FEDERALISM AND ANTITERRORISM INVESTIGATIONS

Tom Lininger*

A growing number of state and local governments have protested the federal government's surveillance and intelligence-gathering in antiterrorism investigations. As of February 13, 2006, a total of eight state legislatures and 397 local governments have passed resolutions objecting to federal investigative practices.[1] These resolutions have raised concerns about racial profiling, surveillance of First Amendment activity without particularized suspicion, interception of attorney-client communication, overzealous investigation of immigrants, and withholding of information from local officials and the public, among other objections.[2] On April 28, 2005, Portland became the first city in the nation to withdraw its police from a Joint Terrorism Task Force (JTTF) organized by the FBI.[3] Elected officials in other cities with JTTFs are considering whether to follow Portland's lead.[4]

Meanwhile, the federal government continues to bolster the power of federal law enforcement agencies. In a succession of legislation from the USA PATRIOT Act of 2001[5] (the Patriot Act) to the Intelligence Reform and

* Tom Lininger (B.A. Yale, J.D. Harvard) worked as a federal prosecutor for seven years before joining the law faculty at the University of Oregon. A stipend from the Walker-Wiener Fund supported the research for this article and a companion piece, Tom Lininger, *Sects, Lies and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004).

1. Most of these resolutions are available on the website of the Bill of Rights Defense Committee, www.bordc.org (last visited Mar. 13, 2006). The list of states and localities protesting federal antiterrorism investigations spans the political spectrum, and includes liberal college towns as well as conservative strongholds such as Alaska and Idaho.

2. *Id.*

3. Eli Sanders, *City Quits Terrorism Force*, N.Y. TIMES, Apr. 30, 2005, at A11. Portland officials explained that one reason for their withdrawal was the refusal of federal agents to provide investigative information to the mayor and police chief. Sarah Kershaw, *In Portland, Ore., a Bid to Pull Out of Terror Task Force*, N.Y. TIMES, Apr. 23, 2005, at A9.

4. Tomas Alex Tizon, *Portland. FBI Unit to Part Ways*, L.A. TIMES, April 28, 2005, at A8 (noting concern that Portland's "decision might encourage other cities to follow suit").

5. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

Terrorism Prevention Act of 2004,[6] Congress has conferred much greater authority on federal agents and prosecutors. In 2006, Congress reauthorized all but two provisions of the Patriot Act.[7] The Bush Administration has repeatedly exercised federal authority to override states' laws and policies, notwithstanding the president's putative commitment to the doctrine of federalism.[8] For its part, the U.S. Supreme Court recently issued an opinion in *Gonzales v. Raich* that emphatically underscored the supremacy of federal law enforcement despite contrary state legislation.[9]

Are state and local governments powerless to slow the federal juggernaut in antiterrorism investigations? The strategies that state and local governments have pursued to date seem unlikely to achieve any significant results. The U.S. Constitution generally precludes state and local governments from exercising control over federal law enforcement officials,[10] except that state and local officials can prevent the federal government from commandeering their personnel and resources.[11] Portland's approach—the withdrawal of local police from a JTTF—actually appears to be counterproductive, reducing the long-term

6. Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified at, inter alia, 50 U.S.C. § 401).

7. Bill Brubaker, *Bush Signs New Version of Patriot Act*, WASH. POST, Mar. 16, 2006.

8. Professor John Yoo of Boalt Hall has chronicled recent examples of cases in which the Bush Administration subverted federalism, despite the president's promise to "make respect for federalism a priority in this administration." John Yoo, *What Became of Federalism?*, L.A. TIMES, June 21, 2005, at B13. Yoo's list includes the following: the refusal to allow medicinal use of marijuana in California, the interference with Oregon's initiative allowing assisted suicide, the President's proposed constitutional amendment to overrule states' experiments with gay marriage, and the President's No Child Left Behind Act, which imposes uniform educational standards on states. *Id.*

9. 125 S. Ct. 2195 (2005). The Court ruled that a California law permitting small-scale cultivation of marijuana for medicinal use could not override the federal classification of marijuana as a controlled substance. Writing for the majority, Justice Stevens declared that, "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Id.* at 2212. Justice O'Connor's dissent protested that the under the majority approach, "little may be left to the notion of enumerated powers." *Id.* at 2223. Justice Thomas was more hyperbolic in his dissent: "the Federal Government is no longer one of limited and enumerated powers." *Id.* at 2229. *But see* Gonzales v. Oregon, 126 S. Ct. 904, 915-25 (2006) (upholding Oregon's death with dignity statute against a challenge by the U.S. Department of Justice; the lack of specific congressional authorization for the Department of Justice to regulate in this are was central to the Court's ruling).

10. U.S. CONST. art. VI, § 2; *see also* Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967) (holding that federal law enforcement officials could ignore Washington state statute that prohibited wiretapping).

11. Printz v. United States, 521 U.S. 898 (1997) (noting that Congress could not compel participation of local law enforcement officials in implementation of Brady Law requiring background checks before issuance of gun permit); *see also* Susan N. Herman, *Introduction to Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1211 (2004) ("*Printz* prohibits commandeering local law enforcement officials, but does not prohibit circumventing or ignoring them or their state and local laws.").

prospects for local influence over federal antiterrorism investigations.[12] Some commentators have suggested that states consider the possibility of suing the federal government, but there has been little progress on this front.[13]

One potentially efficacious strategy has been overlooked, however: ethical regulation of federal prosecutors by state bar associations. In the 1999 McDade Amendment,[14] Congress created a chink in the armor of the Supremacy Clause. That legislation subjected federal prosecutors to the ethical rules of the bars in the states where the prosecutors practice. If state bar codes included provisions that prohibited certain prosecutorial practices, federal prosecutors would have no choice but to abide by these provisions. Constraints imposed on federal prosecutors would, in turn, influence the conduct of law enforcement agents whom the prosecutors direct in proactive investigations.

This article will argue that the amendment of state bar codes could present a viable means of exerting state control over federal antiterrorism investigations. My analysis will proceed in five steps. First, I will contend that federal prosecutors have become central—often indispensable—figures in antiterrorism investigations. Second, I will suggest an amendment to states' bar codes that would help to ensure that all prosecutors (including federal prosecutors) respect the civil liberties of suspects whom they investigate. Third, I will argue that the Supremacy Clause would not thwart the application of this new rule to federal prosecutors. Fourth, I will argue that the rule would indirectly influence the conduct of FBI agents, who depend heavily on prosecutors in proactive investigations. Fifth, I will address foreseeable criticisms of my proposal.

12. When forming a JTTF, a local government typically enters into an agreement with federal law enforcement agencies, and this agreement permits the local government to give some input concerning the work of the joint enterprise. Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 144-45 n.626-27 (2005) (listing examples of such agreements).

13. Vikram David Amar has suggested "converse 1983 litigation" through which state and local governments could sue the federal government for violations of civil rights. Vikram David Amar, *Converse § 1983 Suits in Which States Police Federal Agents: An Idea Whose Time Has Arrived*, 69 BROOK. L. REV. 1369, 1378-79 (2004). However, no state has enacted the statutory framework necessary for such litigation, and the federal courts seem reluctant to find the federal antiterrorism laws unconstitutional. Indeed, on April 27, 2005, in a hearing before the Senate Select Committee on Intelligence, U.S. Attorney General Alberto Gonzales testified that the USA PATRIOT Act had withstood every constitutional challenge filed to date. *U.S. Senator Pat Roberts (R-KS) Holds Hearing on Patriot Act: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (2005) (statement of Alberto Gonzales, U.S. Attorney General).

14. Pub L. No. 105-277, 112 Stat. 2681 (1998) (codified at 28 U.S.C.A. § 530(b) (West Supp. 1998)). For the legislative history of the McDade Amendment, see Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211-15 (2000).

I. PROSECUTORS' INCREASING PROMINENCE IN INVESTIGATIONS

In 1999, Professor Rory Little observed that "prosecutors today are centrally involved in . . . proactive criminal investigations."[15] That role became even more significant after the tragedy on September 11, 2001. An attorney for the FBI observed that by 2003, federal prosecutors' involvement in intelligence-gathering had "reached unprecedented proportions."[16] Prosecutors no longer wait on the sidelines for law enforcement agents to complete investigations; prosecutors now guide, and even control, many important phases of these investigations.

Prosecutors' most powerful investigative tool is the grand jury. While the grand jury's function has historically been a passive one—assessing whether evidence collected by police officers supports a finding of probable cause—today the grand jury takes a more active role in investigating crime and fortifying the prosecution's case.[17] The grand jury can issue subpoenas for both documents and testimony. Of course, it is actually the prosecutor who undertakes these activities, invoking the authority of the grand jury. Much of the evidence gathered by grand juries would be unavailable to law enforcement agents acting on their own.[18] Recognizing the tremendous investigative power of grand juries, Congress has recently enlarged Rule 6(e) of the Federal Rules of Criminal Procedure so that federal prosecutors handling grand jury investigations can disclose their findings to a wide audience, including state

15. Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 728 (1999) (urging adoption of new ethical rules to ensure that prosecutors make investigative decisions that are proportionate to the gravity of offenses under investigation).

16. This memo, entitled *"What do I have to do to get a FISA?"* was prepared by an unnamed attorney at the FBI, and a redacted copy was obtained by the Electric Privacy Information Center in response to a FOIA request, *available at* http://www.epic.org/privacy/terrorism/fisa/fisa-recipe.pdf (last visited Nov. 15, 2005). The quoted language appears on page 10 of the document.

17. Professor Niki Kuckes argues that "the modern grand jury has become an important investigative tool for the federal prosecutor, while its indictment function has become essentially a formality." Niki Kuckes, *Delusions of Grand Juries*, LEGAL AFF., Nov.-Dec. 2003, at 38, 40. Historically the grand jury's most important role was not to investigate crime at the direction of the prosecutor, but to assess independently whether probable cause existed to support the proposed indictment. Hoffman v. United States, 341 U.S. 479, 485 (1951) (the "most valuable function of the grand jury" is not to collect evidence for the prosecutor, but "to stand between the prosecutor and the accused"); Hale v. Henkel, 201 U.S. 43, 59 (1906) (historically, the grand jury's independent assessment of probable cause has been more important than its investigative role).

18. Police can take statements from subjects who consent to be interviewed, but only with the assistance of prosecutors can police compel testimony under oath in secret proceedings. *See generally* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 779 (2003) (explaining that law enforcement agents need to rely on assistance of prosecutors to compel testimony by reluctant witnesses).

and local officials, CIA agents, and even foreign governments.[19]

The approval of prosecutors is necessary for law enforcement agents to use certain electronic surveillance techniques. An agent may not apply for a Title III wiretap[20] unless the agent has received authorization from a high-level attorney within the U.S. Department of Justice.[21] Similarly, when an agent wishes to install a "trap and trace" device—which captures the numbers dialed in outgoing telephone calls—the agent must depend on a prosecutor to present this request to a magistrate or judge.[22] A prosecutor's involvement is also crucial for an agent to set up a pen register, which identifies the phone numbers from which incoming calls originated.[23]

Agents need the help of prosecutors to obtain search warrants and arrest warrants. While federal law technically permits agents to obtain such warrants from judges without the assistance of prosecutors,[24] in practice agents rely heavily on prosecutors to screen the draft applications and affidavits, and to review whether agents have properly discussed the involvement of confidential informants, disclosed exculpatory evidence, listed all the locations and items for which the agents seek authority to search, etc. Agents recognize that judges are more likely to grant an application that a prosecutor has screened.[25] Prosecutors' involvement also increases the odds that a faulty search can be

19. During the period from 2001 to 2004, Congress expanded the disclosure provisions of Rule 6(e) three times. In 2001, Congress included amendments of Rule 6(e) in Section 203 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 279-80 (2001). In 2002, Congress once again amended Rule 6(e) in Section 895 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2256-57 (2002). In 2004, Congress revisited Rule 6(e) in Section 6501 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3760 (2004). *See also* Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community Under the USA PATRIOT Act*, 39 AM. CRIM. L. REV. 1261, 1286 (2002) (discussing rationale for wider dissemination of grand jury information).

20. The term "Title III" is a shorthand for Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq*. (2005), the primary source of authority for wiretaps in criminal cases. Federal prosecutors obtained 730 wiretaps under Title III in 2004. ADMIN. OFFICE OF THE U.S. COURTS, 2004 WIRETAP REPORT, at tbl. 2, http://www.uscourts.gov/wiretap04/contents.html (last visited Nov. 15, 2005). Another statute authorizing wiretaps is the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1862 (2005). *See* note 38, *infra* and accompanying text.

21. 18 U.S.C. § 2516 (2005). In Section 203 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 279-80 (2001), and in Section 896 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2257 (2002), Congress authorized prosecutors and FBI agents to share wiretap information with a longer list of agencies including the CIA.

22. 18 U.S.C. § 3122 (2005).

23. *Id*.

24. FED. R. CRIM. P. 41(a) allows the issuance of a search warrant "[u]pon the request of a federal law enforcement officer or an attorney for the government."

25. Richman, *supra* note 18, at 781-82 (noting that prosecutors "play a bonding role vis-à-vis the judicial officers to whom search warrant applications must be presented").

salvaged under the "good faith exception."[26]

Certain categories of undercover operations require the blessing of prosecutors. According to guidelines promulgated by the U.S. Attorney General,[27] no FBI agent may undertake an undercover operation "involving any sensitive circumstance"[28] unless the agent sends to FBI headquarters a "letter from the appropriate federal prosecutor indicating that he or she has reviewed the proposed operation, including the sensitive circumstances reasonably expected to occur, agrees with the proposal and its legality, and will prosecute any meritorious case that has developed."[29] In reviewing the agent's application to conduct the undercover operation, FBI headquarters must convene a committee that includes prosecutors designated by the Assistant Attorney General in charge of the Criminal Division. The committee may also include assistant U.S. attorneys from the district in which the FBI proposes to conduct the undercover operation.[30] If one of the prosecutors reviewing the application expresses reservations "because of legal, ethical, prosecutive, or departmental policy considerations," the operation cannot proceed unless the prosecutor's concerns are overridden by high-level attorneys in the U.S. Department of Justice.[31] Thus the FBI's ability to conduct undercover investigations in sensitive circumstances depends, at many different junctures, on the approval of federal prosecutors.

Prosecutors also exert significant influence over agents' use of investigative techniques pursuant to the Foreign Intelligence Surveillance Act (FISA).[32] This 1978 legislation created an exception to the probable cause requirement for searches, wiretaps and subpoenas of records, so long as the applicant could demonstrate to the secret Foreign Intelligence Surveillance

26. *See* Massachusetts v. Sheppard, 468 U.S. 981, 989 (1984) (noting that the fact that the detective "prepared an affidavit which was reviewed and approved by the District Attorney" helped show that "[t]he officers in this case took every step that could reasonably be expected of them"); United States v. Bynum, 293 F.3d 192, 198 (4th Cir. 2002) (the fact that the agent "consulted with the prosecutor prior to applying for the search warrant provides additional evidence of his objective good faith, like the law enforcement officer in Leon
. . . . ").

27. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS (2002), *available at* http://www.usdoj.gov/olp/fbiundercover.pdf (last visited Nov. 15, 2005).

28. The term "sensitive circumstance" includes several categories of investigations that are relevant for present purposes, such as investigations of religious organizations and political organizations. *Id.* at 6.

29. *Id*. at 10.

30. *Id.* at 9.

31. *Id*. at 8.

32. 50 U.S.C. §§ 1801-62 (2005). A total of 1724 FISA applications were approved in 2003. Letter from William E. Moschella, Assistant Attorney General, to L. Ralph Mecham, Director, Administrative Office of the United States Courts (Apr. 30, 2004), *available at* http://www.epic.org/privacy/terrorism/fisa/2003_report.pdf (last visited Nov. 15, 2005).

Court that the applicant's primary purpose was to gather foreign intelligence.[33] The original FISA did not contemplate that prosecutors would utilize this court for criminal investigations.[34] In fact, a 1995 memorandum from the U.S. Attorney General emphasized that attorneys in the Criminal Division should not give the FBI advice "that would result in either the fact or the appearance of the Criminal Division's directing or controlling the FBI" in any FISA investigation.[35]

However, in 2001, the Patriot Act liberalized the "primary purpose" requirement, and Congress appeared to allow greater interaction between prosecutors and agents engaged in FISA surveillance.[36] When the Attorney General issued a memorandum in 2002 explicitly permitting prosecutors to take part in FISA investigations,[37] the Foreign Intelligence Surveillance Court rejected the memorandum.[38] The FISA Court of Review overruled the lower court and allowed prosecutors to cooperate with agents in FISA

33. 50 U.S.C. §§ 1801-1862 (2005). For a thorough discussion of the "primary purpose" requirement and its origins, see Richard H. Seamon & William D. Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319, 358-69 (2005).

34. 50 U.S.C. §§ 1801-1862. *See also* . Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1626 (2004).

35. Memorandum from Janet Reno, Attorney General, on "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" (July 19, 1995), *available at* http://www.fas.org/irp/agency/doj/fisa/1995procs.html) (last visited Nov. 15, 2005). In November 2001, the Foreign Intelligence Surveillance Court adopted the Attorney General's procedures requiring "minimization procedures" for all future FISA surveillance. *In re* Sealed Case, 310 F.3d 717, 729 n.17 (FISA Ct. Rev. 2002) (noting that Foreign Intelligence Surveillance Court had adopted Attorney General's memorandum in November 2001).

36. 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2005) (use of FISA surveillance is permissible when collection of foreign intelligence is "significant purpose," even if not primary purpose); 50 U.S.C. § 1806(k) (2005) (information derived from FISA surveillance may be made available for use in connection with criminal cases under certain circumstances).

37. Memorandum from John Ashcroft, Attorney General, to FBI Director, Assistant Attorney General, Criminal Div., Counsel for Intelligence Policy, and U. S. Attorneys (Mar. 6, 2002), *available at* http://www.fas.org/irp/agency/doj/fisa/ag030602.html, at §§ II and III (allowing attorneys in the Department of Justice Criminal Division, along with assistant U.S. attorneys, to confer with agents on "the initiation, operation, continuation, or expansion of FISA searches or surveillance," and to review information derived through FISA investigations).

38. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 625 (FISA Ct. Rev. 2002) (ordering that "the FBI and the Criminal Division [of the Department of Justice] shall ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution, and that advice intended to preserve the option of a criminal prosecution does not inadvertently result in the Criminal Division's directing or controlling the investigation using FISA searches and surveillances toward law enforcement objectives").

investigations.[39] The present practice is for attorneys in the U.S. Department of Justice to prepare virtually all FISA applications that agents submit.[40] Attorney General John Ashcroft, upon learning that the FISA Court of Review would permit prosecutorial involvement in FISA investigations, announced that the U.S. Department of Justice would double the number of attorneys preparing FISA applications.[41] The involvement of DOJ attorneys in reviewing FISA warrants is not perfunctory: DOJ attorneys typically spend forty-six days processing each request for a FISA warrant.[42] To borrow a phrase from Solicitor General Ted Olson, prosecutors have evolved from "Typhoid Marys" to gatekeepers in FISA investigations.[43]

Prosecutors also play a vital role in coaxing cooperation by witnesses who themselves may face criminal charges. Police lack the authority to offer leniency in the form of a plea bargain or immunity agreement. Only a prosecutor can put these options on the table.[44] In antiterrorism cases, prosecutors aid police by zealously charging a wide range of suspects,[45] in the hope that some of these suspects will cooperate with investigators to bargain down their charges. A number of recent antiterrorism investigations have benefited from the cooperation of indicted co-conspirators.[46]

---

39. The FISA Court of Review found "simply no basis for the FISA court's reliance on section 1801(h) to limit criminal prosecutors' abilities to advise FBI intelligence officials." *In re* Sealed Case, 310 F.3d 717, 731 (FISA Ct. Rev. 2002).

40. Testimony of James Baker, Counsel for Intelligence Policy, Office of Intelligence Policy and Review, U.S. Department of Justice, before U.S. Foreign Intelligence Court of Review, Hearing on Docket No. 02-001 (Sept. 9, 2002), *available at* http://www.fas.org/irp/agency/doj/fisa/hrng090902.htm, at 79.

41. Att'y Gen. John Ashcroft, News Conference Transcript Regarding Decision of Foreign Intelligence Surveillance Court of Review (Nov. 18, 2002) *available at* http://www.fas.org/irp/news/2002/11/ag111802.html.

42. Vanessa Blum, *Gonzales Mulls Need for Terror Reform: AG Says Proposed DOJ Changes Could Help in Fighting Terrorism*, LEGAL TIMES, June 3, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1117703113351 (reporting that according to Judge Posner of the Seventh Circuit, the Justice Department needs an average of forty-six days to process a request for a FISA warrant).

43. Transcript of Hearing at 18, *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002) [hereinafter Olson Testimony] (testimony of Solicitor General Theodore Olson), *available at* www.fas.org/irp/agency/doj/fisa/hrng090902.htm (last visited Mar. 27, 2005).

44. JOHN ASHCROFT, U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS 5 (2002), *available at* http://www.usdoj.gov/olp/dojguidelines.pdf ("A [law enforcement] agent does not have any authority to make any promise or commitment that would prevent the government from prosecuting an individual for criminal activity . . . without the prior written approval" of the prosecuting authority with jurisdiction in the area); 18 U.S.C. § 6003 (immunity statutes).

45. Blum, *supra* note 42 (reporting that the DOJ's strategy in antiterrorism cases "has been to throw the book at suspected terrorists using a wide range of criminal charges, from making false statements to credit card fraud").

46. For example, prosecutors persuaded Ahmed Ressam, a defendant in a domestic terrorism case, to provide information that, for the first time, "exposed in a meaningful way the existence of terrorist sleeper cells in the United States," Blaine Harden, *Two Faces of A*

Another reason why prosecutors exert leverage over agents' investigative decisions is that prosecutors may opt not to charge in every case referred by the agents. Federal prosecutors have a monopoly power over the presentation of criminal charges in federal court, and they are not shy about turning away cases they find unsuitable. In 2002, the most recent year for which annual statistics are available, federal prosecutors declined to file charges in 45.2% of the investigations referred by the FBI.[47] The possibility of declination makes agents very attentive to prosecutors' concerns. Agents typically contact prosecutors at an early stage of an investigation to ensure that the prosecutors are supportive of the agents' investigative aims and the procedures they plan to use. Proactive, resource-intensive investigations are particularly likely to involve prosecutorial oversight, because the FBI does not want to stake large amounts of money on cases that prosecutors may eventually reject. Antiterrorism investigations are no exception to this rule. Nearly every terrorism investigation involves a suspicion of crime,[48] so nearly every terrorism investigation will involve prosecutors at an early stage if agents wish to maximize the prospects for successful prosecution.

A strong indication of lawyers' ascendancy in the antiterrorism hierarchy is the Bush Administration's decision on June 29, 2005 to create a new position of "Assistant Attorney General for National Security" at the U.S. Department of Justice.[49] This attorney will have responsibility for overseeing the retooling of FBI intelligence efforts, and will serve as a contact for other intelligence agencies.[50] Also on June 29, 2005, the Bush Administration announced that all terrorism investigators in the FBI will be accountable to three officials with legal training[51]: FBI Director Robert Mueller (a lawyer),[52] Attorney General Alberto Gonzales, and Director of National Intelligence John Negroponte (who

Terrorist to be Presented in Court, WASH. POST, Apr. 27, 2005 (quoting Douglas Kmiec, a law professor at Pepperdine and former senior official at the U.S. Department of Justice). *See, e.g.*, United States v. Koubriti, 297 F.Supp.2d 955, 959 (E.D. Mich. 2004) (discussing the importance of Youssef Hmimssa, "a cooperating defendant in this case whose five-day testimony was a central part of the government's terrorism case against Hmimssa's codefendants").

47. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, at 35, tbl. 2.3 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs02.pdf (comparing federal prosecutors' declination statistics for different law enforcement agencies).

48. Olson Testimony, *supra* note 43, at 17-18.

49. Scott McClellan, White House Press Briefing (June 29, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/06/20050629-4.html.

50. Blum, *supra* note 42.

51. The new initiative puts Negroponte in charge of a "National Security Service" in the FBI. Negroponte will join Mueller and Gonzales in overseeing antiterrorism investigations at every FBI field office. Douglas Jehl, *Bush to Create New Unit in FBI for Intelligence*, N.Y. TIMES, June 30, 2005, at A1.

52. Director Mueller's biographical information is available on the FBI's web site at http://www.fbi.gov/libref/executives/director.htm.

attended the same law school as Gonzales).[53]

In sum, lawyers wield tremendous power over anti-terrorism investigations and intelligence gathering by law enforcement agents.[54] As Professor Daniel Richman concluded, "the world in which federal agents operate seems to have been intentionally constructed to render them dependent on lawyers."[55] This reliance on lawyers is unlikely to change anytime soon because the public does not support a more independent role for agents in antiterrorism investigations.[56] The ineluctable symbiosis of prosecutors and agents suggests that ethical regulation of prosecutors may present a viable means of regulating not only the prosecutors themselves, but also the agents who are so dependent on prosecutors.

II. A PROPOSAL FOR NEW ETHICAL REGULATION OF PROSECUTORS

Now that prosecutors have become so deeply immersed in investigations, one might naturally expect that bar codes would address prosecutors' investigative duties. Indeed, the need for ethical regulation of prosecutors' investigative activities is arguably greater than the need for ethical rules governing prosecutors' courtroom advocacy, because the latter conduct is at least subject to judicial scrutiny. Unethical conduct by prosecutors in investigations may evade judicial review altogether. If the primary purpose of the ethical rules is to guide attorneys where other authority is scant, what topic could be more suitable for the bar codes than prosecutors' investigative activities?

Unfortunately, bar codes have largely ignored prosecutors' investigative duties. The American Bar Association (ABA) just completed a five-year process of updating its Model Rules of Professional Conduct, and state bars updated their ethical codes shortly thereafter,[57] but no jurisdiction seized the

53. Wil Haygood, *Ambassador with Big Portfolio*, WASH. POST, June 21, 2004, at C1 (presenting biographical information about John Negroponte). To be sure, there is no requirement that the Director of National of Intelligence or the FBI Director must have legal training, and it is entirely possible the next occupants of these offices will lack legal training.

54. Little, *supra* note 15, at 737 ("The most significant investigative techniques available today, however, generally involve or require a prosecutorial role.").

55. Richman, *supra* note 18, at 784.

56. ABC News and the Washington Post conducted a poll on June 5, 2005 to gauge the public's support for a proposal that would allow FBI agents to obtain records without the approval of prosecutors and judges. Press Release, ABC News & Washington Post, Most Back Extending Patriot Act But Concerns About Intrusions Grow (June 9, 2005) (announcing poll results), *available at* http://abcnews.go.com/images/politics/983a2patriotact.pdf. Question 29a asked, "Would you support or oppose further expanding the FBI's authority in these investigations by allowing it to demand records without first getting a judge or prosecutor's approval?" The results indicated that sixty-eight percent of respondents expressed opposition, thirty-one percent expressed support, and one percent expressed no opinion. *Id.*

57. According to a website of the American Bar Association, twenty-one state supreme

opportunity to incorporate new ethical rules governing prosecutors' investigative role. The bars' reluctance to regulate prosecutors' investigative activities is attributable to a number of factors, including lack of expertise among bar officials and deference to the Department of Justice's internal regulations.[58] Some specialized subgroups of the ABA have promulgated non-binding guidelines for prosecutors involved in investigations,[59] but the states' bar codes—the primary ethical authority for all lawyers—avoid the topic almost entirely.

In most states' bar codes, the only rule that addresses prosecutorial duties at all is Rule 3.8. The rule imposes six obligations on prosecutors. First, a prosecutor must refrain from bringing charges not supported by probable cause. Second, a prosecutor must make reasonable efforts to ensure that the accused is advised of his right to counsel. Third, a prosecutor should not induce an unrepresented defendant to waive important rights. Fourth, a prosecutor should disclose all exculpatory evidence. Fifth, a prosecutor should not subpoena a lawyer to testify about a past or present representation of a client except in narrow circumstances. Sixth, a prosecutor must refrain from extrajudicial comments that would cause prejudice in a criminal trial.

The shortcomings of Rule 3.8 are readily apparent. Most of the provisions in this rule are duplicative of other statutory and/or constitutional law. For example, Rule 3.8's provisions requiring probable cause to proceed with a criminal charge, requiring warnings of the right to counsel, requiring disclosure of exculpatory evidence, and prohibiting prejudicial publicity do not enhance the criminal justice system in any meaningful way; these safeguards already existed before the ABA memorialized them in Rule 3.8.[60]

---

courts have approved revisions to the states' ethical rules in response to the most recent recommendations by the ABA; review is underway in twenty-nine other states. *See* AM. BAR ASS'N, STATUS OF STATE REVIEW OF PROFESSIONAL CONDUCT RULES (2006), *available at* http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (last visited on March 27, 2006).

58. *See* Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L. J. 969 (1992) (explaining that states are ill-suited to regulate federal prosecutors' ethics because states are far removed from the realities of federal court; federal judges need greater regulatory power so they can "[deal] directly with problems of professional misconduct in federal practice"); Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 306-19 (1992) (maintaining that state bars lack the expertise to draft ethical rules for federal prosecutors).

59. Standard 3-3-1, "Investigative Function of Prosecutor.," A.B.A. Standards Relating to the Administration of Criminal Justice, *reprinted in* John S. Dzienkowski, PROFESSIONAL RESPONSIBILITY: STANDARDS, RULES & STATUTES, 2004-2005 EDITION 914 (2004); AM. TRIAL LAWYER'S ASS'N, CODE OF CONDUCT (1988), ch. 9 (Responsibilities of Government Lawyers), sec. 9.2, *reprinted in* Stephen Gillers & Roy Simon, REGULATION OF LAWYERS 265-66 (1999) (setting forth duties of government attorneys involved in investigations).

60. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975) (probable cause requirement); Miranda v. Arizona, 384 U.S. 436 (1966) (admonition of right to counsel); Brady v. Maryland, 373 U.S. 83 (1963) (disclosure of exculpatory evidence); Irvin v. Dow, 366 U.S.

The provision in Rule 3.8(e) that protects lawyers from appearing before the grand jury is particularly galling. It strains credulity to argue that this provision merits inclusion in a list of the six most urgent ethical obligations of prosecutors. Such a brazenly self-serving rule provides fodder for the critics who argue that lawyers cannot be trusted to regulate themselves.

Rule 3.8 should be expanded for a number of reasons. The present Rule 3.8 defers too much to the internal regulations of prosecuting agencies. This deference seems imprudent at a time when the U.S. Department of Justice is clamoring to expand, not to limit, the powers of its prosecutors. Not only would an expansion of Rule 3.8 prove valuable at the federal level, but it would also improve the states' criminal justice systems. Presently the patchwork of in-house ethical regulations among state and local prosecutorial agencies creates uncertainty about the duties of prosecutors. Defendants and law enforcement agents have greater difficulty discerning the ethical parameters for prosecutors when rules vary widely among jurisdictions. As states' bar codes become more standardized—forty-five states have adopted the ABA Model Rules with only slight variations[61]—it is anomalous that regulation of prosecutors still varies at the state and local level due to the omission of prosecutorial rules from the ABA blueprint.

How could Rule 3.8 be amended to address prosecutors' growing investigative activities? Many possible reforms come to mind. A requirement of "proportionality" in criminal investigations,[62] a prohibition of racial profiling, a rule requiring prompt disclosures to elected officials with oversight responsibilities—all would be salutary additions to Rule 3.8. There is not enough space for the present article to discuss the wide range of alternatives, so this article will focus on one particular proposal: a requirement that prosecutors must have particularized suspicion in order to authorize surveillance of political or religious groups. More precisely, the proposed amendment would add a new subpoint to Rule 3.8, requiring that a prosecutor "shall not direct, authorize, or adopt for prosecution an investigation involving surveillance of a political or religious organization, unless such surveillance is based on a reasonable and particularized suspicion of criminal activity by the organization or a person involved with the organization."

The primary purpose of the present article is to show that state bars are capable of regulating federal prosecutors as a general matter, not to argue the substantive merits of the proposed amendment. Nonetheless, a few policy arguments in favor of the proposed amendment deserve mention here.

---

717 (1961) (prejudicial pretrial publicity).

61. Memorandum from Kathleen Baxter, Counsel, N.Y. State Bar Ass'n, (Jan. 2005), *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA_Reports/ (copy on file with author).

62. Little, *supra* note 15, at 728 (urging adoption of new ethical rules to ensure that prosecutors make investigative decisions that are proportionate to the seriousness of the offenses under investigation).

Unbridled surveillance of political and religious groups can have a chilling effect on their activities, and can stigmatize the members of these groups.[63] While undercover infiltration of political and religious groups does not necessarily violate the Constitution,[64] it is unpopular with the public, even after the terrorist attacks on September 11, 2001.[65] The proposed amendment to Rule 3.8 actually appeared in the U.S. Attorney General's guidelines for the entire twenty-six-year period from 1976 to 2002—a period spanning both Democratic and Republican administrations.[66] Attorney General John Ashcroft abruptly abrogated this policy in 2002.[67] The old rule still applies in some

63. Tom Lininger, *Sects, Lies and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1232-51 (2004) (discussing adverse effects). In January 2003, FBI Director Robert Mueller ordered all fifty-six of the F.B.I.'s field offices to count the number of mosques within their jurisdictional boundaries. Curt Anderson, *FBI Defends Nationwide Tally of Mosques; Critiques Say Anti-terror Program Amounts to Profiling*, THE RECORD, Jan. 29, 2003, *available at* 2003 WLNR 13241447; Yemisrach Benalfew, *FBI Plan to Count Mosques Stirs Protests*, INTER PRESS SERV., Feb. 17, 2003 (on file with author). An FBI spokesman told Congress that this inventory of mosques was useful as a starting point for proactive investigations of terrorists. Eric Lichtblau, *FBI Tells Offices to Count Local Muslims and Mosques*, N.Y. TIMES, Jan. 28, 2003, at A1.

64. *See* Laird v. Tatum, 408 U.S. 1, 9-10 (1972) (finding that allegations the Army engaged in "surveillance of lawful and peaceful civilian political activity" were unavailing, that the Army's intelligence-gathering system, though wide-ranging, simply consisted of culling information that was publicly available, and that no tangible harm was shown); Presbyterian Church (U.S.A.) v. United States, 752 F. Supp. 1505, 1515-16 (D. Ariz. 1990) (finding that infiltration of churches could qualify as a "narrowly tailored" means of enforcing the immigration laws, so long as the undercover operatives did not exceed the scope of their invitation or deliberately suppress the congregants' religious freedoms); *Antiterrorism Investigations and the Fourth Amendment After September 11, 2001: Hearing Before the Subcomm. on the Constitution of the H. Committee on the Judiciary*, 108th Cong. 8, 12 (2003) (statement of Viet D. Dinh, Assistant Attorney General, Office of Legal Policy, U.S. Dept. of Justice) ("[G]overnment observation of public places is consistent with the First and Fourth Amendments.").

65. According to a New York Times/CBS News poll in December 2001, "there is a strong opposition to government surveillance of religious groups. Few think that the government should be allowed to investigate religious groups that gather at mosques, churches or synagogues without evidence that someone in the group has broken the law. Three out of four Americans believe that violates people's rights." *Poll: Doubts on Military Tribunals*, Dec. 11, 2001, *available at* http://www.cbsnews.com/stories/2001/12/11/opinion/main320935.shtml (last visited on Aug. 2, 2003). The poll posed the following question to respondents: "Do you think the United States government should be allowed to investigate religious groups that gather at mosques, churches, or synagogues without evidence that someone in the group has broken the law or does that violate people's rights?" Only twenty-two percent of respondents chose the option "should be allowed," while seventy-five percent chose the option "violates people's rights," and three percent declined to answer. The responses did not vary significantly by partisan affiliation. Among Republicans, seventy percent opposed the proposition; among Democrats, eighty percent opposed the proposition; among nonaffiliated voters, seventy-six percent opposed the proposition. *Id.*

66. Lininger, *supra* note 63, at 1213-28.

67. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 22

contexts, such as applications for FISA warrants,[68] but for the most part prosecutors and agents now do not need particularized suspicion in order to monitor and infiltrate groups engaged in First Amendment activity.

Churches and political groups should not be subject to surveillance without a minimal predicate of suspicion. When these groups invite the public to join in their activities, they do not forfeit their legitimate expectation of freedom from governmental intrusion. The open door of a mosque is an invitation to worship, not an "implied license" for the FBI to pursue any Muslim in an undercover investigation. A license to pray is not a license to prey.

Are the ABA and its state counterparts bold enough to adopt a new ethical rule limiting the ability of prosecutors to take part in surveillance of political and religious groups? It is important to remember that criminal defense attorneys and civil libertarians outnumber prosecutors in bar associations.[69] The ABA lobbied Congress to pass the McDade Act,[70] and the ABA also passed a resolution urging greater congressional oversight of FISA surveillance.[71] While bar officials' lack of expertise in the area of criminal investigations might deter them from innovating new ethical rules, the proposed amendment to Rule 3.8 is not new: it previously appeared in the Department of Justice's own guidelines for twenty-six years. Reviving a time-

(2002), *available at* http://www.usdoj.gov/olp/generalcrimes2.pdf. ("For the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally.") In correspondence with Congress, an official of the Justice Department stressed that the new guidelines enabled FBI agents to monitor and infiltrate political and religious organizations "in the absence of a pre-existing lead or specific predication." Letter from Jamie E. Brown, Acting Asst. Att'y Gen., to Rep. John Conyers, Jr., Ranking Minority Member, H. Judiciary Comm. 39 (May 13, 2003) (copy on file with author).

68. The FISA includes a provision that prohibits the Foreign Intelligence Surveillance Court from granting applications where the sole basis for suspicion is First Amendment activity by a U.S. citizen, but this provision does not apply to the wide range of other investigative techniques for which a FISA warrant is not required. 50 U.S.C. § 1805(a)(3)(2006).

69. Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators? A Response to Little*, 65 FORDHAM L. REV. 429, 449 (1996) (noting strong presence of criminal defense attorneys in bar associations); Cramton & Udell, *supra* note 58, at 306-19 (defense attorneys wield greater influence than prosecutors in state bar associations); F. Dennis Saylor, IV, & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459, 460-61 (1992) ("[T]he A.B.A., the primary architect of the model rules, is a private trade association in which criminal defense attorneys and other private practitioners greatly outnumber prosecutors.").

70. Letter from William H. Jeffress, Jr., ABA Standing Comm. on Ethics and Professional Responsibility, to Sen. Strom Thurmond, Chair of Subcommittee on Criminal Justice Oversight, Comm. on the Judiciary (Mar. 31, 1999), *available at* http://www.abanet.org/poladv/congletters/106th/et33199.html.

71. At its midyear meeting in 2003, the ABA adopted a resolution urging greater congressional oversight of FISA investigations. A copy of this resolution is available at http://www.epic.org/privacy/terrorism/fisa/aba_res_021003.html.

honored protection of civil liberties would be entirely consistent with the ABA's mission to promote "justice, professional excellence and respect for the law."[72]

III. SURMOUNTING THE SUPREMACY CLAUSE

As a general matter, the Supremacy Clause of the U.S. Constitution bars state and local officials from regulating federal officials, or from interfering with the enforcement of federal law.[73] The Supreme Court emphasized the breadth of this doctrine in *Olmstead v. United States*.[74] There, federal agents had investigated a large-scale conspiracy to transport and sell alcohol during the Prohibition era. A significant part of the government's proof consisted of intercepted phone calls among co-conspirators. The federal agents' wiretaps violated a Washington state statute that imposed criminal penalties for intercepting telephone communications. The U.S. Supreme Court concluded that a state statute could not possibly limit the admissibility of evidence offered by federal prosecutors in federal court.[75] Essentially, the *Olmstead* Court held that federal law enforcement personnel could disregard with impunity any state regulations limiting the federal investigative powers.[76] This holding of *Olmstead* remains intact to the present day, and hinders the efforts of state and local governments to influence federal antiterrorism investigations.[77]

In 1999, however, Congress voluntarily relinquished the federal supremacy power with respect to state bars' regulation of federal prosecutors. Alarmed by the federal prosecution of Congressman Joseph McDade, who eventually won acquittal on charges of racketeering and bribery in 1996,[78] Congress decided that federal prosecutors should abide by the same ethical rules that govern ordinary attorneys. Congress passed the Citizen Protection Act of 1999, known more commonly as the "McDade Act." This legislation provided that an attorney for the U.S. Department of Justice "shall be subject to the State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in

72. ABA Mission Statement, approved by ABA House of Delegates in 1997, *available at* http://www.abanet.org/about/goals.html.

73. U.S. CONST. art. VI, § 2.

74. 277 U.S. 438 (1928), *overruled on other grounds by* Berger v. New York, 388 U.S. 41, 51 (1967), *and overruled on other grounds by* Katz v. United States, 389 U.S. 347 (1967).

75. *Olmstead*, 277 U.S. at 469.

76. Susan N. Herman, *Introduction to David G. Trager Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1211 (2004).

77. *Id.*

78. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 600 n.183 (2001) (explaining how McDade prosecution provided impetus for passage of 28 U.S.C. § 530(B)(a)).

the same manner as other attorneys in that State."[79]

The proponents of the McDade Act made clear that they intended for states to take over the regulation of federal prosecutors' ethics. For example, Representative Tillie Fowler made the following statement on the House floor:

> I see this as an issue of accountability. Department of Justice attorneys should be required to abide by the same ethics rules as all other attorneys. These attorneys should be held accountable to the same standards set by the State Supreme Court that granted each lawyer his or her license to practice law in that State.[80]

Representative Steve Buyer echoed this sentiment: "Quite simply the issue before us is whether the government attorneys at the Department of Justice should abide by ethical rules that all other attorneys have to abide by, or can they make up their own standards of conduct?"[81]

Congress believed so strongly in the need for state regulation of federal prosecutors' ethics that the McDade Act passed by an overwhelming margin,[82] and subsequent efforts to repeal the legislation—even in the aftermath of September 11, 2001—have not succeeded.[83]

Notwithstanding the clear language of the McDade Act and the emphatic expressions of congressional intent, the U.S. Department of Justice challenged the application of state bar codes to federal prosecutors. For example, in *United States v. Colorado Supreme Court*,[84] the U.S. Department of Justice argued that federal prosecutors had no obligation to follow Colorado's attorney-subpoena rule. The Tenth Circuit held that the resolution of this challenge depended "on whether the rule is a rule of professional ethics clearly covered by the McDade Act, or a substantive or procedural rule that is inconsistent with federal law."[85] The Tenth Circuit found that Colorado's attorney-subpoena rule fell within the former category. Therefore, the attorney-subpoena rule was "a rule of ethics applicable to federal prosecutors by the McDade Act."[86]

One year later, the Department of Justice brought a similar challenge in *United States v. Oregon State Bar*.[87] At the time, the Oregon Code of Professional Responsibility included the "honesty rule" that all state bars have

79. 28 U.S.C. § 530(B)(a). For a thorough analysis of the McDade Act, see Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211-24 (2000).

80. 144 CONG. REC. H7184, 7234 (daily ed. Aug. 5, 1998) (statement of Rep. Fowler).

81. 144 CONG. REC. H7184, 7236 (daily ed. Aug. 5, 1998) (statement of Rep. Buyer).

82. Zacharias & Green, *supra* note 79, at 215 n.49.

83. When Congress was considering the USA PATRIOT Act, an amendment repealing the McDade Act passed in the Senate, but failed in the House. *Broad Anti-Terrorism Package Passed by Congress, Signed by President*, 70 CRIM. L. REP. (BNA) 93, 96 (2001).

84. 189 F.3d 1281, 1283 (10th Cir. 1999).

85. *Id.* at 1284.

86. *Id.* at 1288.

87. Civ. No. 01-6168-HO (D. Or. July 20, 2001).

adopted in one form or another: "It is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation."[88] Uniquely among all states, the Oregon Supreme Court construed this rule to prohibit prosecutors from supervising deceptive undercover investigations.[89] The Justice Department claimed that imposing such a prohibition on federal prosecutors would violate *Olmstead* and its progeny.[90] The Oregon State Bar analogized the case to *Colorado Supreme Court*, suggesting that internal DOJ guidelines authorizing deceptive investigations do not preempt state regulation on this issue.[91] The U.S. District Court for the District of Oregon avoided a decision on this issue for over a year because the state bar decided to revise the rule in question.[92] Observers thought that the Justice Department's position must have been weak, because otherwise the court would have granted the Department's motion for summary judgment

88. OR. CODE PROF'L. RESPONSIBILITY, DR 1-102(A)(3) (2001). This rule is not exceptional; in fact, it has an analog in every other state's code of legal ethics. In the majority of states that follow the ABA Model Rules, the relevant provision is Rule 8.4(c), which provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2004). In the minority of states that follow the ABA Model Code of Professional Responsibility, the relevant provision is DR 1-102(A)(3), which provides that "[a] lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (2002).

89. *In re* Gatti, 8 P.3d 966, 976 (Or. 2000) (en banc). While all states share the same provision in their codes of ethics, every other court addressing this issue has held that the rule against dishonesty does not automatically bar lawyers from supervising deceptive undercover operations by police. *See, e.g.*, Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456 (N.J. 1998) (holding that a public or private lawyer could properly employ an undercover investigator to detect ongoing violations of law, especially where detection of these violations would otherwise be difficult); Minn. Law. Prof. Resp. Bd. Eth. Op. 18 (1996) (same); Ohio Bd. Com. Disp. Adv. Op. 97-3 (1997) (same); Utah St. Bar Eth. Adv. Comm. Op. No. 02-05 (Mar 18, 2002) (a government attorney does not violate the ethical rule prohibiting dishonesty if the lawyer directs a covert investigation involving dishonesty); Va. Leg. Eth. Op. 1738 (2002) (same).

90. Memorandum in Support of Plaintiff's Motion for Summary Judgment at 2, *Or. State Bar* (Civ. No. 01-6168-HO).

91. Memorandum in Support of Defendant's Motion to Dismiss and Alternative Motions for Abstention and Certification of Questions at 14-15, *Or. State Bar* (Civ. No. 01-6168-HO).

92. The Oregon Supreme Court eventually approved a version of the Oregon State Bar's proposal, which became sub-point (d) of DR 1-102:

> [I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

instead of postponing a decision for over a year.

Does this Article's proposed revision of Rule 3.8 violate the Supremacy Clause? The starting point for preemption analysis is to consider whether the federal government has expressly precluded state ethical regulation in this area.[93] All evidence points in the contrary direction. Congress has strongly signaled its intention that state ethics rules should govern federal prosecutors. Congress has also embraced limits on the surveillance of political and religious activity, at least in the context of FISA surveillance. The mere fact that the U.S. Justice Department now authorizes suspicionless surveillance of First Amendment activity does not amount to "preemption" of state ethical rules regulating such activity, any more than the Justice Department's authorization of attorney subpoenas preempted the attorney-subpoena rule in *Colorado Supreme Court*.

The next step of preemption analysis is to consider whether the federal government has "impliedly preempted" the regulation proposed here. Implied preemption can arise in three contexts. First, if a federal and a state law are mutually exclusive, so that a person cannot comply with both, the state law is deemed to be preempted.[94] This basis for preemption seems inapplicable to the present proposal, because there is no federal law that *requires* surveillance of religious and political groups without particularized suspicion. Another ground for implied preemption would be a finding that the state law impedes the achievement of a federal objective.[95] Here, the requirement of suspicion as a predicate for an investigation of First Amendment activity does not impede the federal objective of fighting terrorism, and the proposed rule would actually advance the congressional objective of holding prosecutors accountable for investigative excesses. A final form of implied preemption is where federal law wholly occupies a field.[96] Congressional deference to states in the regulation of federal prosecutors can hardly be described as "filling the field."

Perhaps critics might argue that this Article's proposed revision of Rule 3.8 is more akin to a "procedural rule" than an "ethical rule" subject to the McDade Act.[97] However, the rule against surveillance of First Amendment activity without particularized suspicion is a natural extension of the ABA Model Rules of Professional Conduct, which prevent any attorney from using "methods of obtaining evidence that violate the legal rights"[98] of a third person. Moreover, invidious discrimination based on religion or political beliefs is a proper subject for ethical regulation of prosecutors.[99] Because the proposed amendment

93. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 306 (2001).

94. *Id.* at 310.

95. *Id.* at 311.

96. *Id.* at 315.

97. United States v. Colorado Supreme Court, 189 F.3d 1281, 1284 (10th Cir. 1999).

98. MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (1998).

99. For example, the ABA Standards Relating to the Administration of Criminal Justice, which include a section entitled "The Prosecution Function," strongly prohibit

addresses topics that implicate ethics, this proposal merits classification as an "ethical rule" and falls within the scope of the McDade Act.

The Supreme Court's recent rulings in *Gonzales v. Raich* and *Gonzales v. Oregon* buttress this Article's conclusion that the Supremacy Clause would abide state bars' ethical regulation of federal prosecutors. In *Raich*, the Supreme Court struck down state regulation concerning the manufacture of marijuana, because the state law conflicted with express language in the federal Controlled Substances Act.[100] In *Gonzales v. Oregon*, the Court upheld Oregon's law allowing assisted suicide, even though the U.S. Department of Justice opposed Oregon's practice; the Court found that Congress had not expressly given the Department of Justice authority in the area of medically assisted suicide.[101] In both rulings, the dispositive consideration was whether Congress had expressly delegated power to federal officials rather than their state counterparts. In the present context, Congress could not have been more clear in the McDade Act that state bars should regulate federal prosecutors' ethics.[102]

discrimination based on religion. Standard 3-3.1, entitled "Investigative Function of Prosecutor," provides in subsection (b) that "[a] prosecutor should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or to prosecute." The standards were drafted in 1983 by a group of criminal law practitioners in the American Bar Association. JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: STANDARDS, RULES & STATUTES, 2003-2004 EDITION 1149 (2003) ("certain groups of lawyers who practice in a specialized area have sought to promulgate their own codes of conduct"). The American Trial Lawyers Association's Code of Conduct also provides that, "[i]n exercising discretion to investigate" a prosecutor "shall not show favoritism for, or invidiously discriminate against, one person among others similarly situated." AMERICAN TRIAL LAWYER'S ASSOCIATION, CODE OF CONDUCT ch. 9 sec. 9.2 (1988) (Responsibilities of Government Lawyers), *reprinted in* STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS 265-66 (1999).

100. 125 S. Ct. 2195 (2005). The Court ruled that a California law permitting small-scale cultivation of marijuana for medicinal use could not override the federal classification of marijuana as a controlled substance. Writing for the majority, Justice Stevens declared that, "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Id.* at 2212. Justice O'Connor's dissent protested that the under the majority approach, "little may be left to the notion of enumerated powers." *Id.* at 2223. Justice Thomas was more hyperbolic in his dissent: "the Federal Government is no longer one of limited and enumerated powers." *Id.* at 2229. But see Gonzales v. Oregon, 126 S.Ct. 904, 915-25 (2006) (upholding Oregon's death with dignity statute against a challenge by the U.S. Department of Justice; the lack of specific congressional authorization for the Department of Justice to regulate in this are was central to the Court's ruling).

101. 126 S. Ct. 904, 915-25 (2006).

102. 28 U.S.C. § 530(B)(a). (stating that an attorney for the U.S. Department of Justice "shall be subject to the State laws and rules").

IV. IMPACT OF NEW RULE ON FEDERAL LAW ENFORCEMENT AGENTS

Would the proposed revision of Rule 3.8 affect the law enforcement agents who conduct the bulk of federal investigations? As noted in Section I, *infra*, prosecutors work alongside agents in many proactive investigations, and prosecutors are the gatekeepers for the most important investigative techniques. An ethical rule limiting prosecutors' involvement in particular types of investigations would, by transitivity, greatly affect agents work in those areas.

Consider, for example, whether the proposed amendment to Rule 3.8 would prevent the FBI from engaging in undercover investigations of religious and political organizations. The Attorney General's investigative guidelines classify as a "sensitive circumstance" any investigation of a political or religious group.[103] Such investigations require the approval of prosecutors at several stages.[104] In the absence of particularized suspicion, prosecutors would be unable to give approval, and undercover investigations would not be possible.

Other important investigative techniques would be off-limits to agents targeting churches and political groups without particularized suspicion. Grand jury investigations would be impossible if the ethical rules barred prosecutors' involvement. Agents would not be able to obtain pen registers or trap-and-trace orders.[105] Prosecutors would not be able to advise agents on certain applications for FISA warrants, although recent evidence suggests that agents might still be able to obtain wiretaps in some circumstances without the FISA court's approval. [106] Perhaps the most important implication of this article's proposal would be that prosecutors could not confer with agents about long-term strategy, including evidentiary needs to build a strong case, potential Fourth Amendment problems, or sentencing issues. With no prosecutorial oversight at its early stages, a resource-intensive investigation would be an extremely risky proposition for the FBI, and the agents might in many instances avoid the case altogether.

Oregon's experience is instructive. Throughout the two-year period in which the Oregon Supreme Court construed the "honesty rule" to bar prosecutors' involvement in deceptive investigations, the FBI's proactive criminal investigations ground to a halt in the state. FBI Agent Nancy Savage, the Special Agent in Charge of the FBI office in Eugene, Oregon, commented

103. *Supra* note 34.

104. *Supra* note 36.

105. Only a prosecutor can seek these orders. 8 U.S.C. § 3122.

106. Craig D. Leonnig, *Administration Paper Defends Spy Program*, WASH. POST, Jan. 20, 2006, at A1 (noting that the Bush administration has directed some agents of the National Security Agency to sidestep FISA for domestic surveillance relating to national security); *see* Letter from constitutional law professors and former government officials to various congressional leaders (Jan. 9, 2006), *available at* http://bordc.org/resources/nsa-letter.pdf (disputing legal authority for Bush administration's position).

on a national television broadcast that the prosecutors' ethical quandary had "shut down major undercover operations" in Oregon.[107] In the end, it was this devastating effect on law enforcement, and not the Justice Department's lawsuit, that prodded the Oregon State Bar to revise its "honesty rule" so that prosecutors could take part in deceptive undercover investigations.[108]

As Professor Richman noted, federal agents are dependent on prosecutors in proactive investigations, and prosecutors in turn are dependent on state bar rules to set the parameters for lawyers' ethics. It is a curious irony indeed that state and local governments are generally powerless to influence federal antiterrorism investigations, but federal prosecutors and law enforcement agents are powerless to resist the influence of state bar codes.

V. POSSIBLE OBJECTIONS TO THIS ARTICLE'S PROPOSAL

A number of foreseeable criticisms deserve discussion here. First, some critics may argue that stricter regulation of prosecutors' ethics would drive a wedge between prosecutors and agents. In other words, agents might disassociate themselves from prosecutors in order to avoid the preclusive effect of the new ethical rules.[109] Without the advice and moderating influence of lawyers, the agents might proceed less cautiously, and might violate civil liberties more frequently than when they were under prosecutorial supervision.[110] This criticism seems meritorious in part, and the recent conduct of NSA agents sidestepping FISA for warrantless wiretaps suggests the gravity of the risk.[111] On the other hand, it is simply not viable for law enforcement agents to undertake a substantial proactive investigation with no assistance from prosecutors. Agents who refuse to associate with prosecutors would not

107. The O'Reilly Factor (Fox television broadcast Oct. 31, 2001) (videotape on file with author). Special Agent Savage described the implications of the *Gatti* decision as "unintended consequences." The host, Bill O'Reilly, derided the *Gatti* holding as "ridiculous," and suggested that it was a major impediment to proactive investigations. Former New Jersey Judge Andrew Napolitano, a "senior judicial analyst" for Fox, said the *Gatti* rule was "insane."

108. OR. RULES OF PROF'L CONDUCT R. 8.4(b) (allowing lawyers to supervise "covert activity").

109. Richard Delonis, President of the National Association of Assistant U.S. Attorneys, told a congressional committee that agents might steer clear of prosecutors as states' ethical regulation of prosecutors increased. "Knowing that their closer relation to the prosecutor serves to circumscribe their investigative efforts, agents may well be motivated to separate themselves from prosecutorial oversight and act more independently." *The Effect of State Ethics Rules on Federal Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 63 (1999).

110. When the FISA Court of Review was considering whether to exclude prosecutors from the preparation of FISA applications, Solicitor General Theodore Olson argued that such a rule would be dangerous because it would deny agents the guidance on constitutional parameters for their investigations. Olson Testimony, *supra* note 43, at 28.

111. *Supra*, note 113..

have access to a number of important investigative tools.[112] This reality will prevent a major rift between prosecutors and agents.

Another possible drawback of this Article's proposal is that it might provoke Congress to repeal the McDade Act or otherwise bolster prosecutors' power. Such conjecture seems too alarmist, though. Why would Congress repeal the McDade Act now after declining to do so two months after 9/11, when support for antiterrorist legislation was at its high-water mark?

A third possible disadvantage may be a loss of investigative leads. Yet the Justice Department's own officials have conceded that the surveillance of political and religious groups in the absence of particularized suspicion has yielded very little useful information. In a letter to the House Judiciary Committee on May 13, 2003, Acting Assistant Attorney General Jamie Brown shared the results of an informal survey involving most of the FBI's field offices. This survey indicated that since September 11, 2001, there had only been a single visit to a mosque for which the new guidelines were necessary (i.e., agents had not yet developed a particularized suspicion).[113] In other words, the rule requiring reasonable suspicion would only have caused the loss of a single lead over an eighteen-month period. And incidentally, that one lead proved to be useless; the FBI found no evidence of criminal activity.[114]

Finally, critics might be concerned that state bars would not zealously enforce the new version of Rule 3.8. It is true that bar disciplinary panels would have difficulty gaining access to information about prosecutors' investigative decisions, and bar officials might be daunted by the prospect of "prosecuting a prosecutor." On the other hand, the new rule might result in self-policing by federal prosecutors who would want to avoid any possibility of bar discipline. Further, the Department's own Office of Professional Responsibility (OPR) would be obliged to enforce not only internal Department regulations, but also any state regulations to which prosecutors may be subject. OPR officials would have less difficulty obtaining the sensitive information necessary to scrutinize prosecutors' investigative decisions.

CONCLUSION

James Madison wrote in the Federalist Papers that a separation of state and federal powers would best protect the liberties of the people. "In the compound republic of America, the power surrendered by the police is first divided between two distinct governments . . . [h]ence a double security arises to the rights of the people. The different governments will control each other; at the

112. *Supra*, Part I..

113. Letter from Jamie E. Brown, Acting Assistant Attorney General, to Representative John Conyers, Jr., Ranking Minority Member of House Judiciary Committee, 39 (May 13, 2003) (copy on file with author).

114. *Id.* at 39-40.

same time that each will be controlled by itself."[115]

In the context of federal antiterrorism investigations, the power of the federal government is alarmingly asymmetrical with the power of state and local governments. This Article has suggested one means to restore the federal-state balance: the ethical regulation of federal prosecutors by state bar codes. The federal supremacy power is a mighty fortress, but the McDade Act has lowered the drawbridge. State bars should seize the opportunity to revise Rule 3.8 and revitalize the doctrine of federalism.

115. The Federalist No. 51 (James Madison) (Henry B. Dawson ed., 1865).