere to the ethical standards which apply to other attorneys in the places where the litigators perform their duties.[1] While supporters argue the Amendment affords the only effective means of preventing and correcting prosecutorial abuse, critics contend that the Amendment impedes effective federal law enforcement. Twice in the last year, the Senate has passed legislation that included sections substantially modifying the amendment, but in each instance the modifications have been stripped out of the host legislation prior to its passage. This is a discussion of those sections and other similar proposals introduced in the 107th Congress.

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

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

"(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40," 28 U.S.C. 530B.

"The phrase *attorney for the government* means the Attorney General; the Deputy Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and Tax Division; the Chief Counsel for the DEA and any attorney employed in that office; the General Counsel of the FBI and any attorney employed in that office or in the (Office of General Counsel) of the FBI; any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; and any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The phrase *attorney for the government* also includes any independent counsel, or employee of such counsel, appointed under chapter 40 of title 28, United States Code. The phrase *attorney for the government* does not include attorneys employed as investigators or other law enforcement agents by the Department of Justice who are not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings, 28 C.F.R. §77.2(a).

Background

Prior to enactment of the McDade-Murtha Amendment as section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, 112 Stat. 2681-118, Justice Department attorneys had long been required to be licensed to practice law by some state, territory or the District of Columbia and as a consequence were obligated to honor the ethical standards imposed upon members of the bar to which they were admitted.[2] The federal courts when called upon to establish ethical standards for attorneys appearing before them generally adopted the rules of the states in which they were located.

Early in 1980, the Justice Department ruled that nothing in these state and local federal court standards should be construed as an impediment to federal law enforcement efforts.[3] Attorneys General Thornburgh and Reno subsequently re-emphasized the point.[4]

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[2] *United States v. Ferrara*, 847 F.Supp. 964, 969 (D.D.C. 1993), *aff'd on other grounds*, 54 F.3d 825 (D.C.Cir. 1995). The requirement first appeared and has been carried forward in Justice Department appropriation and authorization acts, 52 Stat. 269 (1938); 93 Stat. 1004 (1979)("None of the sums authorized to be appropriated by this Act may be used to pay the compensation of any person employed after the date of the enactment of this Act as an attorney (except foreign counsel employed in special cases) unless such person shall be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia"); 114 Stat. 2762A-67 (2000)("Hereafter, authorities contained in the Department of Justice Appropriation Authorization Act, Fiscal Year 1980 (P.L. 96-132; 93 Stat. 1040 (1979)), as amended, shall remain in effect until the effective date of a subsequent Department of Justice Appropriation Authorization Act").

[3] "[F]ederal law enforcement activities are limited only by relevant constitutional and statutory provisions . . . . [C]ourts have no authority to exclude evidence solely on the basis of a violation of [state ethical standards], and state bar associations may not, consistent with the Supremacy Clause, impose sanctions on a government attorney who has acted within the scope of his federal responsibilities," *Ethical Restraints of the ABA Code of Professional Responsibility on Federal Investigations*, 4B OPINIONS OF THE OFFICE OF LEGAL COUNSEL 576, 577 (1980).

[4] "The Department has taken the position that, although the states have the authority to regulate the ethical conduct of attorneys admitted to practice before their courts, that authority permits regulation of federal attorneys only if the regulation does not conflict with the federal law or with the attorneys' federal responsibilities," *Memorandum from Attorney General Dick Thornburgh to All Justice Department Litigators* (June 8, 1989)(Thornburgh Memorandum), *printed in*, *In re Doe*, 801 F.Supp. 478, 490 (D.N.M. 1992).

"[T]he Department has long maintained, and continues to maintain that it has the authority to exempt its attorneys from the application of DR7-104 and Model Rule 4.2 [(American Bar Association model ethical standards relating to prohibited discussions with clients unbeknownst to their attorneys)] and their state counterparts. Furthermore, the Department maintains that whether, and to what extent, such prohibitions should apply to Department attorneys is a policy question. *See*,4B OP.O.L.C. 576, 577 (1980)," *Communications with Represented Persons*, 59 *Fed.Reg.* 39910, 39911 (Aug. 4, 1994)(Reno Regulations).

In the meantime, however, Congress had begun to express its concern. The House Government Operations Committee conducted hearings[5] and recommended among other things a thorough examination of the ethics rules applicable to Department attorneys while expressing concern over "the problems inherent in any system of self-policing and regulation," H.Rept. 101-986, at 35 (1990). Later, the House Judiciary Committee held hearings on a legislative proposal cast in language much like that of the McDade-Murtha Amendment.[6]

Thereafter, apparently frustrated by the perceived lack of an effective mechanism to curb prosecutorial abuse by federal prosecutors, both Independent Counsel and regular Justice Department attorneys, Congress added the McDade-Murtha Amendment to the 1998 Justice Department appropriations act.

Divisive Issues

Debate over the Amendment and proposals to change it revolve around the same issues that have marked the subject from the beginning. Some are general; others particularized. Who should determine what ethical standards federal litigators must honor? Should federal standards be uniform throughout the United States or compatible with local standards? Should local "no contact," grand jury, or honesty regulations apply to federal litigators even if they impede the performance of federal attorneys? These issues touched upon below in the context of specific legislative proposals are discussed in greater detail in *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS Report RL30060 (Dec. 14, 2001).

Professional Standards for Government Attorneys Act (S. 1437/§501 of S. 1510)

Senator Leahy introduced the Professional Standards for Government Attorneys Act of 2001 (S.1437) for himself and Senators Hatch and Wyden on September 19, 2001, 147 *Cong.Rec.* S9509. The bill passed the Senate as section 501 of the Senate's terrorism bill (S.1510), 147 *Cong.Rec.* S10622 (daily ed. Oct. 11, 2001), but was not included in the final USA PATRIOT Act, P.L. 107-56.[7] It repeals the McDade-Murtha Amendment and instead places federal litigators under the exclusive control of the local federal court rules where they conduct their activities, subject to several specific exceptions. It calls for studies and reports designed to remove specific divisive issues from the domain of local federal court rules and place them within the federal rules of criminal and civil procedure.

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[5] *Exercise of Federal Prosecutorial Authority in a Changing Legal Environment: Hearing Before the Government Information, Justice, and Agriculture Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. (1990).

[6] *Ethical Standards for Federal Prosecutors Act of 1996 [H.R. 3386]: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996).

[7] S.1510 was passed without hearings or committee report; thus far, S.1437 has been the subject of neither hearings nor a committee report.

More specifically, when federal litigators are engaged in conduct "in connection with" or "reasonably intended to lead to" a proceeding in or before a particular court, they are bound by the ethical standards of that tribunal, which in the vast majority of cases would be a federal rather than a state court. Otherwise, they are bound by the rules of the local federal court where they ordinarily perform their duties.

The sponsor's summary indicates that this last category is for cases of uncertainty as when venue is possible in more than one district or when proceedings are being conducted or anticipated in more than one district: "in other circumstances, where no court has clear supervisory authority over particular conduct, an attorney would be subject to the professional standards established by rules and decisions of the United States District Court for the judicial district in which the attorney principally performs his officials duties," 147 *Cong.Rec.* S9511 (daily ed. Sept. 19, 2001)(*Summary of the "Professional Standards for Government Attorneys Act of 2001"* accompanying the introductory remarks of Sen. Leahy).

The bill codifies the appropriations requirement that federal litigators be licensed to practice law in some American jurisdiction. Like most local federal court rules, it does not require them to be admitted either in the state where they ordinarily represent the United States or in any states where they otherwise perform their duties.[8] Federal litigators are thus returned to where they stood prior to the McDade-

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[8] *E.g.*, D.Vt.L.R. 83.1(c)("Any Assistant United States Attorney for the District of Vermont who does not qualify for admission pursuant to LR 83.2(a)(1), *supra* [relating to members of the bar of the State of Vermont] but is an attorney for the Bar of any District Court of the United States, whose professional character is good and is not subject to any pending disciplinary proceedings, may be admitted to practice in this court upon motion of the United States Attorney for the District of Vermont, pay the required application fee and upon taking the proper oath"); N.D.Tex. L.R. 83.11, LCrR 57.11 (Unless the presiding judge otherwise directs, an attorney appearing on behalf of the United States Justice Department or the Attorney General of the State of Texas, and who is eligible pursuant to LCrR 57.9(a) [*i.e.*, is licensed to practice law by the highest court of any state or the District of Columbia] to appear in this court, shall be exempt from the requirements of LCrR 57.9(b)[relating to application to appear pro hac vice] and 57.10 [relating to the requirement of local counsel], but shall otherwise be subject to all requirements applicable to attorneys who have been granted leave to appear pro hac vice"); N.D. & S.D.Iowa L.R. 83.2(d)(1), L.Cr.R. 1.1; N.D. & S.D.Miss. L.R. 83.1(A)(3); E.D.Pa. Civ.R. 83.5[e], Crim.R. 1.2; E.D.Wash. L.R. 83.2(a); *but see*, S.D.Cal.Civ.Local R., LR 83.3 [c.][3.]("The United States Attorney or Acting United States Attorney. The United States Attorney or the Acting United States Attorney must be a member in good standing of and eligible to practice before the bar of any United States court or of the highest court of any state, or of any territory or insular possession of the United States. b. Attorneys for the United States. An attorney who is not eligible for admission under Civil Local Rule 83.3.c hereof, but who is a member in good standing of, and eligible to practice before, the bar of any United States court or of the highest court of any state, or of any territory or insular possession of the United States and who is of good moral character, may practice in this court in any matter in which the attorney is employed or retained by the United States or its agencies and is representing the United States or any of its officers or agencies, provided that the attorney shall apply for and pass the next succeeding California bar examination for which the attorney may be eligible after receiving permission to practice before this court and thereafter obtain admission to the State Bar of California. Attorneys so permitted to practice in this court are subject to the jurisdiction of the court with respect to

Murtha Amendment, *i.e.*, remote from the enforcement mechanisms of state bar counsel whenever they are employed in a state other than the one in which they have chosen to be licensed.

The proposal also addresses potential limitations on the use of undercover investigations. Stings and other forms of undercover investigation are highly valued law enforcement techniques. For any number of reasons including the fact that federal prosecutors are now more likely to direct, supervise, or advise those conducting undercover investigations, conflicts have arisen under two sets of rules – the "no contact" rules and the honesty rules.

The no contact rules, formulated in order to prevent lawyers from taking unfair advantage of unsophisticated laymen, prohibit attorneys from approaching a represented client unbeknownst to the client's lawyer.[9] For any number of reasons law enforcement undercover investigations will ordinarily not be considered a violation of the no contact rule in most jurisdictions, but there are exceptions, *e.g.*, *United States v. Hammad*, 858 F.2d 834, 839-40 (2d Cir. 1988). The bill leaves the

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their conduct in this court are subject to the jurisdiction of the court with respect to their conduct to the same extent as members of the bar of this court. *Special Assistant United States Attorneys.* Pursuant to 28 U.S.C. §543, the Attorney General may appoint Special Assistant United States Attorneys for the district `when the public interest so requires.' Special Assistant United States Attorneys appointed pursuant to section 543 shall not be required to apply for and pass the next succeeding bar examantion for admission to the State Bar of California as otherwise specified in Civil Local Rule 83.3c.3. Attorneys so permitted to practice in this court are subject to the jurisdiction of the court with respect to their conduct in this court and are subject to the jurisdiction of the court with respect to their conduct to the same extent as members of the bar of this court."); S.D.Cal.Crim.Local Rules, Crim.L.R. 1.1[e.] ("The provisions of the following Civil Local Rules shall apply to criminal actions and proceedings, except where they may be inconsistent with the Federal Rules of Criminal procedure or provisions of law specifically applicable to criminal cases: . . . 20. Rule 83.3 Attorney Admissions, Standards. . . . .").

[9] Rule 4.2 of the American Bar Association's Model Code of Professional Conduct declares that, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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." The earlier ABA Code of Professional Responsibility, declares that "During the course of his representation of a client a lawyer shall not: (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. (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client," DR 7-104(A). Disciplinary Rule 7-104(A) is itself a successor to a provision in the early ABA Canons of Ethics, ABA Canon 9 ("A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law").

no contact rule issue to be resolved by the uniform rules it anticipates will follow from the study it mandates.[10]

The bill deals with the honesty rule issue more directly. The honesty rules ban attorneys from making false statements during the course of their representation of a client or from engaging in dishonest, deceitful, or fraudulent conduct under any circumstances.[11] The Oregon Supreme Court has held that an attorney violates the honesty rules when he misidentifies himself and his purpose in the course of investigating possible fraud committed against a client, *In re Gatti*, 330 Ore. 517, 8 P.3d 966 (2000). In doing so, it refused to recognize a law enforcement exception for either state or federal authorities, 300 Ore. at 530-33, 8 P.3d at 974-76.

It has been suggested that the problems presented by *Gatti* could be overcome if federal prosecutors simply disassociated themselves from undercover investigations until the case was ready for prosecution. The Justice Department replies that early attorney participation helps prevent constitutional violations and is more conducive to successful prosecution.[12]

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[10] "In order to encourage the Supreme Court to prescribe, under chapter 131 of title 28, United States Code, a uniform national rule for Government attorneys with respect to communications with represented persons and parties, not later than 1 year after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chief Justice of the United States a report, which shall include recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for such a uniform national rule," S.1437, §2(c)(1).

[11] Rule 4.1(a) of the ABA Model Rules of Professional Conduct declares that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person;" and Rule 8.4(c) that it "is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Its predecessors, Disciplinary Rules DR7-102(A)(5) and DR1-102(A)(4) of the ABA Model Code of Professional Responsibility are similarly worded. In one form or another, they are in effect in virtually every jurisdiction.

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

"Moreover, this is how it should be. The value of attorneys' direct involvement in investigations cannot be overestimated. Attorneys are well-schooled in the law and can help ensure that investigations stay within constitutional bounds. There are many areas of the law that are highly complex and specialized. In these areas–civil and criminal environmental law enforcement, money laundering, securities fraud, cases arising out of acts of terrorism–federal attorneys are critical because only they will understand the technical issues that are the difference between a case that should be brought to trial and one that does not meet statutory requirements," *The Effect of State Ethics Rules on Federal Law Enforcement; Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. 43 (1999)(prepared statement of Dep.Att'y Gen. Eric H. Holder, Jr.).

The bill creates an undercover exception for federal litigators: "Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction, or supervision on conducting covert activities, and participate in such activities, even though such activities may require the use of deceit or misrepresentation," S.1437, proposed 28 U.S.C. 530B(d).[13]

Although the courts have generally held that a prosecutor's ethical violations do not in and of themselves constitute grounds for the exclusion of evidence, a few have held otherwise.[14] The bill declares that otherwise admissible evidence may not be excluded from evidence in federal criminal proceedings on the basis of a prosecutor's ethical violations.

In addition to the no contact rule study, the bill directs the Judicial Conference to report to the House and Senate Judiciary Committees within two years on (1) the actual and potential conflicts between the performance of federal law enforcement duties and ethical standards dictated by the bill, and (2) the amendments necessary to resolve those conflicts.

S. 1435/§599A of H.R. 2506 (As Passed by the Senate)

Senator Wyden introduced the Federal Investigation Enhancement Act of 2001 for himself and Senator Leahy on September 19, 2001. It was incorporated into the foreign operations appropriations act, H.R.2506, and passed the Senate as section 599A of that bill on October 24, 2001, 147 *Cong.Rec.* S10961. Unlike the more comprehensive S. 1437, it does not repeal the McDade-Murtha Amendment but

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[13] The summary accompanying Senator Leahy's introductory remarks makes it clear that the provision was drafted in response to *Gatti*: "Subsection (d) specifically addresses the situation in Oregon, where a state court ruling has seriously impeded the ability of Federal agents to engage in undercover operations and other covert activities. *See In re Gatti*, 330 Ore. 517 (2000). This subsection ensures that these traditional law enforcement tools will be available to federal prosecutors and agents,"147 *Cong.Rec.* S9511 (daily ed. Sept. 19, 2001)(*Summary of the "Professional Standards for Government Attorneys Act of 2001"* accompanying the introductory remarks of Sen. Leahy).

[14] *United State v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999); *State v. Baker*, 931 S.W.2d 232, 236 (Tenn.Crim.App. 1996); *State v. Decker*, 138 N.H. 432, 438, 641 A.2d 226, 230 (1994); *United States v. Heinz*, 983 F.2d 609, 614 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir. 1990); *Suarez v. State*, 481 So.2d 1201, 1207 (Fla. 1986); *State v. Morgan*, 231 Kan. 472, 479, 646 P.2d 1064, 1070 (1982); *People v. Green*, 405 Mich. 273, 293-94, 274 N.W.2d 448, 454-55 (1979); *but see, Henrich v. State*, 666 S.W.2d 185, (Tex.App. 1983)(rule violation constitutes a violation of state law triggering the general suppression statute); *contra*, *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (suppression is a permissible but not required remedy for violation of the *rule; United States. v. DeVillio*, 983 F.2d 1185, 1192 (2d Cir. 1993)(same); *State v. Miller*, 600 N.W.2d 457, 467 (1999)(same).

imports into it an undercover law enforcement exception similar to that found in S. 1437.[15]

H.R. 3309

The Investigation Enhancement Act of 2001, introduced on November 15, 2001 by Representative Walden for himself and Representatives DeFazio, Wu, Hooley, and Blumenauer, replicates S.1435 with one exception. It applies the exception both to federal litigators and to Justice Department attorneys who are investigators rather than litigators.[16]

APPENDIX

S. 1437

SECTION 1. SHORT TITLE.

This Act may be cited as the "Professional Standards for Government Attorneys Act of 2001".

SEC. 2. PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS.

(a) Section 530B of title 28, United States Code, is amended to read as follows:

"SEC. 530B. PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS.

"(a) DEFINITIONS- In this section:

"(1) GOVERNMENT ATTORNEY- The term 'Government attorney'--

"(A) means the Attorney General; the Deputy Attorney General; the Solicitor General; the Associate Attorney General; the head of, and any attorney employed in, any division, office, board, bureau, component, or agency of the Department of Justice; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney appointed under section 515; any Special Assistant United States Attorney appointed under section 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States; any independent counsel, or employee of such counsel, appointed under

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[15] "Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction or supervision on conducting covert activities, and participate in such activities, even though such activities may require the use of deceit or misrepresentation."

[16] "Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction, or supervision on conducting undercover activities, and any attorney employed as an investigator or other law enforcement agent by the Department of Justice who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings may participate in such activities, even though such activities may require the use of deceit or misrepresentation, where such activities are consistent with Federal law."

chapter 40; and any outside special counsel, or employee of such counsel, as may be duly appointed by the Attorney General; and

"(B) does not include any attorney employed as an investigator or other law enforcement agent by the Department of Justice who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

"(2) STATE- The term 'State' includes a Territory and the District of Columbia.

"(b) CHOICE OF LAW- Subject to any uniform national rule prescribed by the Supreme Court under chapter 131, the standards of professional responsibility that apply to a Government attorney with respect to the attorney's work for the Government shall be--

"(1) for conduct in connection with a proceeding in or before a court, the standards of professional responsibility established by the rules and decisions of that court;

"(2) for conduct reasonably intended to lead to a proceeding in or before a court, the standards of professional responsibility established by the rules and decisions of the court in or before which the proceeding is intended to be brought; and

"(3) for all other conduct, the standards of professional responsibility established by the rules and decisions of the Federal district court for the judicial district in which the attorney principally performs his or her official duties.

"(c) LICENSURE- A Government attorney (except foreign counsel employed in special cases)--

"(1) shall be duly licensed and authorized to practice as an attorney under the laws of a State; and

"(2) shall not be required to be a member of the bar of any particular State.

"(d) COVERT ACTIVITIES- Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction, or supervision on conducting covert activities, and participate in such activities, even though such activities may require the use of deceit or misrepresentation.

"(e) ADMISSIBILITY OF EVIDENCE- No violation of any disciplinary, ethical, or professional conduct rule shall be construed to permit the exclusion of otherwise admissible evidence in any Federal criminal proceeding.

"(f) RULEMAKING AUTHORITY- The Attorney General shall make and amend rules of the Department of Justice to ensure compliance with this section.".

(b) TECHNICAL AND CONFORMING AMENDMENT- The analysis for chapter 31 of title 28, United States Code, is amended, in the item relating to section 530B, by striking "Ethical standards for attorneys for the Government" and inserting "Professional standards for Government attorneys".

(c) REPORTS-

(1) UNIFORM RULE- In order to encourage the Supreme Court to prescribe, under chapter 131 of title 28, United States Code, a uniform national rule for Government attorneys with respect to communications with represented persons and parties, not later than 1 year after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chief Justice of the United States a report, which shall include recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for such a uniform national rule.

(2) ACTUAL OR POTENTIAL CONFLICTS- Not later than 2 years after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chairmen and Ranking Members of the Committees on the Judiciary of the House of Representatives and the Senate a report, which shall include--

(A) a review of any areas of actual or potential conflict between specific Federal duties related to the investigation and prosecution of violations of Federal law and the regulation of Government attorneys (as that term is defined in section 530B of title 28,

United States Code, as amended by this Act) by existing standards of professional responsibility; and

(B) recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for additional rules governing attorney conduct to address any areas of actual or potential conflict identified pursuant to the review under subparagraph (A).

(3) REPORT CONSIDERATIONS- In carrying out paragraphs (1) and (2), the Judicial Conference of the United States shall take into consideration--

(A) the needs and circumstances of multiforum and multijurisdictional litigation;

(B) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil law; and

(C) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

S. 1435/§599A of H.R. 2506 (As Passed by the Senate)

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Investigation Enhancement Act of 2001".

SEC. 2. COVERT INVESTIGATIVE PRACTICES CONDUCTED BY FEDERAL ATTORNEYS.

Section 530B(a) of title 28, United States Code, is amended by inserting after the first sentence, "Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction or supervision on conducting covert activities, and participate in such activities, even though such activities may require the use of deceit or misrepresentation."

H.R. 3309

SECTION 1. SHORT TITLE.

This Act may be cited as the "Investigation Enhancement Act of 2001".

SEC. 2. UNDERCOVER INVESTIGATIVE PRACTICES CONDUCTED BY FEDERAL ATTORNEYS.

Section 530B(a) of title 28, United States Code, is amended by inserting after the first sentence the following: "Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction, or supervision on conducting undercover activities, and any attorney employed as an investigator or other law enforcement agent by the Department of Justice who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings may participate in such activities, even though such activities may require the use of deceit or misrepresentation, where such activities are consistent with Federal law.".