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The Uniqueness of Federal Prosecutors

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ARTICLE

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INTRODUCTION

With the 1998 federal appropriations bill,[1] Congress passed a remarkable rider regulating federal government attorneys.[2] The rider was entitled the Citizens Protection Act[3] (CPA) and encapsulated a previously proposed statute that had not survived the committee process.[4] It provided, in pertinent part:

1. *See* Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal 1999, H.R. 4328, 105th Cong. (1998) (enacted).

2. *See* Pub. L. No. 105–277, 113 Stat. 9 (1998) (codified as amended at 28 U.S.C.A. § 530B (West Supp. 1998)).

3. 28 U.S.C.A. § 530B (West Supp. 1998).

4. For a description of the legislative history of the CPA, see *infra* text accompanying note 33.

> § 530B. Ethical Standards for Attorneys for the Government
>
> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent 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.[5]

As will be discussed below,[6] the new legislation capped a personal drive to limit the power of federal prosecutors by a congressman who believed he had been improperly investigated. It was adopted in the context of a national debate over the authority of the Department of Justice to exempt itself from state and federal district court ethics rules.[7] Quite apart from its specific applications, however, the legislation highlights two sets of basic issues—one substantive and one jurisdictional. First, are federal prosecutors somehow special for purposes of ethics regulation, and why? Second, what are the origin and nature of the powers of Congress, the states, and the federal judiciary to regulate the ethics of federal prosecutors? This article explores possible responses to these issues.

Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, strongly opposed the new legislation.[8] Because of the peculiar circumstances under which the bill was adopted, its effect was stayed until April 19, 1999.[9] Soon after the CPA's adoption, efforts began to repeal or rework it.[10] Those efforts thus far have failed, and the statute has taken effect.

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5. 28 U.S.C.A. § 530B(a)-(b).

6. *See infra* text accompanying note 12.

7. *See* Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors; Or, Who Should Regulate the Regulators?*, 65 FORDHAM L. REV. 429, 429–30 & nn.1–2 (1996) (describing history of the debate); *infra* note 21. The controversy is outlined *infra* text accompanying note 25.

8. Senator Hatch decried the sponsors' circumvention of the committee process as well as the legislation's substance. *See* 144 CONG. REC. S12,798-12,800 (1998). Hatch stated:

> Under the guise of setting ethical standards for federal prosecutors and other attorneys for the government, [the legislation] will severely hamper the ability of the Department of Justice to enforce federal law and cede authority to regulate the practice of law by federal prosecutors in our federal courts to more than fifty state bar associations.

Id. at S12798.

9. Many members of Congress opposed allowing such "riders" to the Omnibus Appropriations bill because they felt that the committee process was being subverted. *See* 144 CONG. REC. S12,783, 12,792, 12,806 (1998). As a compromise, Congress retained the core of the CPA, but eliminated its broader sections. *See* H.R. CONF. REP. NO. 105–825 (1998). Implementation of the CPA was delayed for six months.

10. Senator Hatch has introduced a proposed bill entitled the "Federal Prosecutor Ethics Act." S. 250, 106th Cong. (1999). The proposal would in large measure return the law to its pre-CPA state, amending the core of the CPA to read as follows:

> A federal prosecutor shall not be subject to a State law or rule governing ethical conduct of attorneys, to the extent that the State law or rule is inconsistent with Federal law or interferes with the effectuation of Federal law or policy, including the investigation of violations of Federal law.

Id. The proposal contains other provisions that require federal attorneys to obey standard ethics standards that concededly apply to federal attorneys, calls for enforcement, and establishes a "Commission on Federal Prosecutorial Enforcement" to review particular inconsistencies between state and federal law.

Part I of this article describes the background and history of the new legislation. Part II then discusses its possible practical implications for existing state and federal law. Those who supported the legislation for the purpose of resolving the national debate over specific Department of Justice regulations will be surprised to learn of the potentially broad scope of the law they actually adopted.

As might be expected of legislation that did not endure the committee oversight process, the CPA is remarkably unclear. One cannot tell from the text of the law whether the CPA is limited to regulating prosecutorial ethics in the traditional sense.[11] One cannot tell how far it extends in curtailing the power of federal prosecutors, in changing the power of the possible regulators of federal prosecutors, or in delegating the authority of Congress. The legislation's simple language, which on the surface addresses all aspects of the regulation of prosecutorial ethics, masks the complexity of the issues. Understanding this fundamental failing of the CPA is important because it highlights the need for regulators of federal prosecutorial ethics to tailor ethics standards to their reasons for regulating.

Part III identifies three substantive reasons why, for purposes of ethics regulation, regulators might wish to distinguish federal prosecutors. First, prosecutors, in general, may be different than private attorneys. Second, federal prosecutors may be different than state prosecutors. Finally, federal prosecutors who litigate national cases exclusively in federal court may be different than ordinary litigators.

The question of whether federal prosecutors are "ethically unique" has simmered beneath the surface of the debate about the Department of Justice's efforts to exempt itself from state codes. But surprisingly, no one has addressed the conceptual question directly. The CPA seems to reject all three visions of federal prosecutors as distinctive, but it is unclear whether its sponsors considered any of them.

In rushing past the issues, the CPA's sponsors may have created serious obstacles to the effective administration of federal law enforcement. Perhaps more importantly, because the sponsors rejected unthinkingly the notion of a

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Id. § 530B(c)-(d). A democratic alternative to Senator Hatch's proposal has also been circulated. *See* S. 855, 106th Cong. (1999). This bill, introduced by Senator Patrick Leahy and entitled the "Professional Standards for Government Attorneys Act of 1999," would amend the federal judicial code so as to subject government attorneys appearing before a court to the rules of conduct of that court. *See id.* § 530B(b)(1). With respect to all other conduct, the government attorney is to be governed by the "standards established by the rules and decisions of the state in which the attorney is licensed to practice." *Id.* § 530B(b)(2). The bill also requires the Judicial Conference of the United States to submit recommendations for amending the Federal Rules of Civil and Criminal Procedure to create a uniform national rule governing federal attorneys' conduct. *See id.* § 530B(c).

11. The CPA contains a subtitle, "Ethical Standards for Attorneys for the Government." *See* 28 U.S.C.A. § 530B. However, the text of the CPA does not confine itself to ethics standards. Even if the subtitle is interpreted to limit the CPA's reach, many laws and rules other than state ethics codes encompass the goal of setting "ethical standards" for prosecutorial behavior. *See id.*

unique federal prosecution corps, the legislation raises theoretical and legal issues that have significant implications for the future regulation of prosecutorial ethics.

Part IV addresses the jurisdictional issues that the CPA brings to the fore: what are the source and extent of the powers of Congress, the states, and the federal judiciary to regulate the ethics of federal prosecutors? The CPA's broad assertion of power to determine who may regulate federal prosecutors presses the limits of congressional authority and invites litigation regarding that authority.

A few commentators have touched upon isolated aspects of the regulatory power of particular branches, but no one has acknowledged the complexity of the broader jurisdictional issues. Part IV highlights and opens the debate on these issues. Congress, in its proposed re-evaluation of the CPA, will need to address them.

If the CPA survives for long, courts inevitably will confront the jurisdictional issues in deciding challenges to specific state regulation of prosecutorial ethics. If, instead, the legislation is repealed or amended, confrontation between potential regulators can be avoided for a time. Nevertheless, in determining what steps they should take to produce or avoid a confrontation in future regulation, Congress, federal judges, and the Attorney General will need to assess the limits of their own authority and the risks and rewards of pressing that authority to the hilt.

I. THE HISTORY OF THE CPA

A. BACKGROUND

On May 5, 1992, a federal grand jury indicted Congressman Joseph McDade on five counts of bribery-related offenses.[12] The indictment alleged, inter alia, that McDade had accepted real and sham campaign contributions in exchange for using his influence on behalf of various government contractors and their lobbyists.[13] McDade issued an immediate press release admitting that "errors had been made," but denied the essence of the allegations.[14] He retained his seat in Congress.[15] Four years later, he was acquitted by a jury of all charges.[16]

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12. *See* United States v. McDade, No. 92–249, 1992 WL 151314, at *1 (E.D. Pa. June 19, 1992) (denying evidentiary hearing on motion to dismiss).

13. *See id.* at 1 (describing allegations of indictment); *see also Tokens of Gratitude: Rep. Joseph McDade Accused of Bribe-Taking*, TIME, May 18, 1992, at 19 (reporting indictment).

14. Michael deCourcy Hinds, *Top Republican on a House Panel is Charged with Accepting Bribes*, N.Y. TIMES, May 6, 1992, at A1; *see also* Robert E. Kessler, *Indictment: Congressman Took Bribes From LI Firms*, NEWSDAY, May 6, 1992, at 2 (reporting McDade as referring to indictment as "fishing expedition").

15. *See Defense Cleanup: McDade to Rule Over DOE's Budget*, INFO. ACCESS CO., Nov. 29, 1996, at 2 (discussing McDade's postindictment committee assignments).

16. *See* Eric Pianin, *Rep. McDade Acquitted of Bribery, Racketeering Charges*, WASH. POST, Aug. 2, 1996, at A15; *cf. Federal Prosecutors: Hearings Before the Subcomm. on Courts and Intellectual*

Even as the indictment was handed down, McDade complained that federal investigators had harassed and hounded him and that they had "turned his life into 'a living nightmare.' "[17] During the criminal proceedings, McDade filed numerous motions claiming prosecutorial misconduct and violations of ethics standards,[18] including one motion that alleged a significant conflict of interest.[19] All of McDade's motions were dismissed or made moot by the acquittal.[20]

Roughly simultaneously with the investigation and prosecution of Congressman McDade, the Department of Justice became embroiled in a separate controversy with state bar organizations regarding the obligation of federal prosecutors to comply with state and federal court rules of ethics.[21] The controversy centered on two professional rules, one a long-standing rule prohibiting lawyers from contacting represented parties[22] and the second a newer rule limiting prosecutors' ability to subpoena witnesses.[23] During the Bush Administration, Attorney General Richard Thornburgh circulated an internal memorandum that purported to exempt Department of Justice attorneys from such state ethics rules and local federal court rules that adopted them.[24] In 1994, Attorney

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Property of the House Comm. on the Judiciary, 104th Cong. (1996) (testimony of Rep. Joseph McDade) (reporting chronology of his prosecution).

17. Hinds, *supra* note 14, at A1.

18. *See, e.g.*, United States v. McDade, 827 F. Supp. 1153 (E.D. Pa. 1993), *aff'd*, 28 F.3d 283 (3d Cir. 1994) (denying various defense motions); United States v. McDade, No. 92–249, 1992 WL 382351, at *2–3 (E.D. Pa. Dec. 11, 1992) (denying motion based on government's impropriety in delivering too many documents in response to discovery requests); United States v. McDade, No. 92–249, 1992 WL 187036, at *2 (E.D. Pa. July 30, 1992) (denying motion to dismiss because of prosecutor's conflict of interest), *cf.* United States v. McDade, No. 92–249, 1995 WL 476230, at *4 (E.D. Pa. Aug. 7, 1995) (denying motion to exclude government's expert testimony).

19. *See McDade*, 1992 WL 187036, at *2 (denying motion).

20. *See supra* note 18.

21. The history of these events is well documented. *See generally* 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 *passim* (1992); Corinna Barrett Lain, *Prosecutorial Ethics under the Reno Rule: Authorized by Law?*, 14 CRIM. JUST. ETHICS 17, 22–24 (Summer/Fall 1995) (discussing DOJ's regulatory power under APA); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 406–10 (1996); Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473, 479–90 nn. 22–64 (1995); Alafair S.R. Burke, Note, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635, 1650–61 (1994); William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855, 858–59 nn.16–19 (1995).

22. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7–102 (1969) [hereinafter MODEL CODE].

23. *See* MODEL RULES, *supra* note 22, Rule 3.8(f). For discussions of Model Rule 3.8(f), *see generally* Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 917–19 nn.1, 5 (1992); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

24. *See* Richard L. Thornburgh, Memorandum from Attorney General to all Justice Department Litigators 1 (June 8, 1989) [hereinafter Thornburgh Memorandum], *reprinted in In re* Doe, 801 F. Supp. 478, 489 (D.N.M. 1992); *see also* Richard L. Thornburgh, *Ethics and the Attorney General*, 74 JUDICATURE 290 (1991) (justifying Thornburgh Memorandum).

General Janet Reno promulgated formal regulations continuing the exemption (the Reno Rule),[25] while promising that the Department of Justice would, in general, voluntarily adhere to most professional rules.[26]

The Justice Department's position sparked significant media and scholarly attention.[27] Numerous lawsuits raised the legal issues surrounding the Department's claims that the Supremacy Clause[28] authorized its preemption of state ethics rules[29] and that separation of powers considerations foreclosed federal courts from adopting and applying state rules to federal prosecutors.[30] Congress considered intervening in the controversy in 1990.[31] It chose instead to warn the

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25. 28 C.F.R. § 77 (1994), *explained in* Communications With Represented Persons, 59 Fed. Reg. 39,910 (1994) [hereinafter Reno Rule]. Reno initially asserted a virtually unlimited right of Justice Department lawyers to contact unrepresented parties preindictment, in violation of many state professional codes. *See* Proposed Justice Department Rule on Communications with Represented Persons, 58 Fed. Reg. 39,976 (1993) (detailing early history of proposed rule). The Justice Department then withdrew its proposed regulation. *See* Proposed Justice Department Rule Governing Communications with Represented Persons, 59 Fed. Reg. 10,086 (1994) (detailing history). Subsequently, the Department reissued the regulation in its current form.

26. *See id.* at 10,086 ("[F]ederal attorneys generally continue to be subject to state bar ethical rules where they are licensed to practice, except in the limited circumstances where state ethical rules clearly conflict with lawful federal procedures and practices.").

27. *See* authorities cited *supra* notes 7, 21 & 23; *see also* John Flynn Rooney, *Thornburgh Says ABA Rules Hurt Prosecutor's Efforts*, CHI. DAILY L. BULL., Aug. 6, 1990, at 1 (reporting dispute between Department of Justice and ABA); Tom Watson, *AG Decrees Prosectuors May Bypass Counsel*, LEGAL TIMES, Sept. 25, 1989, at 1, 29 (media report of controversy leading up to Thornburgh Memo); Tom Watson, *Prosecutors See ABA as "Arm of the Defense Bar,"* LEGAL TIMES, Sept. 17, 1990, at 6 (same); *Playing Politics*, NAT'L L.J., Aug. 20, 1990, at 12 (criticizing Thornburgh Memo).

28. U.S. CONST. art. VI, § 2.

29. *See* Reno Rule, *supra* note 25, at 39,916 (Justice Department maintains that it may preempt state regulation "whenever the agency, in doing so, is acting within the proper scope of its congressionally delegated authority"); *see also, e.g.*, Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 575 (4th Cir. 1989) (finding "colorable claim" that Supremacy Clause bars state enforcement against federal prosecutors of state's antisubpoena rule); *In re* Doe, 801 F. Supp. 478, 480 (D.N.M. 1992) (rejecting Supremacy Clause argument). For discussions of the preemption issues as they apply to the no-contacts debate, see, for example, Samuel Dash, *An Alarming Assertion of Power*, 78 JUDICATURE 137, 138–40 (1994) (arguing against Justice Department's position); Lain, *supra* note 21, at 22–23 (arguing against Reno Rule); Little, *supra* note 21, at 378–79, 382–411 (supporting Department of Justice's position); F. Dennis Saylor & 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, 483–85 (1992) (arguing that Supremacy Clause forbids state regulation of federal prosecutors); Delker, *supra* note 21, at 878–81 (criticizing Justice Department's position); Jocelyn Lupert, Note, *The Department of Justice Rule Governing Communications with Represented Persons: Has the Department Defied Ethics?*, 46 SYRACUSE L. REV. 1119, 1132–36 (1996) (analyzing Justice Department position); Todd S. Shulman, Note, *Wisdom Without Power: The Department of Justice's Attempt to Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. REV. 1067, 1085–93 (1996) (focusing on preemption issue); Zacharias, *supra* note 7, at 431–39 (suggesting that the preemption issue is complex).

30. *See* Reno Rule, *supra* note 25, at 39,917 (arguing that it would raise separation of powers concerns if courts were to regulate day-to-day activities of executive branch attorneys in the exercise of alleged "supervisory power"); *see also, e.g.*, Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1366 (1st Cir. 1995) (upholding federal local court rule applying state ethics provision against federal prosecutors); United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) (requiring prosecutorial compliance with California no-contacts rule); United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (same); *see also* authorities cited in Little, *supra* note 21, at 409–10 nn. 296–99.

31. *See* HOUSE COMM. ON GOV'T OPERATIONS, FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING

Department of Justice to beware of future congressional oversight.[32]

B. LEGISLATIVE HISTORY

Shortly after his acquittal, Congressman McDade introduced the first version of the CPA.[33] The Subcommittee on Courts and Intellectual Property held hearings on September 12, 1996.[34] Congressman McDade was the first witness[35] and was followed by an Associate Deputy Attorney General[36] and a panel of organizational witnesses[37] who focused on the Reno Rule and its effect on state ethics provisions forbidding contacts with represented persons.[38] Congressman McDade referred to his personal experiences, asserting his "first-hand knowledge of the overzealousness and excessiveness of federal prosecutors."[39] Although McDade further asserted that "the power of prosecutors is tremendous and the problem of misconduct is serious,"[40] the only specifics of his testimony focused on the adoption of the Reno Rule.[41] McDade characterized the proposed legislation as a response to the Justice Department's regulation.[42] The subcommittee took the bill under advisement.[43]

The bill was reintroduced in the next Congress,[44] characterized as a bill "to

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LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED, H.R. REP. NO. 101–986, at 32 (1990) ("We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules of the Federal Courts before which they appear.").

32. *See id.* at 36 (warning Department of Justice that Congress would oversee progress in the no-contacts controversy).

33. The bill was introduced as the Ethical Standards for Federal Prosecutors Act of 1996. *See* H.R. 3386, 104th Cong. (1996).

34. *See Ethical Standards for Federal Prosecutors Act of 1996: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. (1996) [hereinafter *Legislative Hearings*].

35. *See id.* at 6 (testimony of Rep. Joseph McDade).

36. *See id.* at 11 (testimony of Seth Waxman, Associate Attorney General).

37. The Subcommittee heard testimony from representatives of the National Association of Criminal Defense Lawyers, the American Corporate Counsel Association, and the CATO Institute. *See id.* at 57–98 (testimony of Tim Evans, Member of Board of Directors, National Association of Criminal Defense Lawyers; Frederick J. Krebs, President, American Corporate Counsel Association; and Roger Pilon, Director, CATO Institute).

38. Tim Evans of the National Association of Criminal Defense lawyers characterized the bill as "a much needed, long overdue measure to reign in professed self-policing prosecutors run amok, and to end the reign of prosecutorial imperialism begat by, the roundly condemned 'Thornburgh Memorandum' of June 1989." *Id.* at 60 (testimony of Tim Evans). Roger Pilon, from the CATO Institute testified that "however prudent the [Reno] rule may or may not be, it is presumptuous at least for the department to be telling the rest of us that it and it alone will set the rules for the conduct of its attorneys—suggesting an arrogance that has led many critics to the charge, 'above the law.' " *Id.* at 96 (testimony of Roger Pilon).

39. *Id.* at 7 (testimony of Rep. Joseph McDade).

40. *Id.* at 10 (statement of Rep. Joseph McDade).

41. *See id.* at 8.

42. *See id.*

43. *See id.* at 106.

44. It was reintroduced as the Ethical Standards for Federal Prosecutors Act of 1997. *See* H.R. 232, 105th Cong. (1997).

amend title 28, United States Code, to require prosecutors in the Department of Justice to be ethical."[45] It was referred to the House Committee on the Judiciary, but the Committee took no action.[46]

In March of 1998, Congressman McDade introduced an expanded version of the legislation, including not only the legislation that was ultimately adopted, but also standards of conduct for all Justice Department employees and a provision establishing a review board to monitor compliance.[47] The new legislation was submitted to the Committee on the Judiciary for further review.[48]

The portion of the legislation now known as the CPA somehow was received by the Committee on Appropriations in July of 1998.[49] A modified version of the CPA was included as a rider to the Omnibus Consolidated and Emergency Supplemental Appropriations Bill for the Fiscal Year 1999,[50] which was debated on the floor of the Senate in late October of 1998.[51] Over the vociferous objection of Senator Hatch,[52] whose oversight committee had been bypassed, the appropriations act was adopted with the rider intact.[53]

II. THE CPA'S PRACTICAL EFFECT AND ISSUES OF INTERPRETATION

One aspect of the legislation is self evident: the CPA is intended to regulate federal prosecutors more stringently and to limit their powers. This goal can be

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45. *Id.*

46. *See supra* note 34 & accompanying text.

47. The bill, entitled the Citizens Protection Act of 1998, included the Ethical Standards for Federal Prosecutors Act of 1996, but added a list of ten acts of punishable prosecutor misconduct, sanctions for prosecutorial misconduct, and a provision to create a "Misconduct Review Board" appointed by the President of the United States and leaders of both the House and Senate. H.R. 3396, 105th Cong. (1998).

48. *See id.* (introduction to proposed bill).

49. By March 27, 1998, 22 days after its introduction, the bill had 33 cosponsors. *See* 144 CONG. REC. H1699 (1998). However, because no Committee proceedings took place and no action was taken on H.R. 3396, it lost its status as independent legislation.

Congressman McDade was a member of the House Appropriations Committee and prevailed upon the Committee to include the Citizens Protection Act in the bill covering appropriations for the Departments of State, Commerce, Justice, and the Judiciary. *See* H.R. 4276, 105th Cong. (1998). In hearings before the House Appropriations Subcommittee on Departments of Commerce, Justice, and State, the Judiciary, the president of the National Association of Criminal Defense Lawyers spoke in support of the bill. *See Regarding the Fiscal Year 1999 Appropriations for Defender Services: Hearings Before the Subcomm. on Dept's of Commerce, Justice, State, and the Judiciary*, 105th Cong. (1998).

The Citizens Protection Act was included in the proposed appropriations bill for the Departments of Commerce, State, and Justice and the Judiciary for fiscal year ending September 30, 1999. *See* H.R. 4276. Representative Hutchinson moved to strike the Citizens Protection Act, but the House voted 345–82 against the amendment. *See* 144 CONG. REC. H7226 (1998). One successful amendment extended the CPA to include independent counsels. *See* 144 CONG. REC. H7229 (1998).

50. The appropriations bill was received in the Senate on August 31, 1998, at which time several appropriations bills, including H.R. 4276, were rolled into one larger Omnibus Spending bill. *See* H.R. 4328, 105th Cong. (1998). A compromise version of the Citizens Protection Act made its way through the conference process. *See* H.R. CONF. REP. No. 105–825 (1998).

51. *See* 144 CONG. REC. S12,696-12,716, S12,741-12,810 (1998).

52. *See* 144 CONG. REC. S12,798 (1998).

53. *See* Pub. L. No. 105–277, 112 Stat. 2681–118 (1998). The President signed the $520 billion Omnibus Spending bill into law on October 21, 1998. *See* 28 U.S.C.A. § 530B.

gleaned both from Congressman McDade's personal antipathy toward the federal prosecution corps and from the fact that the legislation reacted to the Reno Rule's attempt to insulate the Department of Justice. Far less clear, however, is how the CPA will effectuate an increase in regulation.

A. CHANGES IN THE CONCEPTUALIZATION OF FEDERAL PROSECUTORS

On one level, the CPA changes how federal prosecutors should be viewed. As we discuss in detail in Part III, federal prosecutors have long considered themselves unique in several respects. Because of their resources, the breadth of the statutes they enforce, and their national jurisdiction, federal prosecutors have always seemed different than state prosecutors. The Justice Department's self-perception, in part, is what led to the Reno Rule.[54] One interpretation of the CPA is that it now requires federal prosecutors to be treated like state prosecutors.

The CPA may, however, go further. All prosecutors consider themselves governed by different rules and ethical mandates than private lawyers.[55] One can interpret the CPA's words "to the same extent as other attorneys in that State"[56] as reducing the status of federal prosecutors. In other words, the CPA may subject federal prosecutors to more regulation than state prosecutors, treating federal prosecutors like private attorneys. Although counterintuitive, this interpretation may be consistent with the antipathy toward federal prosecutors felt by the legislation's chief sponsor.

Finally, federal prosecutors—who practice almost exclusively in federal court—typically view themselves as federal litigators. Federal litigators historically have been subjected more to the rules of local federal courts in which they practice than to the rules of their licensing states. Again, one can interpret the CPA as undermining not only this self-perception, but also the ability of federal courts to control its own processes. The CPA subjects federal prosecutors to the simultaneous regulation of state "and Federal local court rules."[57]

B. CHANGES IN THE NATURE OF RESTRICTIONS GOVERNING FEDERAL PROSECUTORS

At a second, more practical, level, the CPA changes what federal prosecutors can do and the nature of the regulation that limits them. Federal prosecutors always have conceded that they are subject to federal law.[58] Explicit terms of the CPA make federal prosecutors subject to at least three additional sources of

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54. *See* Reno Rule, *supra* note 25, at 39,911, 39,914 (asserting that national prosecutions require immunity from nonuniform state rules).

55. *See, e.g.*, Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 103–09 (1991) (discussing psychology of prosecutors).

56. 28 U.S.C.A. § 530B(a).

57. 28 U.S.C.A. § 530B.

58. *Cf.* 4B Op. Off. Legal Counsel 576, 581 (1980) (considering argument by federal law enforcement authorities that they are subject "only to the Constitution, federal statutes, and regulations").

regulation: state laws, state rules, and local federal court rules. By implication, the CPA may also subject federal prosecutors to the gloss upon professional rules that are produced in state court opinions and other expressions of state disciplinary authorities.[59]

The pertinent portion of the CPA is labeled "Ethical Standards for Attorneys for the Government." Yet the text of the CPA nowhere limits itself to rules or law specifically governing legal ethics. One could interpret the CPA narrowly, by characterizing the label as an implicit limitation of the CPA's terms. It is, however, equally plausible to interpret the CPA's provisions literally, as incorporating all state law that bears on lawyers' professional conduct.[60]

So interpreted, the CPA would expose federal prosecutors to a broad variety of existing state legislation and an infinite range of limitations that state regulators may see fit to adopt in the future. For example, federal prosecutors supervising investigations currently may seek wiretap authority under the federal Wire and Electronic Communications Interception and Interception of Oral Communications Act.[61] This statute requires only that federal prosecutors prove that a wiretap may provide evidence of defined crimes in order to obtain wiretapping authority.[62] Under the CPA, federal prosecutors may now also be bound by stricter provisions in state wiretapping statutes[63] and state privacy laws.[64]

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59. Although the CPA does not expressly mention these sources of regulation, it does purport to subject federal prosecutors to state regulation "to the same extent and in the same manner as other attorneys in that State." 28 U.S.C.A. § 530B(a). If local attorneys are bound by the determinations of state courts or disciplinary agencies, these presumably become part of the rules that are being interpreted.

60. One quirky recent opinion that applies the CPA attributes great weight to the title. *See* United States v. Colorado Supreme Court, No. 98–1081, 1999 WL 679678 (10th Cir. 1999). The Tenth Circuit Court of Appeals interprets the words "ethical standards" as both limiting and expanding the legislation's scope. In determining whether the CPA requires federal prosecutors to abide by a state version of Model Rule 3.8(f), the court holds that the CPA incorporates only those professional rules that are ethical in nature. *See id.* at *6. The court defines "ethical" as "conduct unbecoming a member of the bar" and considers three factors in deciding whether Rule 3.8(f) rises to the ethical level: that the rule bars "conduct recognized by consensus within the profession as inappropriate"; that the rule is a "commandment dealing with morals and principles"; and that the rule is "directed at the attorney herself." *Id.* at *6–9. By implication, the court suggests (1) the CPA does not encompass all professional rules, and (2) the CPA does encompass state rules found outside the professional codes but which share the characteristics of "ethics."

61. 18 U.S.C. § 2516 (1994).

62. *See id.* (enumerating offenses the detection of which justifies wiretapping).

63. *See, e.g.*, FLA. STAT. ch. 934.03, 934.09 (1998) (enumerating limited number of offenses for which wiretaps are acceptable and providing procedural limitations on interception of oral communications); *cf.* Mozo v. State, 632 So. 2d 623, 629 (Fla. Dist. Ct. App. 1994), *aff'd*, 655 So. 2d 1115 (1995) (noting that Florida Security of Communications Act evinces greater concern for protection of privacy interests in conversation than does federal Omnibus Crime Control and Safe Streets Act).

64. *See, e.g.*, CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); FLA. CONST. art. 1, § 12 (protecting right "against the unreasonable interception of private communications"); 18 PA. CONS. STAT. ANN. §§ 5703, 5704 (West 1999) (making it felony to intercept telephone communications except under specified circumstances).

The incorporation of state law may interpose other obstacles to federal law enforcement as well. State evidentiary rules, if codified as in California,[65] may apply. Thus, for example, a state's expansive view of attorney-client privilege may supervene a narrower federal common-law rule.[66] Where federal law limits defense discovery by statute, as in the federal Jencks Act,[67] state law now may govern.[68] To be sure, when state and federal law are in direct conflict, federal law will continue to govern.[69] However, in situations in which state law simply adds to federal constraints on prosecutors, the CPA arguably incorporates the supplemental regulation.

As significant as the impact of incorporated state law may be, incorporated state "rules" may be even more burdensome to federal prosecutions. The caption of the CPA[70] suggests that the main focus of the "rules" aspect of the CPA is state ethics codes. Arguably, however, state discovery rules that go beyond federal discovery rules are incorporated as well. Thus, in states in which open discovery is mandated[71]—often on the basis of some reciprocal discovery requirement[72] or other tradeoffs in the criminal process designed to maintain an adversarial balance[73]—federal prosecutors may no longer be able to claim the

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65. *See* CAL. EVID. CODE § 1-1605 (West 1991).

66. *See, e.g.*, FLA. STAT. ANN. § 90.5025 (West 1999) (expanding attorney-client privilege to include communications made by person who seeks or receives services from Department of Revenue under child support enforcement program); N.Y. C.P.L.R. 4503 (McKinney 1998) (including expansive definition of privilege and including commentary C4503, which notes that "CPLR 4503 offers greater protection for attorney-client communications than does the common law").

Similarly, federal law does not recognize an accountant-client privilege. *See* Couch v. United States, 409 U.S. 322, 335 (1973) (rejecting privilege). However, many states have either explicitly extended the attorney-client privilege to an attorney's agent, including the accountant, or have created stand-alone accountant-client privileges. *See* Denzil Causey & Frances McNair, *An Analysis of State Accountant-Client Privilege Statutes and Public Policy Implications for the Accountant-Client Relationship*, 27 AM. BUS. L.J. 535, 538 (1990) (noting that 24 jurisdictions have adopted some form of accountant privilege statute).

67. 18 U.S.C. § 3500 (1994) (requiring disclosure of witness statements only after witness has testified).

68. Thus, for example, the Jencks Act requires the government to turn over witness statements to the defense, but only *after* the witness has testified. 18 U.S.C. § 3500 (1994). In marked contrast, some states allow the defense to take pretrial depositions of potential prosecution witnesses. *See, e.g.*, ALASKA STAT. § 15(a) (Michie 1994); FLA. STAT. ch. 3.220(d) (1973); IND. CODE § 35-37-4-3 (1994).

69. In other words, the Supremacy Clause of the Constitution will govern so long as the subject is one over which the federal government has regulatory power. *See* U.S. CONST. art. VI.

70. The CPA characterizes itself as establishing "Ethical Standards for Attorneys for the Government." 28 U.S.C.A. § 530B.

71. *See, e.g.*, CAL. PENAL CODE § 1054.1 (West 1999) (requiring prosecutors to disclose, inter alia, witness statements and all real evidence obtained as part of investigation); MASS. R. CRIM. P. 14 (West 1999) (requiring full disclosure of all evidence in possession of prosecution, including full probation department records of all prospective prosecution witnesses).

72. *See, e.g.*, MASS. R. CRIM. P. 14(a)(3) (West 1999) (conditioning open discovery on significant discovery rights of prosecution, after defense has requested discovery); Hobbs v. People, 284 Cal. Rptr. 655 (Cal Ct. App. 1991), *overruled on other grounds sub nom.*, People v. Tillis, 18 Cal. 4th 284, 295 (1998) (discussing reciprocal aspect of California's open discovery rules).

73. *See, e.g.*, FLA. R. CRIM. P. 3.220(b)(4)(i) (entitling prosecutor to receive defense witness statements after defendant requests statements from prosecution).

benefits of the more limited Federal Rules of Criminal Procedure.[74]

Here, again, the CPA produces a unique issue of interpretation. Where practice rules are concerned, one ordinarily would expect federal rules to apply in federal court and state rules to apply in state court. Intended or not, the terms of the CPA seem to prescribe a change in this long-standing principle.

C. CHANGES IN THE APPLICABILITY OF STATE ETHICS STANDARDS

The most immediate effects of the CPA are in its incorporation of state ethics rules. These clearly are intended to apply to federal prosecutors. Controversy over their applicability provided the stimulus for the CPA.[75]

Interestingly, the CPA may not end the debate regarding the particular ethics provision that lay at the heart of the controversy—the "no contact with represented persons" rule.[76] The American Bar Association formulation of this rule, and most state versions that the CPA incorporates, allow prosecutors to contact represented persons "when authorized by law to do so."[77] Federal regulations such as the Reno Rule arguably are authorizing "law."[78] In the aftermath of the new legislation, states may choose to amend away the exception.[79] Nevertheless, it is ironic that the CPA, as it stands, may not eliminate the very claim of authority to avoid state standards that prompted the CPA itself.

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74. *See* FED. R. CRIM. P. 16 (providing limited discovery rights to defense).

75. *See supra* text accompanying note 21.

76. MODEL RULES, *supra* note 22, Rule 4.2.

77. *Id.* At least 41 jurisdictions have adopted this limiting provision, including Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

78. Reno Rule, *supra* note 25, at 39,916–17 (asserting that federal regulations have same preemptive force as legislation that authorized them). If federal regulations are federal law, they presumably preempt conflicting state law. *See, e.g.*, Little, *supra* note 21, at 378–84 (arguing that Justice Department rulemaking does preempt state law); Zacharias, *supra* note 7, at 440 (discussing question of whether Department of Justice regulations are "law").

The CPA attempts to foreclose the conflict between Justice Department regulations and state rules by requiring the Attorney General to "amend rules of the Department of Justice to assure compliance" with the CPA. 28 U.S.C.A. § 530B(b). Yet, under the terms of the CPA, compliance simply requires federal attorneys to be "subject to State law and rules." 28 U.S.C.A. § 530B(a). Unless state law prohibits federal regulations, promulgating federal regulations does not necessarily undermine compliance. This conclusion is obvious with respect to no-contacts provisions that refer to "other law," but the conclusion is equally reasonable with respect to state laws that silently acknowledge the possibility of preemption by a higher authority.

79. It may be difficult for Congress to craft a general provision that would retain Congress's ability to preempt state law while eliminating the possibility of Justice Department preemption. On a specific issue, such as the no-contacts-with-represented-persons controversy, Congress easily can remove the Justice Department's authority to override state rules simply by regulating the subject directly. It is quite another matter to declare somehow that federal regulations are not federal law for purposes of the Supremacy Clause. The difficulty comes in trying to craft legislation that leaves the Department the general rulemaking authority that it needs to carry out its functions, while at the same time limiting the force of particular kinds of departmental rules. *Cf. infra* text accompanying note 222 (discussing argument that the Executive may have independent power to preempt or withstand state law).

In other respects, however, the CPA is less forgiving. It specifically requires federal prosecutors to abide by state ethics standards, regardless of whether local federal courts have adopted them and regardless of whether they interfere with effective law enforcement. The CPA invites state bar organizations dominated by the private bar to lobby state courts and legislatures to adopt provisions constraining prosecutors.[80] At least one such provision is already a source of controversy: ethics rules adopted in numerous states significantly limit prosecutorial authority to subpoena lawyers to give unprivileged information at trial or before the grand jury.[81] Other limiting ethics rules that already exist in some states expand prosecutors' obligation to disclose evidence to the defense,[82] require prosecutors to expose exculpatory evidence to grand juries,[83] require prosecutors to discourage public statements by law enforcement personnel,[84] and limit the prosecutor's (but not the defense's) ability to discourage witnesses from cooperating with their adversaries.[85] By authorizing states to regulate federal prosecutors, the CPA may encourage the adoption of new ethics provisions defining prosecutors' special responsibilities.[86]

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80. Procedural questions surrounding the CPA also raise the specter of obstacles to law enforcement. First, by filing ethics charges against federal attorneys, litigants in cases involving the federal government may be able to force disclosures that would not be required in the underlying litigation. Second, there is a serious question regarding which jurisdictions have authority to prosecute federal attorneys for violating state ethics rules—the jurisdiction in which an attorney is licensed, the home jurisdiction of his agency, the jurisdiction in which he ordinarily practices, or the jurisdiction in which he appears in a case pro hac vice. *Cf.* United States v. Ferrara, 54 F.3d 825, 830 (D.C. Cir. 1995) (holding that New Mexico ethics rule governed conduct of Assistant U.S. Attorney licensed in New Mexico but practicing in District of Columbia, but finding lack of jurisdiction to challenge New Mexico's disciplinary action in District of Columbia courts).

81. *See, e.g.*, MODEL RULES, *supra* note 22, Rule 3.8(f)(3) (forbidding subpoenas to lawyers unless information sought is unprivileged and essential and "there is no feasible alternative to obtain the information"). Some jurisdictions that follow the ABA's model have added the proviso that prosecutors must seek judicial approval before issuing such subpoenas. *See, e.g.*, MASS. RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) (1999); PA. RULES OF PROFESSIONAL CONDUCT Rule 3.10 (1998); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 8–102 (1995); *see also* Law. Man. on Prof. Conduct (ABA/BNA) 55:1303 (1997) (identifying 10 states that have adopted ethics rules that in some form limit prosecutors' use of subpoenas to obtain information from lawyers about their clients); authorities cited *supra* note 23.

82. *See* D.C. RULES OF PROFESSIONAL CONDUCT Rule 3.8(g) (providing that prosecutor, in presenting case to grand jury, shall not "intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause").

83. *See id.*

84. *See* OKLA. RULES OF PROFESSIONAL CONDUCT Rule 3.8(e) (requiring prosecutors to "exercise reasonable efforts to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under R. 3.6").

85. *See* VA. DISCIPLINARY RULE 8–102A(3) (prohibiting public prosecutor from discouraging any person from giving relevant information to defendants).

86. The range of possible new ethics provisions is limited only by one's imagination. For example, state rules of criminal procedure that require prosecutors to open their files to the accused might just as easily be promulgated as state ethics rules. If applied through the CPA, these rules would afford defendants far broader discovery than they now receive in federal criminal cases. Similarly, state ethics regulators could forbid prosecutors to use illegally obtained evidence, on the theory that using such evidence brings disrespect to the legal profession. Such a provision would have the effect of negating

Three more general types of ethics provisions, if interpreted broadly by state authorities, have far greater significance for federal prosecutions than the explicit prosecutorial standards discussed above. First, several states have adopted ethics rules that forbid lawyers to compensate fact witnesses for their testimony.[87] A controversial federal appellate decision recently suggested that inducements to testify in plea bargaining might violate a federal bribery statute.[88] Although the decision has not stood the test of time,[89] a reasonable argument can be made that plea bargaining inducements do constitute "compensation" under the state ethics rules. The CPA may provide a stronger basis than the federal bribery statute for defense attorneys to seek the exclusion of testimony procured through plea bargains.

Second, according to testimony before Congress, state bar organizations have recently begun to consider whether general prohibitions against "misrepresentations" by attorneys[90] should be applied to prosecutors.[91] Undercover investigations conducted under a prosecutor's supervision inevitably require misrepresentations. Likewise, efforts to induce confessions or cooperation by

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Fourth Amendment decisions permitting the introduction of illegally obtained evidence where the wrongdoing was committed by a private party or by law enforcement agents acting in good faith, or where the wrongdoing violated the rights of someone other than the accused. Indeed, an ethics rule could go even further and require the disqualification of any prosecutor who has deliberately acquired illegally obtained evidence. *Cf.* MODEL RULES, *supra* note 22, Rule 1.9 (disqualifying lawyers who previously had access to confidential information of former client that they might, in theory, misuse). While it is unlikely that any state court would presently adopt many of the above ethics provisions, it is important to remember that, even today, state ethics codes include some provisions directed uniquely at prosecutors. *See supra* notes 81-85.

87. *See, e.g.*, DEL. RULES OF PROFESSIONAL CONDUCT Rule 3.4(b)(ii)-(iii) (1995) (limiting compensation for fact witnesses, but not expert witnesses); ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(15) (1998) (lawyers may pay fact witnesses only expenses and reimbursement for lost compensation, but may pay expert witness a reasonable fee); PA. RULES OF PROFESSIONAL CONDUCT Rule 3.4b(1)-(2) (1998) (limiting fact witness compensation).

88. *See* United States v. Singleton, 144 F.3d 1343, 1348 (1998), *rev'd*, 165 F.3d 1297 (10th Cir. 1999) (en banc).

89. *Singleton* was reversed by an en banc panel. *Singleton*, 165 F.3d at 1297. Several other courts also have rejected the argument. *See, e.g.*, United States v. Haese, 162 F.3d 359, 366–67 (5th Cir. 1998) (rejecting *Singleton*); United States v. Ware, 161 F.3d 414, 421–22 (6th Cir. 1998) (disagreeing with *Singleton* and holding that § 201(c)(2) does not apply to government); United States v. White, 27 F. Supp. 2d 646, 648–49 (E.D.N.C. 1998) (rejecting *Singleton* as aberrational decision); United States v. Hammer, 25 F. Supp. 2d 518, 535–36 (M.D. Pa. 1998) (disagreeing with *Singleton*); United States v. Reid, 19 F. Supp. 2d 534, 535–38 (E.D. Va. 1998) (holding that *Singleton* would work "obvious absurdity"); United States v. Arana, 18 F. Supp. 2d 715, 717–19 (E.D. Mich. 1998) (declining to follow *Singleton*); United States v. Dunlap, 17 F. Supp. 2d 1183, 1184–88 (D. Colo. 1998) (holding that agreements made with witnesses do not violate government antigratuity statute); United States v. Guillaume, 13 F. Supp. 2d 1331, 1332–34 (S.D. Fla. 1998) (disagreeing with *Singleton*); United States v. Eisenhardt, 10 F. Supp. 2d 521, 521–22 (D. Md. 1998); United States v. Barbaro, No. 98 CR. 412, 1998 WL 556152, at *3 (S.D.N.Y. Sept. 1, 1998) (predicting *Singleton* would be reversed). *But see* United States v. Revis, 22 F. Supp. 2d 1242 (N.D. Okla. 1998) (accepting argument); United States v. Fraguela, No. 96–0339, 1998 WL 560352 (E.D. La. Aug. 27, 1998) (same), *vacated on reconsideration*, No. 96–339, 1998 WL 910219 (Oct. 7, 1998).

90. *See, e.g.*, MODEL RULES, *supra* note 22, Rules 4.1, 4.3.

91. *Legislative Hearings*, *supra* note 34, at 11 (testimony of Seth Waxman, Associate Attorney General).

defendants often involve threats that the prosecutors do not intend to carry out as well as misrepresentations about the facts. If state regulators determine that such activity constitutes deceit or misrepresentation within the meaning of state ethics rules, the Citizen Protection Act's incorporation of the state determinations could undermine federal undercover operations and plea bargaining as we know it.

Third, to the extent that state conflict of interest rules apply fully to federal prosecutors, practical problems may arise for federal law enforcement. In particular, prior to the CPA, federal prosecutors' offices were always granted more leeway than private law offices when an individual lawyer's conflict of interest would, under a strict reading of conflict rules, be imputed to all other lawyers in the office and thereby require the entire office to be disqualified.[92]

D. CHANGES IN THE APPLICABILITY OF LOCAL FEDERAL COURT RULES

As we have already noted, the CPA subjects federal prosecutors to state law *and* local federal court rules. One way of interpreting this mandate is that state professional rules apply when the local federal court has not adopted any local rules.[93] A somewhat broader interpretation is that the state rules apply only when the federal court has not adopted any local rules regarding the prosecutorial conduct in question. A more expansive reading, however, would subject federal prosecutors to state rules even when a federal court has adopted a less onerous rule, provided the rules are not in direct conflict. In other words, the CPA arguably imposes on federal prosecutors the most restrictive regulation that can be found within state and federal law. Such an interpretation, though peculiar on its face, is consistent with Congressman McDade's distrust of federal prosecutions.[94] Again, the thrust of the legislation may be to limit federal prosecutorial activity to the maximum effect possible, regardless of its effect on valid law enforcement goals.

E. CHANGES IN WHO MAY REGULATE FEDERAL PROSECUTORS

Thus far, this article has focused upon the Citizen Protection Act's effects on the day-to-day operations of prosecutors. The CPA significantly affects what laws and rules apply to federal prosecutors. Perhaps more importantly, the CPA

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92. *See, e.g.*, Blair v. Armontrout, 916 F.2d 1310 (8th Cir. 1990); United States v. Gout, 897 F.2d 231 (7th Cir. 1990); United States v. Newman, 534 F. Supp. 1113 (S.D.N.Y. 1982). In most jurisdictions, a private lawyer with a conflict of interest may not be "screened" from participating in the representation. The lawyer's office will be vicariously disqualified. *See* MODEL RULES, *supra* note 22, Rule 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . ."). Applying this rule equally to federal prosecutors would mean that an entire U.S. Attorneys' Office would be disqualified when a single Assistant U.S. Attorney has a conflict. However, ethics rules generally permit a personally disqualified prosecutor to be screened. *See* MODEL RULES, *supra* note 22, Rules 1.10, 1.11(c).

93. *See supra* text accompanying note 57.

94. *See supra* text accompanying note 12.

opens the door to future regulation—giving states blanket authority to impose further constraints down the road.

Of equal significance is the effect of the CPA on who can regulate federal prosecutors. Until now, the primary regulator of federal prosecutors has been Congress. The Department of Justice has claimed limited authority to regulate itself.[95] It has also given some grudging deference to local federal court rules in circumscribed areas.[96] The CPA now delegates primary regulatory authority to the states. Although Congress continues to recognize the regulatory authority of the federal courts, it seems to equate or even subordinate that authority to that of the states.[97] The CPA minimizes the Department of Justice's own authority.[98]

Perhaps more interesting is the assumption underlying the CPA that Congress's power to determine who can regulate federal prosecutors is plenary. The CPA assumes that there is no area of federal prosecutorial activity that states are inherently powerless to regulate. It also assumes either that the federal executive and judiciary have no independent power to regulate federal prosecutorial ethics or that Congress has the authority to override that power. Finally, even if the CPA is correct that Congress has the final say regarding the regulation of federal prosecutors, the CPA assumes that Congress has the power to delegate its authority to whatever regulator Congress sees fit.

F. CONCLUSIONS REGARDING THE EFFECT OF THE CPA

When simply reading the CPA, it is difficult to determine how much change in the traditional regulation of federal prosecutors the CPA truly intends to bring about. At root, the CPA probably was intended simply to limit the prosecutorial conduct that Congressman McDade found offensive in his own prosecution. Nevertheless, the CPA's broad and undifferentiated language supports each of the changes discussed above and with them raises difficult practical, theoretical, and legal issues.

If the CPA remains in effect for long, there is little doubt that some American jurisdiction will exercise its newly delegated power and that the Department of Justice will resist. Both state and federal courts will need to resolve the resulting legal issues.

Even if the CPA is amended, however, the issues remain important. In

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95. *See* Reno Rule, *supra* note 25, at 39,911–12 (asserting that Justice Department may preempt state ethics codes but noting that "its attorneys should adhere to the principles underlying those rules to the maximum extent possible").

96. The Reno Rule itself acknowledges some judicial power to set rules. *See* Reno Rule, *supra* note 25, at 39,916–17 (recognizing courts' rulemaking authority but asserting Justice Department's authority to preempt particular rules). For the most part, however, the Justice Department has, in recent years, limited its acquiescence to federal court regulation to circumstances in particular litigation that occur in a court's presence. *See, e.g.*, United States v. Williams, 504 U.S. 36, 48 (1992) (suggesting that federal court's supervisory power over prosecutors may be limited to in-court conduct).

97. *See supra* text accompanying note 57.

98. In other words, to the extent the Department's view of appropriate conduct conflicts in any way with that of state law, the CPA requires the Department to follow the state model. *See* 28 U.S.C.A. § 530B(b).

re-evaluating the statute, Congress must consider both the extent of its own authority and how far it truly wishes to press that authority. Likewise, the Justice Department, in adopting regulations, and federal courts, in adopting rules, must confront the very real conflicts between their purported regulatory authority and that of the other branches. Thus far, with the limited exception of the Thornburgh memorandum and the Reno Rule, the various branches have restrained themselves so as to avoid a confrontation. The issues raised by the McDade proposal and discussed in this article demonstrate that the potential for a confrontation may be greater even than the regulators have always assumed.

III. THE OVERARCHING SUBSTANTIVE QUESTION—ARE FEDERAL PROSECUTORS ETHICALLY DISTINCTIVE?

An essential assumption of the CPA is that federal prosecutors *should*, for purposes of legal ethics, be treated more like private lawyers and state prosecutors. Because the CPA never underwent the scrutiny of full committee oversight, this assumption never was tested. Part III of this article considers whether there are reasons to regulate federal prosecutors differently from other lawyers generally or from state prosecutors in particular. Part III identifies the possible justifications without attempting to analyze them fully. These are complex issues that future regulators of federal prosecutors—including Congress in re-evaluating the CPA—will need to address.

As discussed above, the CPA's scope, in part, is unclear.[99] In subjecting government attorneys to ethics rules "governing attorneys in each State [where they perform their duties] to the same extent as other attorneys in that State,"[100] the CPA may eliminate all ethical distinctions between federal prosecutors and private attorneys.[101] Viewed this way, the CPA challenges the conventional understanding that prosecutors are ethically distinguishable from other lawyers. Part IIIA, however, suggests that in practice most state ethics rules are irrelevant

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99. *See supra* Part II.

100. 28 U.S.C.A. § 530B(a).

101. This interpretation was advocated by the ABA, which asserted in support of the CPA that "[a]ll lawyers should [continue] to be held to the same standards of ethical conduct." Letter of Robert D. Evans, Director, ABA Governmental Affairs Office, to ABA conferees (Sept. 17, 1998) (on file with author); *accord* Letter of Philip S. Anderson, President, ABA, to members of United States Senate (Feb. 22, 1999) (asserting same in opposition to proposed repeal of CPA) (on file with author); William D. Delahunt, *All-Powerful Prosecutors*, WASH. POST, Mar. 3, 1999, at A23 (opposing repeal of CPA, on ground that "[i]f the people are to have confidence in the administration of justice, they must know that federal prosecutors will be held to the same standards of conduct that apply to other attorneys").

The National Association of Criminal Defense Lawyers argued this principle less successfully in the context of *United States v. Singleton*, discussed *supra* note 89 and accompanying text: "Requiring prosecutors to abide by the same standards of conduct that all other lawyers are required to meet would help restore public confidence in the criminal justice system and would constitute a small step toward restoring some equilibrium in the adversarial process." Brief Amicus Curiae of National Association of Criminal Defense Lawyers at 14–15, United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), *quoted in* David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 538 n.138 (1999).

to prosecutors. Of the rest, many set standards for private lawyers that are too permissive for prosecutors, while others set standards from which prosecutors traditionally, and correctly, have been exempt.

Alternatively, Congress simply might have meant to treat federal prosecutors the same as state prosecutors in the states in which they are licensed.[102] This interpretation of the CPA challenges the position of the Department of Justice that federal criminal prosecutors differ from state prosecutors in ways that render state ethics regimes ill-suited to their work. Parts III.B and III.C explore the conflicting premises. Part III.B explains how the rationales for treating both state and federal prosecutors differently from other lawyers might also explain why federal prosecutors should be treated differently from state prosecutors. Part III.C suggests that the federal nature and national character of federal prosecutors' cases may also provide a basis for making distinctions.

Reading the CPA most narrowly, one can argue that Congress might have accepted the possibility that federal prosecutors should be regulated less restrictively than state prosecutors, but concluded that the Department of Justice is the wrong body to make rules reflecting this distinction.[103] In other words, Congress might simply have removed regulatory authority from the Department of Justice and conveyed its authority, residually, to the states. This raises the question, explored briefly in Part III.D, of which government bodies still can determine whether federal prosecutors are unique, whether federal prosecutors should be governed by different standards and, if so, what those standards should be. Part III.D identifies the issues left unresolved by the CPA that future regulators would need to address.

A. ARE PROSECUTORS DIFFERENT FROM OTHER LAWYERS?

Ethics regulators always have assumed that prosecutors are unique. For the most part, this assumption is reflected in ethics norms that restrict prosecutors more than other lawyers. It is questionable whether the CPA intended to overturn the traditional understanding about prosecutors' heightened ethical responsibilities. However, prosecutors also typically have been exempted from a number of ethics prohibitions that apply to private lawyers. Whether the CPA meant to reject this distinction, and therefore, to regulate federal prosecutors more strictly than state prosecutors is less clear.

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102. *See* United States v. Ferrara, 847 F. Supp. 964, 968–69 (D.D.C. 1993), *aff'd*, 54 F.3d 825 (D.C. Cir. 1995) (effort by Justice Department to exempt its attorney from discipline for violating state rule applicable to state prosecutors); *In re* John Doe, 801 F. Supp. 478, 480 (D.N.M. 1992) (asserting that "the Government threatens the integrity of our tripartite structure by arguing [that] its lawyers, in the course of enforcing the laws regulating public conduct, may disregard the laws regulating their own conduct").

103. *See generally* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 486–89 (1996) (arguing that Department of Justice is less qualified than federal courts because of lack of objectivity).

1. Prosecutors' Higher Obligations

The CPA's suggestion that ethics rules should apply equally to federal prosecutors and other lawyers seems odd. Most state ethics rules are irrelevant to prosecutors' work, because full-time federal prosecutors do not engage in much of the professional conduct that is regulated by disciplinary rules. Federal prosecutors are entrusted to make decisions on behalf of the United States, and thus do not represent clients in the same way as most private attorneys.[104] Federal prosecutors do not market their services, do not enter into fee arrangements, and ordinarily do not have dealings with clients per se. Consequently, provisions on client consultation, advertising, solicitation, and attorneys' fees are inapplicable to federal prosecutors. Likewise, ethics rules allocating decision-making authority do not remotely describe the way prosecutors reach decisions in federal criminal cases.

Many ethics provisions that do apply to prosecutors in theory, such as those dealing with client confidentiality[105] and conflicts of interest,[106] are far less significant for them than for other lawyers. Federal prosecutors are subject to federal regulations that deal with these subjects more specifically and, by and large, more restrictively. For example, the confidentiality of government informa-

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104. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 633–34 (1999).

105. A prosecutor has an ethical duty to preserve the government's confidential information. *See* MODEL RULES, *supra* note 22, Rule 1.6; MODEL CODE, *supra* note 22, DR 4–101; *see also* United States v. Ostrer, 597 F.2d 337, 339–40 (2d Cir. 1979) (former federal prosecutor disqualified from representing criminal defendant to prevent his use of nonpublic government information); Robinson v. Grievance Comm., 70 A.D.2d 209 (N.Y. App. Div. 1979) (former federal prosecutor disbarred for giving confidential information respecting cases pending in U.S. Attorney's Office to persons believed to be members of organized crime); Op. N.Y. State Bar Ass'n Comm. on Professional Ethics, No. 606 (Jan. 11, 1990). *See generally* Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625 (1979); Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809 (1995). However, this duty does not significantly restrain a prosecutor in the investigation and prosecution of criminal cases because, typically, a prosecutor represents no individual client who can make confidential disclosures. While the government may be entitled to preserve the confidentiality of information acquired in its capacity as a prosecutor, a prosecutor has substantial authority to waive confidentiality on behalf of the government. *Cf.* 5 C.F.R. § 2635.703(a) (1999) (government employee "shall not use inside information obtained as a result of his Government employment for private gain").

106. The duty of loyalty and the duty to avoid conflicting interests apply to prosecutors. *See* MODEL RULES, *supra* note 22, Rule 1.7(b); MODEL CODE, *supra* note 22, DR 5–101, 5–107(A)(2). But these obligations have far less significance for full-time federal prosecutors than for private lawyers or state prosecutors, because they represent only one client. *Cf. In re* Patterson, 176 F.2d 966, 968 (9th Cir. 1949) (disciplining federal prosecutor for his representation of litigant in state proceedings). In contrast, in state or local jurisdictions in which prosecutors are allowed to engage in private practice while they function as a government attorney, conflicts of interest may arise. *See* Gault v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 552 n.24 (5th Cir. 1988) (noting that "there are special ethical considerations which must be taken into account by public prosecutors who also engage in private representation"); *In re* Truder, 17 P.2d 951, 952 (N.M. 1932) (reprimanding district attorney for prosecuting suit for civil damages on same facts as criminal prosecution in which he was involved). *See generally* John O. Kizer, *Legal Ethics and the Prosecuting Attorney*, 79 W. VA. L. REV. 367, 371 (1977).

tion is addressed by federal regulation[107] and a rule of procedure.[108] Likewise, the federal prosecutor's duty of loyalty is addressed both by criminal statutes that outlaw conflicts of interest[109] and by regulations that require government lawyers to represent the government in a loyal and disinterested manner.[110] Because the overwhelming majority of state ethics rules are superfluous, the CPA's mandate that federal prosecutors should play by the same ethics rules as other lawyers has considerably less force than at first appears.

The more significant problem with the notion that prosecutors should play on a level field with other lawyers is that, in many respects, both state and federal prosecutors have been held to a *higher* standard than other lawyers. They are charged with an overarching duty to seek justice—a duty recognized for well over a century.[111] In contrast, the ordinary understanding of the private lawyer's role in litigation is that the lawyer should do almost everything legally permissible to win a case on behalf of a client.[112]

The prosecutor's unique role has been the justification for disciplinary provisions that are directed exclusively at prosecutors.[113] Over the past three decades, the number of such provisions has increased.[114] Moreover, courts have

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107. *See, e.g.*, 5 C.F.R. 2635.703(a) (government employee "shall not use inside information obtained as a result of his Government employment for private gain").

108. *See* FED. R. CRIM. P. 6.

109. *See, e.g.*, 18 U.S.C. §§ 201, 205, 208 (1994) (prohibiting government attorneys to receive bribes and gratuities and to act as lawyer against interests of United States); *cf.* United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986) (federal prosecutor convicted of having conflict of interest in violation of 18 U.S.C. § 201(g)).

110. *See, e.g.*, 5 C.F.R. § 735.204 (1999) (financial conflicts of interest); *id.* § 735.203 (outside employment).

111. The duty is said to be premised on prosecutors' extraordinary powers and their unique role as "the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935); *see also* Green, *supra* note 104, at 612–14, 625–37.

112. *See, e.g.*, WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 7 (1998) ("The core principle of the Dominant View is this: the lawyer must or at least may pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim.").

113. *See* MODEL RULES, *supra* note 22, Rule 3.8; MODEL CODE, *supra* note 22, DR 7–103. The ethics codes also contain conflict-of-interest provisions that are directed particularly at government attorneys. *See, e.g.*, MODEL RULES, *supra* note 22, Rule 1.11(c); MODEL CODE, *supra* note 22, DR 9–101.

114. The ABA *Model Code of Professional Responsibility*, which was adopted (with some variation) by most states beginning in the early 1970s, included only two—the first requiring "probable cause" before instituting criminal charges and the second requiring prosecutors to disclose exculpatory and mitigating evidence. *See* MODEL CODE, *supra* note 22, DR 7–103(A)-(B). When the ABA *Model Rules of Professional Conduct* was adopted in 1983, its special rule on prosecutors included several additional provisions. *See, e.g.*, MODEL RULES, *supra* note 22, Rule 3.8(b) (imposing responsibility on prosecutors to protect an accused's right to counsel); *id.* Rule 3.8(c) (forbidding prosecutors from seeking a waiver of important rights by an unrepresented defendant). Since that time, other provisions have been added, including a provision restricting the issuance of grand jury subpoenas to lawyers that the Department of Justice has adamantly opposed and few states have adopted. *See id.* Rule 3.8(f); *see also* authorities cited *supra* note 81; *cf.* United States v. Colorado Supreme Court, No. 98–1081, 1999 WL 679678, at *5–6 (10th Cir. 1999) (upholding the rule); Stern v. Supreme Judicial Court for Massachusetts, 184 F.R.D. 10 (D. Me. 1999) (challenging rule).

recognized that, given the different conception of the prosecutor's role, generally applicable disciplinary provisions may be unduly permissive as applied to prosecutors. For example, prosecutors have a duty, not shared by other lawyers, to prevent or correct judicial and other procedural error.[115] Likewise, prosecutors' obligation of candor to the tribunal is also greater than that of lawyers generally.[116]

Congressman McDade introduced the CPA to prevent perceived ethical abuses by federal prosecutors. By subjecting government attorneys to state ethics rules, he probably did not mean to reduce the conduct of federal prosecutors to the ethical level of private lawyers. The CPA's general premise that federal prosecutors must play by the same ethical rules as other lawyers is at odds with the CPA's own goals.

2. Prosecutors' Claim to Exemption from Ethics Restrictions

Although for the most part prosecutors have accepted their higher ethical responsibilities, they have simultaneously claimed that many ethics restrictions applicable to other lawyers do not apply, or do not apply in the same way, to them.[117] With respect to the no-contact rule, this claim has occasioned controversy. With respect to other rules, however, the "uniqueness of prosecutors," in the sense of their being regulated less restrictively than other lawyers, has been accepted almost universally by courts. Until recently, the proposition has not been questioned even by the private bar.

In some respects, this deference to prosecutors is not entirely visible in state

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115. Thus, the rules appear to permit lawyers generally, but not prosecutors, to advance "bad" legal arguments (that is, arguments that they expect will not prevail and believe ought not to prevail), as long as the arguments are not frivolous. *Cf.* SIMON, *supra* note 112, at 29 ("Sir, you do not know [an argument] to be good or bad till the judge determines it.") (quoting JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON (1952)). *Compare* MODEL RULES, *supra* note 22, Rule 3.1 (allowing good faith nonfrivolous arguments), *with* United States v. Eason, 920 F.2d 731 (11th Cir. 1990) (imposing higher duty on prosecutors). Similarly, ethics rules do not require private lawyers to call procedural problems to the court's attention, but prosecutors are expected to do so. *See, e.g.*, Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Criminal Defense Counsel Has a Conflict of Interest*, 16 AM. J. CRIM. L. 323 (1989) (noting that only prosecutors have been required to alert court when opposing party's lawyer has conflict of interest).

116. The rules can be interpreted as allowing lawyers to make statements to the court or to introduce testimony that they only suspect is false or erroneous, but most regulators would insist that it is ethically (if not constitutionally) improper for a prosecutor to do the same. *See, e.g.*, United States v. Wallach, 935 F.2d 445, 457 (2d Cir. 1991) (stating that prosecutors should proceed with great caution when introducing testimony that they suspect may be false). Similarly, courts have held that a prosecutor may not ask the jury to draw an inference that the prosecutor knows to be false. *See, e.g.*, United States v. Lusterino, 450 F.2d 572, 574–75 (2d Cir. 1971) ("When the prosecution participates in allowing a false picture to be painted, it bears a heavy burden of showing that it could not have affected the verdict. . . . A verdict based on such a deception must be set aside."); United States v. Universita, 298 F.2d 365, 367 (2d Cir. 1962) (holding that prosecution has special duty not to mislead and that prosecution should never make affirmative statements contrary to what it knows to be truth).

117. Reno Rule, *supra* note 25, at 39,911, 39,914 (exempting Department of Justice from state no-contacts rules, but stating that Department would try to honor spirit of state ethics codes when that is consistent with its attorneys' law enforcement duties).

ethics codes, because it takes the form of an *absence* of rules addressing conduct that ordinarily would be regulated. The most obvious examples relate to prosecutorial decisionmaking in investigating and charging, plea bargaining, taking positions at sentencing, and other discretionary functions. Recognizing the danger of prosecutorial overreaching, the U.S. Supreme Court has suggested that even constitutionally permissible prosecutorial conduct might be subject to ethics regulation.[118] The ABA has published unenforceable guidelines addressing such conduct.[119] Yet the state ethics codes and the ABA models on which they are based have remained silent on these matters.[120]

In other respects, the ethical distinctiveness of prosecutors is more openly acknowledged. As discussed below, courts and bar association ethics committees have always exempted prosecutors from ethics restrictions imposed on private lawyers in (1) conducting criminal investigations, (2) rewarding witnesses for their willingness to testify, and (3) dealing with conflicts of interest.

a. Criminal Investigations. For private lawyers, zealous representation in the pretrial context typically involves seeking information helpful to a client's cause and seeking to determine what information the adverse party has learned.[121] Ethics rules restrict who lawyers may contact and the methods lawyers may use to ascertain information. In particular, ethics rules forbid lawyers and their agents to engage in deceitful conduct,[122] give advice to unrepresented persons,[123] and engage in ex parte communications with represented parties.[124] On their face, these rules make no distinctions among lawyers practicing in specific roles or settings. Nonetheless, courts generally, and federal courts in particular, have given prosecutors far more leeway than private practitioners in choosing the means by which they gather evidence.[125]

The no-contact rule has been the controversial example. The CPA is in large

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118. *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 & n.9 (1978) (discussing overcharging by prosecutors); Imbler v. Pachtman, 424 U.S. 409 (1976) (upholding prosecutors' immunity from suit in part because of prosecutor's "amenability to professional discipline by an association of his peers").

119. *See generally* STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standards 3–3.1 to 4.3, 3–6.1 (3d ed. 1993).

120. The exception is one inconsequential provision that codifies pre-existing law. MODEL RULES, *supra* note 22, Rule 3.8(a) (forbidding prosecutor from initiating criminal charges without probable cause).

121. *See, e.g.*, ABA Comm. on Professional Ethics and Grievances, Formal Op. 117 (1934) ("[I]t is the duty of the attorney to learn the facts by every fair means within his reach."); N.Y.S. Bar Ass'n Comm. on Professional Ethics, Op. 463 (1997) ("The gathering of information and the marshalling of evidence are an inseparable part of the lawyer's duty to serve his client with zeal and competence.").

122. *See, e.g.*, MODEL RULES, *supra* note 22, Rule 8.4(c); MODEL CODE, *supra* note 22, DR 1–102(4).

123. *See* MODEL RULES, *supra* note 22, Rule 4.3; MODEL CODE, *supra* note 22, DR 7–104(A)(2).

124. *See* MODEL RULES, *supra* note 22, Rule 4.2; MODEL CODE, *supra* note 22, DR 7–104(A)(1).

125. Some decisions have, however, applied the same standard to defense lawyers and prosecutors. *See, e.g.*, Grievance Comm. v. Simels, 48 F.3d 640, 647–49 (2d Cir. 1995) (noting that ethical rules apply to both defense lawyers and prosecutors); Ill. State Bar Ass'n, Op. 837 (1983) (criminal defense lawyer does not violate DR 7–104(A)(1) by contacting individual represented on unrelated criminal charges because that individual is not "party" and is not represented "in the matter").

measure designed to counter the Justice Department's efforts to exempt federal prosecutors from its reach.[126] Yet, the fact remains that the Reno Rule is consistent with federal court decisions applying and interpreting the no-contact provisions. The no-contact rule forbids private lawyers to directly contact people who have retained counsel in a matter,[127] but the overwhelming weight of judicial authority permits prosecutors to direct undercover investigators or informants to contact represented individuals prior to the initiation of formal criminal charges.[128]

Prosecutors' exemption from other ethics restrictions governing investigations has been taken for granted. For example, despite ethics rules that forbid lawyers to provide advice to unrepresented third parties with adverse interests,[129] prosecutors routinely advise arrested defendants and likely witnesses that they should cooperate with the government.

Similarly, ethics rules proscribing "conduct involving dishonesty, fraud, deceit or misrepresentation"[130] apply far more restrictively to civil litigators than to criminal prosecutors. In the civil context, the rules forbid such deceitful conduct as the failure to correct a false impression or misunderstanding.[131] Civil

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126. *See supra* text accompanying note 42.

127. *See, e.g.*, W.T. Grant Co. v. Haines, 531 F.2d 671, 674 (2d Cir. 1976) (applying no-contact rule to persons who have retained counsel in connection with potential civil dispute); Kearns v. Fred Lavey/Porsche Audi Co., 573 F. Supp. 91, 95–96 (E.D. Mich. 1983) (same); Triple A Machine Shop, Inc. v. State, 261 Cal. Rptr. 493, 498 (Cal. Ct. App. 1989) (rule "attached once an attorney knew that an opposing party was represented by counsel even where no formal action had been filed"); Fla. State Bar Ass'n Comm. on Professional Ethics, Op. 78–4 (1978) (rule applies "whenever an attorney-client relationship has been established, regardless of whether or not litigation has commenced"); Miss. State Bar, Op. 141 (1988) ("The actual filing of a lawsuit or intent to file a lawsuit is irrelevant to the question of whether the lawyer may communicate with the adverse party"); Or. State Bar Ass'n Bd. of Governors, Op. 1991–42 (1991) (before instituting lawsuit, lawyer for prospective agent may not contact prospective defendant or have agent do so if prospective defendant is known to be represented); Tex. State Bar Professional Ethics Comm., Op. 492 (1994) (rule applies "despite the fact that litigation is neither in progress nor contemplated"); *see also* R.I. Op. 93–33 (1993) (citing *In re* Illuzzi, 616 A.2d 233 (Vt. 1992) (applying rule to represented insurers who have interests with respect to litigation but are not parties)).

128. *See, e.g.*, United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990); United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981); United States v. Weiss, 599 F.2d 730, 739 (5th Cir. 1979); United States v. Lemonakis, 485 F.2d 941, 955–56 (D.C. Cir. 1973).

129. *See, e.g.*, MODEL RULES, *supra* note 22, Rule 4.3; MODEL CODE, *supra* note 22, DR 7–104(A)(2); *see* Attorney Q v. Mississippi State Bar, 587 So.2d 228 (Miss. 1991) (plaintiff's attorney violated rule by answering "Don't worry about it" in response to unrepresented defendant's question about whether to contact his insurer).

130. MODEL RULES, *supra* note 22, Rule 8.4(c); MODEL CODE, *supra* note 22, DR 1–102(4); *cf.* Richard K. Burke, *"Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 1 (1984) (suggesting that rule is too vague to be effective).

131. *See, e.g.*, *In re* Milita, 492 A.2d 380 (1985) (disciplining criminal defense lawyer for failing to correct witness's mistaken impression that lawyer was representing witness); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978) (extensive undisclosed participation by lawyer assisting pro se litigant would constitute dishonest conduct); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1386 (1977) (failure to disclose that client had signed Mary Carter agreement would violate rule); *see also In re* Hockett, 303 Or. 150, 159 (1987) (for purposes of

litigators must ensure that their investigators refrain from misleading witnesses and adversaries about their identities and who they represent.[132] In contrast, prosecutors routinely direct law enforcement agents to mislead suspects about the agents' identities and goals. Criminal investigators often communicate with suspects in an "undercover" capacity[133] and mislead suspects into believing that they are not targets of an investigation.[134]

Except with respect to surreptitious tape recording of conversations with witnesses, the reported decisions have never questioned the use of deceit in criminal investigations.[135] Even on the taping issue, prosecutors have ignored

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DR 1–102(A)(4), "dishonesty can be engaged in actively or passively and has an element of knowledge that the conduct engaged in is contrary to commonly accepted norms of fair and open dealings with others").

132. Lawyers are forbidden to violate ethical rules through the acts of another. *See, e.g.*, MODEL RULES, *supra* note 22, Rule 8.4(a); MODEL CODE, *supra* note 22, DR 1–102(A)(2). *Compare* L.A. County Bar Ass'n Op. 314 (1970) (lawyer for defendant in personal injury case may not direct investigator to make undercover contact with the plaintiff to determine his present activities and physical condition), *with* Ala. Bar Ass'n Op. RO-89–31 (1989) (lawyer may direct investigator to pose as buyer for plaintiff's machine in order to determine whether plaintiff can lift machine and must therefore have lied about extent of his injuries).

133. *See, e.g.*, Jacobson v. United States, 503 U.S. 540, 548 (1992); Weatherford v. Bursey, 429 U.S. 545, 545 (1977); United States v. Russell, 411 U.S. 423, 424 (1973); Lewis v. United States, 385 U.S. 206, 210 (1966); United States v. Manarite, 44 F.3d 1407, 1411 (9th Cir. 1995).

134. *See, e.g.*, Brogan v. United States, 522 U.S. 398, 403 n.2 (1998) (Ginsburg, J., concurring) (citing illustrative cases). *See generally*, Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316, 325–26 (1977).

135. An ABA opinion has taken the firm position that secretly recording a witness's conversation is deceit. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974). That opinion extended the prohibition to prosecutors based on an earlier opinion, decided under the 1908 Canons of Ethics, that had held that prosecutorial use of secretly recorded conversations created an "appearance of impropriety." *Id.* (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 150 (1936)). Although the 1974 opinion recognized that "[t]here may be extraordinary circumstances" in which a prosecutor "might ethically make and use secret recordings if acting within strict limitations conforming to constitutional requirements," this language connoted that, in most situations, prosecutors, like other lawyers, are ethically forbidden from making surreptitious tape recordings. *Id.* Most states addressing the issue of secret recordings have agreed with the ABA approach, but have not focused specifically on prosecutors. *See* People v. Smith, 778 P.2d 685 (Colo. 1989); People v. Wallin, 621 P.2d 330 (Colo. 1981); *In re* Anonymous Member of South Carolina Bar, 404 S.E.2d 513 (S.C. 1991); ABA Comm. on Professional Ethics and Grievances, Informal Op. C-480 (1961); ABA Comm. on Professional Ethics and Grievances, Informal Ops. 1008 & 1009 (1967); Ala. Bar Ass'n, Op. 84.22 (1984); Alaska Bar Ass'n, Op. 83–2 (1983); Haw. Formal Op. 30 (1988), *reprinted in* NAT'L REPORTER ON LEGAL ETHICS n.3 (1989); Idaho Formal Op. 130 (1989), *reprinted in* NAT'L REPORTER ON LEGAL ETHICS n.8 (1990); Minn. Informal Ethics Op. 3 (1986), *reported in* Law. Man. on Prof. Conduct (ABA/BNA) 901:5025 (1986); N.Y. City Bar, Comm'n. on Professional Ethics, Ops. 683 (1945); 813 (1956); 832 (1957); 836 (1958); *cf.* Idaho Formal Op. 130 (1989), *reprinted in* NAT'L REPORTER ON LEGAL ETHICS n.8 (1990) (forbidding secret tape recordings as "conduct that is prejudicial to the administration of justice"). *See generally* Abraham Abramovsky, *Surreptitious Recording of Witnesses in Criminal Cases: A Quest for Truth or a Violation of Law and Ethics?*, 57 TULANE L. REV. 1 (1982); Charles W. Adams, *Tape Recording Telephone Conversations—Is it Ethical for Attorneys?*, 15 J. LEGAL PROF'L 171 (1990); Ellen A. Mercer, Note, *The Undisclosed Recording of Conversations by Private Attorneys*, 42 S.C. L. REV. 995 (1991). Some authorities, deferring to conventional practice, have explicitly authorized prosecutors to make secret tape recordings subject to constitutional and statutory restrictions. *See, e.g.*, Ohio Supreme Court, Bd. Comm'rs on Grievances and Discipline, Formal Op. 97–3 (1997).

the suggestion of regulators that it is unethical to secretly record conversations with witnesses and suspects.[136] In practice, countless reported decisions acknowledge the occurrence of surreptitious recording in criminal investigations without questioning its propriety.[137] No disciplinary body has ever sanctioned prosecutors for authorizing undercover officers and informants to gather evidence in this manner.

b. Compensating Witnesses. Ethics codes restrict lawyers from providing compensation to fact witnesses that may induce the witnesses to testify falsely.[138] The rules have been interpreted broadly to forbid offering any inducements other than fair compensation for lost time.[139] As a practical matter, however, prosecutors have been exempt from this prohibition. Prosecutors regularly offer witnesses inducements that are specifically prohibited by the terms of the rules. Again, this practice has rarely been questioned.[140]

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136. Prosecutors have taken the position that legally obtained evidence should not be excluded because of a perceived violation of ethics rules. *See* N.Y. City Bar, Comm'n on Professional Ethics, Op. 80–95 (1980) ("No subsequent opinion has considered the ethics of a prosecutor's use of secret recordings. And not surprisingly, the ABA's Delphic statement has not deterred prosecutors from using this investigative tool.").

137. *See, e.g.*, United States v. Dijan, 37 F.3d 398 (8th Cir. 1994); United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991); United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985).

138. *See, e.g.*, MODEL CODE, *supra* note 22, DR 7–109(C) (forbidding lawyer to pay "compensation to a witness contingent upon the content of his testimony or the outcome of the case," but allowing reimbursement of expenses and compensation for lost time); MODEL RULES, *supra* note 22, Rule 3.4(b) (prohibiting inducements to witnesses that are "prohibited by law"); Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp. 1516 (S.D. Fla. 1994) (interpreting MODEL RULES, *supra* note 22, Rule 3.4(b) broadly to exclude testimony of witnesses who received payments permissible under federal law but which court nonetheless deemed unethical).

The principal purpose of rules like DR 7–109(C) is to avoid inducements that serve as "an incentive to untruthful testimony." Person v. Association of the Bar of New York, 414 F. Supp. 144, 146 (E.D.N.Y. 1976), *rev'd*, 554 F.2d 534 (2d Cir. 1977); *cf.* MODEL CODE, *supra* note 22, EC 7–28 ("Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."). The rules also reflect the concern that it is inappropriate to pay for testimony that witnesses have a civic duty to provide. *See* N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 547 (1982) (quoting 8 WIGMORE, EVIDENCE § 2202 (1961)).

139. *See, e.g.*, MODEL CODE, *supra* note 22, DR 7–109(C)(2) (allowing compensation for lost time); NLRB v. Thermon Heat Tracing Servs., Inc., 143 F.3d 181, 188–91 (1998) (reviewing case law). Thus, the rule has been read to forbid payments that are contingent on the outcome of the case and noncontingency payments that are designed solely to secure the individual's presence as a witness. *See, e.g.*, Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72–73 (2d Cir. 1990) (sanctioning payment of separate contingency fees to lawyer who also was witness in case); Committee on Legal Ethics of the W. Va. State Bar v. Sheatsley, 452 S.E.2d 75 (W. Va. 1994) (sanctioning contingency payment); *In re* Shamy, 282 A.2d 401 (N.J. 1971) (sanctioning giving of loan to witness to secure the witness's testimony); AMERICAN BAR ASS'N, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 370–72 (Maru ed., 1979) (summarizing rule); *cf.* Florida Bar v. Jackson, 490 So. 2d 935 (Fla. 1986) (sanctioning lawyer for requesting that his clients be paid $50,000 for their testimony in pending insurance claim case). The rule has been held to forbid not only payments, but also promises of potential payment that are never intended to be kept. *See, e.g.*, Wagner v. Lehman Bros. Kuhn Loeb, 646 F. Supp. 643, 656–57 (N.D. Ill. 1986) (affirming disciplinary action against lawyer who induced witness "by the promise of potential payment to give testimony he otherwise might not have given," despite defense that lawyer never meant for money to change hands).

140. Courts typically wink at contingent payments to witnesses made with the knowledge of

c. Conflicts of Interest. Conventional bar association wisdom is that prosecutors and other government lawyers have a greater obligation than other lawyers to avoid conflicts of interest. Government lawyers may have a special obligation to "avoid the appearance of impropriety" because of the importance of preserving public trust in the operation of government.[141] Yet, judicial decisions apply conflict of interest rules less restrictively to prosecutors than to other lawyers.[142] Federal cases, in particular, have refused to apply the ordinary rule.[143]

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prosecutors. *See, e.g.*, United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) ("[N]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence."); *id.* at 316 (Rubin, J., concurring) (noting that it would otherwise violate ethical rules for prosecution to pay its witness contingent fee and that doing so perverts trial process, but that Court's decision in *Hoffa v. United States*, 385 U.S. 293 (1966), appears to authorize the practice); United States v. Beard, 761 F.2d 1477, 1479 (11th Cir. 1985) (characterizing payment to witness that included "reward" at conclusion of case as noncontingency payment); People v. Mills, 237 N.E.2d 697, 705 (Ill. 1968) (characterizing prosecutor's payment to witness as essential). Moreover, courts have given prosecutors the benefit of the doubt as to whether payments to witnesses are contingent on the success of the prosecution or the content of their testimony. *See, e.g.*, United States v. Solorio, 53 F.3d 341 (9th Cir. 1995) (reversing earlier decision that paying informer/witness was based, inter alia, on whether sting operation resulted in conviction, was contingent witness fee). In some cases, the practice of paying witnesses is now specifically permitted by federal legislation. *See, e.g.*, Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S&L Crisis*, 59 FORDHAM L. REV. 155, 181 (1991) (questioning wisdom of this legislative development).

Similarly, courts permit prosecutors to promise leniency to defendants in exchange for their testimony against others, although this form of "compensation" for testimony may be even more likely than monetary payments to induce a witness to testify falsely. A particularly effective promise is a prosecutor's agreement to consider filing a motion asking a witness's sentencing court to depart from federal sentencing guidelines on the basis that the witness has, *in the prosecutor's view*, provided substantial assistance to the prosecution. Without such a motion, the witness has no chance of obtaining sentence below the guideline minimum. *See, e.g.*, United States v. Agu, 949 F.2d 63, 67 (2d Cir. 1991) (holding that prosecutor has exclusive authority to decide whether to file motion and trigger court's ability to depart from the guidelines); United States v. Huerta, 878 F.2d 89, 93–94 (2d Cir. 1990) (same); *see also* authorities cited *supra* note 89 (stating that courts considered whether prosecutorial promises of leniency violated federal bribery statutes but ignored question of whether such promises violated state ethical rules). *But see* United States v. Lowery, 15 F. Supp.2d 1348, 1358 (S.D. Fla. 1998) (holding that prosecutor's offer of leniency to witness violated Florida's ethical rule as well as federal bribery statute), *rev'd*, 166 F.3d 1119 (11th Cir. 1999).

141. *See generally* Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—Or Revived Everywhere Else?*, 28 SETON HALL L. REV. 315 (1997).

142. *See supra* text accompanying note 92; *see also* State v. Camacho, 406 S.E.2d 868, 873–74 (N.C. 1991) (holding that district attorney could be disqualified only for actual, not potential, conflict of interest); State v. Fitzpatrick, 464 So. 2d 1185, 1188 (Fla. 1985) (overturning disqualification of whole state's attorney's office where one prosecutor had previously had confidential relationship with defendant); Morganthau v. Krane, 113 A.D.2d 20, 22 (N.Y. App. Div. 1985) (holding that county district attorney's office was not disqualified from prosecuting defendant simply because defendant's first cousin was assistant district attorney); State v. Jones, 429 A.2d 936, 942–43 (Conn. 1980) (declining to impute disqualification of single state prosecutor to entire prosecutor's office).

143. *See, e.g.*, United States v. Caggiano, 660 F.2d 184, 190–91 (6th Cir. 1981) (no imputed disqualification where defendant's former lawyer was screened from participation).

3. Questions Raised by the CPA Regarding Prosecutors' Distinctiveness

We have suggested that state and federal prosecutors have always been treated as distinct, sometimes being held to a higher ethical standard and other times to a lower one. The CPA raises the question of whether or not prosecutors should continue to be regulated differently from other lawyers, and if so, how. There are three possible answers, and it is unclear which one the CPA adopts.

First, one might interpret the CPA as authorizing only stricter and not more permissive ethics standards for federal prosecutors than for nonprosecuting attorneys. This would subject the prosecutors to generally applicable rules concerning investigations, witness compensation, and conflicts of interest. This interpretation of the CPA would encourage states to re-examine their ethics rules. States could permit or forbid the distinctive conduct that federal prosecutors have traditionally pursued, but states could not make distinctions in applying the rules between the prosecutors and private lawyers.[144]

Second, one could interpret the CPA as eliminating all distinctions between federal prosecutors and other lawyers, including the traditionally heightened ethical responsibilities of prosecutors. This would mean, for example, that disciplinary rules could not impose more onerous disclosure obligations on federal prosecutors or address areas of professional conduct, such as the issuance of grand jury subpoenas or the decision to initiate criminal charges, that relate distinctively to their work.[145] The Department of Justice would remain free to adopt additional restrictions and to enforce them internally. Courts could issue opinions containing precatory language or admonitions about prosecutors' duty to do justice. But ethics regulators could not adopt enforceable higher standards of conduct.

Finally, one might interpret the CPA as allowing regulators other than the Justice Department to continue adopting and enforcing standards of conduct distinguishing prosecutors from other lawyers, but requiring federal prosecutors to be treated like state prosecutors. This would be consistent with the traditional approach—that the higher standard for prosecutors should, to some extent, be enforceable in the disciplinary context and that the standards applicable to other lawyers sometimes are ill-suited to prosecutors.

One interpretation the CPA does not seem to countenance is that *federal*

144. Several states have used such reciprocal reasoning to allow private lawyers, like prosecutors, to secretly tape record witnesses. *See, e.g.*, Ariz. State Bar Op. 90–2 (1990); Ky. Bar Ass'n Op. E-279 (1984); N.Y. County Lawyers' Ass'n Op. 696 (1993); *cf.* Attorney M v. Mississippi State Bar, 621 So. 2d 220, 221 (Miss. 1992) (recording witness secretly is not by itself unethical but use of tape may be); Or. State Bar, Legal Ethics Comm., Formal Op. 1999–156 (1999) (in absence of substantive legal restriction, lawyer generally may secretly tape record conversation); Utah State Bar, Ethics Advisory Op. Comm., Formal Op. 1999–156 (1999) (with respect to whether attorney may record communications surreptitiously, "[w]e believe there is no reason to make a distinction between prosecuting attorneys and attorneys in other areas of practice").

145. This is essentially the approach taken by the ABA *Model Rules* with respect to government lawyers in civil practice. *See* ABA Standing Comm. on Professional Ethics and Grievances, Formal Op. 94–387 (1994).

prosecutors should be considered unique unto themselves. The CPA leaves open the possibility that regulators other than the Justice Department—including Congress—may implement special rules for the federal prosecution corps. That possibility is discussed in Part III.C of this article. However, the thrust of the CPA is to set aside any vision of prosecutors as special. The following section considers reasons why that judgment may be ill-conceived.

B. ARE FEDERAL PROSECUTORS DIFFERENT FROM STATE PROSECUTORS?

This article has illustrated some of the ways in which all prosecutors have been regulated less strictly than private lawyers. Broadly speaking, the differential treatment has been justified on four different grounds: (1) the nature and context of prosecutors' work, (2) prosecutors' independent duty to "seek justice," (3) respect for the professional traditions governing prosecuting attorneys, and (4) prosecutors' status as government officials. The following sections consider whether these rationales can be extended to justify further distinctions, not only between prosecutors and private lawyers, but also between federal and state prosecutors.

1. The Distinctiveness of Federal Law Enforcement

Prosecutors' enforcement of criminal law is meaningfully different from other types of litigation. Criminal process differs from civil process.[146] The constitutional law that informs prosecutors' legal work is distinctive.[147] The public arguably has a greater interest in the accomplishment of legitimate law enforcement objectives than in the just resolution of private civil disputes.

The differences between criminal and civil processes, for example, helps explain why the no-contact rule has been applied less strictly to prosecutors than to civil lawyers conducting an investigation.[148] In a civil case, a client's interest in receiving information from another represented person can be pur-

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146. For example, in order to obtain evidence in a criminal case, the government may:

> on behalf of the grand jury . . . compel the production of evidence and the attendance of witnesses at ex parte grand jury proceedings; . . . apply for search warrants, arrest warrants and authorization to conduct wiretaps; . . . grant individuals immunity from prosecution; . . . [and] seek an order compelling witnesses to testify before the grand jury or at a criminal trial in exchange for a promise that their testimony will not be used against them. . . . These powers afforded the government are ordinarily denied to all others within sociary and are generally denied even to the State in other legal settings.

N.Y. State Bar Ass'n, Comm. on Professional Ethics, Formal Op. 683 (1996).

147. For example, prosecutors and police are subject to constitutional restrictions on questioning individuals who are in custody or who have been indicted, whereas private citizens are not subject to such restrictions. *See, e.g.*, Arizona v. Mauro, 481 U.S. 520 (1987) (requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), do not apply when wife of prisoner questions her husband with police present); United States v. Watson, 894 F.2d 1345 (D.C. Cir. 1990) (Sixth Amendment restrictions on police questioning of indicted defendant do not apply to jailhouse informant acting on his own initiative).

148. *See generally* Bruce A. Green, *A Prosecutor's Communications With Represented Suspects and Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 317–20 (1988).

sued through formal discovery. It therefore is not considered sufficiently important to outweigh the interests protected by the no-contact rule. In the criminal context, the balance arguably tilts the other way because there is a greater public interest in full disclosure of all relevant information, there is limited discovery from criminal defendants once charges are filed,[149] and it is generally more difficult to obtain truthful information in criminal than in civil proceedings. Therefore, criminal prosecutors (and in some jurisdictions criminal defense lawyers as well)[150] are given greater latitude than civil practitioners to gather evidence informally.

Similarly, the distinctive nature of criminal law helps explain why prosecutors have greater discretion than other lawyers to employ deceit in the course of an investigation.[151] Secret tape recordings are no less deceitful in the criminal than in the civil context. But they are permitted because of the paramount need for "the efficient detection and proof of criminal conduct"[152] and because constitutional and statutory provisions specifically regulating criminal investigations do not proscribe the use of deceit.[153]

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149. Even before charges are filed, the Fifth Amendment right against self-incrimination may be invoked to impede access to testimony and documents through the grand jury process. *See, e.g.*, United States v. Doe, 465 U.S. 605, 622 (1984) (upholding invocation of privilege in response to grand jury subpoenas for business documents and records of several sole proprietorships).

150. *See, e.g.*, Grievance Comm. v. Simels, 48 F.3d 640 (2d Cir. 1995) (holding that no-contact rule does not forbid criminal defendant's lawyer from communicating directly with represented individual who is potential witness and potential codefendant).

151. *See supra* note 135.

152. N.Y. City Bar, Comm'n on Professional Ethics, Op. 80–95 (1980).

153. That the distinction between prosecutors and private lawyers is at least partly attributable to the context of their work is borne out by the willingness of ethics regulators to allow private lawyers to employ deceit in the same manner as prosecutors when their work is fairly analogous to criminal law enforcement—for example, when the work implicates comparably important interests or entails comparable impediments to the discovery of important evidence. *See, e.g.*, Apple Corps Ltd. v. International Collections Soc'y, 15 F. Supp. 2d 456, 474–75 (D.N.J. 1998) (allowing civil lawyers to make misrepresentations to uncover evidence of violations of court order); *see also* Richardson v. Howard, 712 F.2d 319, 321–22 (7th Cir. 1983) (authorizing use of "testers" in housing discrimination cases); Hamilton v. Miller, 477 F.2d 908, 909 n.1 (10th Cir. 1973) (same); Ala. Bar Ass'n, Op. RO-89–31 (1989) (opining that lawyer may direct investigator to pose as customer in order to determine whether plaintiff lied about his injuries), *available in* Law. Man. on Prof. Conduct (ABA/BNA) 901:1052–53 (1989). *But see* Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 738 (1989) (arguing that prosecutors should be held to less exacting standard than private lawyers). *See generally* David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 805–07 (1995) ("There is no solid basis for a generalized *ethical* distinction between government and private lawyers [involved in discrimination cases], exempting the former from applicable restrictions simply by reason of the identity of their employer or client."); Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-level Jobs*, 26 U. MICH. J.L. REFORM 403 (1993) (discussing the ethical distinctions); Alex Young K. Oh, Note, *Using Employment Testers to Detect Discrimination: An Ethical and Legal Analysis*, 7 GEO. J. LEGAL ETHICS 473 (1993) (approving use of employment discrimination testers).

In proposing legislation to replace the CPA,[154] Senator Hatch implicitly relied on the distinctive nature of *federal* criminal law enforcement to support a provision distinguishing *federal* prosecutors.[155] Hatch took the position that even if state courts might reasonably apply their rules in certain ways to state prosecutors—for example, to forbid prosecutors from communicating directly with corporate employees or to require prosecutors to present exculpatory evidence to the grand jury[156]—they should not necessarily apply these rules equally to federal prosecutors.[157]

Hatch relied upon a perceived distinction between the nature of the conduct that state and federal criminal laws cover. Federal prosecutors are more likely than state prosecutors to enforce laws governing complex, ongoing, conspiratorial conduct, such as "multistate terrorism, drug, fraud, or organized crime conspiracies, . . . fraud against federally financed programs, . . . [violations of] civil rights laws, . . . complex corporate crime, and . . . environmental crime."[158]

A related distinction involves the context and mechanics of federal prosecutions. Federal prosecutors are more likely to investigate across state lines. They also are likely to be involved personally in the investigation leading to an indictment and to employ the grand jury for investigative purposes. State prosecutors, in the typical case, rarely become responsible for a case until the police have made an arrest and the evidence is ready to be presented to the grand jury.

Consider how these distinctions might justify different ethics regimes for federal and state prosecutors. For example, do differences in federal and state grand jury practices warrant requiring state prosecutors to introduce exculpatory evidence, while not imposing the same requirement on federal prosecutors? In federal grand jury investigations, massive amounts of evidence, much of it documentary, may be accumulated. It may be difficult for prosecutors to recognize the exculpatory nature of an item of evidence. Where there are massive amounts of inculpatory evidence, there may be less need to call an exculpatory item to the grand jury's attention. To the extent federal cases truly tend to be more complex than state cases,[159] there thus may be grounds for applying different ethical standards to the prosecutors involved.

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154. S. 250, 106th Cong. (1999).

155. *See id.* § 530B(b) and accompanying remarks, quoted *supra* note 10. The provision offers an exception to a separate provision stating that "a Federal prosecutor shall be subject to all laws and rules governing ethical conduct of attorneys of the State in which the Federal prosecutor is licensed as an attorney." *Id.* § 530B(a). On one level, Hatch's proposal may have stemmed from concern that state courts might be persuaded by "clever defense lawyers" to adopt rules that are bad for both state and federal prosecutors—such as a rule forbidding prosecutors from giving leniency to cooperating witnesses. 145 CONG. REC. S705 (1999) (testimony of Sen. Hatch). Congress, however, can do little to prevent such a result in the state courts.

156. *See id.*

157. *See id.*

158. *Id.*

159. This premise, of course, is subject to dispute. Many state prosecutions are complex and involve massive investigations as well.

Similarly, suppose that a state court interprets its ethics rules to restrict state prosecutors from offering inducements to accomplice witnesses in exchange for their testimony, based on the court's conclusion that this practice sometimes encourages false testimony. Such a restriction may be reasonable for the state's prosecutors, while being inappropriate for federal prosecutors. The complexities of federal criminal cases and the difficulty in securing evidence in such cases may give federal prosecutors a greater need to obtain evidence through the use of inducements.

2. The Distinctiveness of Federal Prosecutors' Commitment to Higher Ethical Standards

One counterintuitive justification for regulating all prosecutors less restrictively than other lawyers is that prosecutors have "a duty to do justice." This standard, because of its rigor, may justify exempting prosecutors from prophylactic ethics rules generally applicable to lawyers. Thus, for example, prosecutors' greater obligation to ensure that the testimony they offer is truthful may mean that prosecutors are less likely to reward witnesses improperly for agreeing to testify.[160] As a consequence, the rules limiting lawyers' ability to offer such inducements arguably should be different for prosecutors than for private attorneys.[161]

One cannot make the claim that federal prosecutors have a greater "duty to seek justice" than state and local prosecutors. But it may be that federal prosecutors, and the offices in which they work, take the duty more seriously than state prosecutors as a whole.[162] A variety of evidence suggests that, as a general rule, the Department of Justice takes its duty to serve justice to heart. Unlike most state and local prosecutors' offices, the Justice Department continu-

160. *See* Sklansky, *supra* note 101, at 517 (arguing that prosecutors should be permitted to offer leniency to witnesses, even though it is ethically impermissible for private lawyers to offer their witnesses comparable inducements).

161. This reasoning also helps explain the less restrictive application of conflict of interest rules to prosecutors. Conflict of interest rules are rules of "risk avoidance," which restrict lawyers from undertaking representation when their independent judgment is likely to be impaired or they are otherwise likely to fail in their obligations to a client. *See generally* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 71–72 (1996); Kevin McMunigle, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 826 (1992) (discussing risk avoidance theory). Because prosecutors' objectives are to do justice, not merely to win, prosecutors may be less tempted to overlook their duties to multiple clients. For example, a prosecutor who has been screened from participating in a case because she formerly represented the accused may be less likely to improperly divulge confidences to other prosecutors participating in the case. Likewise, the other prosecutors might be less likely to request disclosure of the confidences than would private lawyers in comparable situations. This is precisely the reason given by a 1975 ABA ethics opinion for treating prosecutors' offices less restrictively than private law offices under the vicarious disqualification rule. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) ("The salaried government employee does not have the financial interest . . . inherent in private practice. . . . The channeling of advocacy toward a just result lessens the temptation to circumvent the disciplinary rules through the actions of associates. . . .").

162. Of course, one cannot fairly apply these generalizations to particular state prosecutors or prosecution offices.

ally has developed published guidelines that reflect its understanding of prosecutors' duty to seek justice.[163] It has established formal training programs through which its ethical understandings are transmitted.[164] In recent years, the Department has required United States Attorneys' Offices to appoint ethics officers to address ethical issues.[165] It has established the Office of Professional Responsibility specifically for the purpose of internal regulation.[166]

The disparity between the Justice Department's ethics oversight and that of most local district attorneys' offices may justify a different level of external regulation. State ethics codes must take into account state prosecutors who work part-time and serve in offices where there are few career prosecutors, little history or ethical tradition to guide prosecutors, and minimal written guidelines, training, supervision, or formal self-regulation. The resulting rules may be unduly restrictive when applied to federal prosecutors.[167]

The CPA seems to reject this reasoning. The CPA was largely motivated by its sponsor's personal experience with perceived misconduct by federal prosecutors.[168] Congressman McDade personally would never have agreed with the empirical claim that federal prosecutors are, on average, more professional than their state counterparts. In assuming away the argument, however, Congress rejected the traditional perception of federal prosecutors without any assessment of the facts.

3. The Distinctiveness of Federal Prosecutors' Professional Traditions

One can explain many rules that distinguish prosecutors from other lawyers simply on the basis of a respect for traditional understandings of how prosecutors act.[169] Yet, as a justification for distinctions in ethics rules, this explanation

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163. *See* UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL Vol. 7, Tit. 9 (1987). *See generally* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995) (discussing Department of Justice internal guidelines).

164. *See* 10 Laws. Man. On Prof. Conduct (ABA/BNA) 312 (1994).

165. *See id.*

166. *See* 28 C.F.R. § 0.39a(a) (1999). *See generally* Green, *supra* note 163, at 84–87 (discussing work of Office of Professional Responsibility).

167. This reality helps explain why federal courts are less likely than state courts to disqualify an entire prosecutors' office when an individual prosecutor has a conflict of interest. *See supra* note 92.

168. *See supra* note 12.

169. *See* 145 CONG. REC. S705 (1999) (testimony of Sen. Hatch) (characterizing state ethics rules requiring the disclosure of exculpatory evidence as inappropriate when applied to federal prosecutors because "contrary to long-established federal grand jury practice," and the possibility that witness-compensation rules might proscribe "the long accepted . . . federal practice of moving for sentence reductions for co-conspirators who . . . testify[] truthfully for the government").

Respect for tradition is another explanation for why prosecutors, but not other lawyers, may reward witnesses for their testimony. The restriction on compensating witnesses derives from common-law decisions predating the Code of Professional Responsibility. *See, e.g.*, Dodge v. Stiles, 26 Conn. 463, 467 (1857); Burchell v. Ledford, 10 S.W.2d 622, 622–23 (Ky. 1928); Keown & McEvoy, Inc. v. Verlin, 149 N.E. 115, 116 (Mass. 1925); State *ex rel.* Spillman v. First Bank of Nickerson, 207 N.W. 674, 676 (Neb. 1926); Clifford v. Hughes, 124 N.Y.S. 478, 479 (N.Y. App. Div. 1910); Ealy v. Shelter Ice Cream Co., 150 S.E. 539, 540–41 (W. Va. 1929); Thatcher v. Darr, 199 P.2d 938, 940 (Wyo. 1921). *See*

is tautological. It is hard to make a logical case for extending this rationale—to argue that federal prosecutors should be treated distinctively simply because they have been so treated in the past.

Even if one wished to rely on the professional traditions of federal prosecutors, before accepting separate ethical standards one would have to ask the factual question of whether identifiable federal prosecutorial traditions actually exist. One should at least consider the normative question of why federal prosecutors should be permitted to continue traditional federal practices that state ethics rules reject (either because state prosecutors have no history of following the practice or because the state has discarded the tradition). The CPA, in any event, seems to foreclose making such a distinction between state and federal prosecutors unless states choose to make the distinction on their own or federal courts are capable of overruling state law.[170]

4. The Distinctiveness of Federal Prosecutors' Status as Members of the Executive Branch

In part, prosecutors have always been regulated differently from other lawyers because they represent the executive branch of government.[171] Courts hesitate to supervise prosecutorial conduct for fear of encroaching on the authority of another branch. Courts sometimes perceive that a prosecutor's office has superior expertise with respect to questions concerning the propriety of certain conduct or, at least, that the judgments of prosecutors deserve greater weight than those of private lawyers.[172]

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generally 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1430, at 379 (1962) (witness compensation is "almost certain to affect the attitude of the witness and to color his testimony, consciously or unconsciously. This is true even though there is no perjury and no intention to induce perjury."); HENRY S. DRINKER, LEGAL ETHICS 75 (1953) ("A lawyer may not participate in a bargain with a witness as a condition of his giving evidence. . . ."). Prosecutors also had a long history of offering criminals leniency in exchange for their testimony. *See* United States v. Singleton, 165 F.3d 1297, 1301 (10th Cir. 1999) (discussing tradition).

170. *See supra* text accompanying note 93.

171. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 30 (1986) (suggesting that, on one reading of separation of powers principles, it might be argued that as "members of the executive branch of government . . . the conduct of prosecutors may be regulated solely by the executive branch and not by the judiciary").

172. These considerations explain the absence of ethics rules and the dearth of disciplinary decisions relating to prosecutors' discretionary decisions about whom to investigate and charge. Even aside from constitutional concerns about whether they have authority to regulate these areas of conduct, courts defer to prosecutors' views concerning the standards that should govern these areas of conduct because this conduct is entrusted to the executive branch. *See* Harvard Law Review Association, *Race and the Prosecutor's Charging Decision*, 101 HARV. L. REV. 1520, 1522 (1988) (separation of powers considerations foreclose "significant judicial review of [a prosecutor's] constitutionally delineated power to decide independently which crimes and what charges to file"); *cf.* United States v. Armstrong, 517 U.S. 456, 463 (1996) (exhibiting deference to policymaking authority of federal prosecutors); Wayte v. United States, 470 U.S. 598, 607 (1985) (limiting judicial intervention into alleged selective enforcement decisions by federal prosecutors). These policy decisions differ from decisions made by prosecutors as trial lawyers, which are more similar to decisions private lawyers make for private clients. Courts have more institutional interest and more expertise in regulating the latter type of decisionmaking.

This article will not catalogue the many examples in which judicial or bar deference to state prosecutorial agencies helps explain the development of state ethics rules,[173] but instead continues to focus on the federal-state distinction. Because state and federal prosecutors have comparable status as executive officials, there appears to be no obvious reason to treat federal prosecutors more permissively. On closer examination, however, two justifications for drawing a federal-state distinction exist—one based on the distinctive character of the federal executive branch and the other, discussed in Part III.C, based on the truism that federal prosecutors must perform their duties in a federal context.

Even if individual state and federal prosecutors are similar in their executive status, their offices arguably are not. State prosecutors' offices typically are fragmented. There are statewide and local prosecutors, each with separate policymaking authority. Statewide Attorney General's Offices typically oversee only limited aspects of state prosecutions. Thus, particular state prosecutors cannot speak individually or collectively on behalf of the entire executive branch.

The Department of Justice, in contrast, represents the law enforcement authority for the entire federal executive branch. Its positions are authoritative. When the Department of Justice takes a considered institutional position on a question of prosecutorial ethics, as on other criminal justice questions, courts may owe it somewhat more deference than they would accord a similar assertion by a local prosecutor's office.

We do not necessarily endorse this position. For our purposes, it is enough to note that the CPA seems to reject it without any consideration of its merits. Nonetheless, it seems questionable that Congress truly would wish states to ignore the policy assessments of the Department of Justice, including its

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173. For example, except with respect to cases of constitutional dimension, ethics regulators typically avoid setting rules that encroach on the discretion of prosecutors' offices to conduct investigations. Only when the prosecution's methods of gathering evidence implicate the integrity of the judicial process itself—for example, when prosecutors use a false subpoena or introduce false evidence—do courts and regulators become less deferential. *See, e.g.*, United States v. Hammad, 858 F.2d 834, 841 (2d Cir. 1988) (criticizing use of sham subpoena); *In re* Friedman, 392 N.E.2d 1333 (Ill. 1979) (overturning discipline of prosecutor for deceiving court as part of sting operation); *In re* Malone, 480 N.Y.S.2d 603 (N.Y. App. Div. 1984) (censuring prosecutor for instructing police officers to testify falsely), *aff'd*, 482 N.E.2d 565 (N.Y. 1985).

Deference notions also help explain why courts are reluctant to disqualify prosecutors and their offices, even though conventional wisdom is that prosecutors should be held to a higher standard than private lawyers. It is one thing to exhort government lawyers to avoid appearances of impropriety; it is another thing, through the exercise of supervisory authority over the conduct of licensed attorneys, to remove duly appointed (or elected) government officials from office. *See, e.g.*, Schumer v. Holtzman, 454 N.E.2d 522, 526 (N.Y. 1983) ("A court may intervene to disqualify an attorney only under limited circumstances.... [A] District Attorney ... is a constitutional officer chosen by the electorate ... whose removal by a court implicates separation of powers considerations."); State v. Camacho, 406 S.E.2d 868 (N.C. 1991) ("any order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible"); *cf.* ABA Comm. on Professional Ethics and Grievances, Formal Op. 199 (1940) (recognizing that prosecutors' status as government officials required applying restrictions on pretrial publicity less strictly so as to accommodate their institutional obligation to communicate with the public concerning their office's work).

judgments regarding ethics norms. It is one thing to say that state courts can regulate individual federal prosecutors whom they license, but quite another thing to say that state courts have "ethics" authority over an entire federal executive agency.

C. ARE FEDERAL PROSECUTORS DIFFERENT FROM ORDINARY LITIGATORS IN STATE COURTS?

There are two aspects of the federal status of federal prosecutors that bear on whether they should be regulated distinctively. The first militates in favor of the CPA's position that *more* regulation of federal prosecutors may be appropriate. But the other provides a strong practical argument for producing regulation through more centralized regulatory bodies than individual states.

Federal prosecutors appear exclusively as litigators in federal court. There, they are subject to local federal court rules. The federal courts, however, tread lightly in establishing ethics standards, mindful of their limited rulemaking authority[174] and recent Supreme Court warnings that their supervisory authority over federal prosecutors may be limited to in-court conduct.[175] The alternative federal regulator, Congress has, until the CPA, never seen fit to involve itself in regulating legal ethics generally, let alone federal prosecutorial ethics.[176] In part, this hesitation may stem from Congress's fear that entering the field will encroach upon the federal courts' realm of authority.[177]

These observations have several ramifications. Litigators in state court ordinarily are subject to two sets of nonlegislative regulation: ethics rules and judicial supervision. The coexistence of this parallel oversight itself suggests that judicial and bar regulation serve different purposes and complement each other. To the extent that federal prosecutors are subject to only one set of independent rules—those established by cautious federal courts—a piece of the regulatory puzzle may be missing.

The CPA would supply the missing piece by applying state ethics rules. But this approach magnifies a separate problem that stems from federal prosecutors' status as federal litigators. Unlike state prosecutors, federal prosecutors have national jurisdiction and, as a consequence, their cases often stretch across state lines. As a result, if state ethics standards apply, individual prosecutors may be subject to standards in multiple jurisdictions in a single case—for example,

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174. *See infra* note 200.

175. *See* United States v. Williams, 504 U.S. 36, 48 (1992); Bank of Nova Scotia v. United States, 487 U.S. 250, 264 (Scalia, J., concurring) (1988); United States v. Hasting, 461 U.S. 499 (1983).

176. *See generally* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (suggesting that Congress might federalize legal ethics). Those commentators who have addressed the legal issues typically have done so in the context of discussing which regulator is best able to administer regulations governing prosecutorial ethics. *See generally* Green, *supra* note 163 (arguing against diffusion of regulation of federal prosecutorial ethics); Zacharias, *supra* note 7 (discussing pros and cons of various regulators of federal prosecutorial ethics).

177. *See infra* text accompanying note 194 (discussing potential conflicts between Congress and federal courts).

varying state no-contact rules.[178] Moreover, different prosecutors working on a single case may, because they are licensed in different jurisdictions, be subject to different rules. This greatly complicates the Department of Justice's ability to provide general oversight of federal law enforcement.[179] Individual federal prosecutors inevitably will find it difficult to internalize and keep abreast of the rules that apply in all the different states.[180]

The status of federal prosecutors as federal litigators, therefore, may justify distinguishing them from state prosecutors. Where that conclusion leads is another matter, for all it suggests is that subjecting federal prosecutors to nonuniform state rules is problematic. It does not establish, as a substantive matter, that federal prosecutors should be able to avoid the underlying substantive restrictions that the state rules embody.[181]

D. CONCLUSIONS REGARDING THE SUBSTANTIVE ISSUES

A number of reasons have been suggested to explain why one might treat federal prosecutors as unique for purposes of ethics regulation. This issue is essential to any congressional reassessment of the CPA and to any future regulation of prosecutorial ethics. More immediately, however, the CPA leaves open the question of which regulatory body should decide whether to distinguish federal prosecutors from private lawyers or state prosecutors. The CPA

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178. *See, e.g.*, Reno Rule, *supra* note 25, at 39,911 (discussing practical problems caused by nonuniform rules); Proposed Rules Governing Communications With Represented Persons, 57 Fed. Reg. 54,737, 54,738 (1992) (justifying Reno Rule as means of resolving "uncertainty and confusion arising from variety of interpretations of state and local Federal court rules" by "impos[ing] a comprehensive, clear, and uniform set of regulations on conduct of government attorneys"); Jamie S. Gorelick & Geoffrey M. Klineberg, *Justice Department Contacts with Represented Persons: A Sensible Solution*, 78 JUDICATURE 136, 142–43 (1994).

179. To make the distinction more concrete, consider the following: A state prosecutor will be subject to the restriction on compensating witnesses for testimony in every case. In federal prosecutions, however, the rule will not invariably apply because of the disuniformity of state rules. This complicates training and supervision of federal prosecutors. In individual cases, it may be unclear whether or not the rule applies, because prosecutors licensed in different states may be working together, some subject to the particular state rule, others not.

180. *See* 145 CONG. REC. S705 (1999) (testimony of Sen. Hatch) (arguing that federal prosecutors, like all other litigants, "have the right to know what the rules are").

181. In the debate over the Reno Rule, the Justice Department did not claim that federal and state law enforcement differ, perhaps because it hesitated to draw attention to Rule's departure from state interpretations of the no-contact rule. Although the Reno Rule expressly rejected restrictive state interpretations, the Department sought to depict it as a mere codification of judicial authorities. *See* Proposed Rules Governing Communications With Represented Persons, 57 Fed. Reg. 54,737, 54,738–39 (1992) (arguing that Justice Department position follows traditional interpretations of DR 7–104). *Compare* 28 C.F.R. § 77.6(e) (1998) (allowing federal prosecutors to speak with indicted defendants about crimes other than ones for which they have been charged), *with* People v. Sharp, 150 Cal.App.3d 13, 15 (1983) (holding that state no-contact rule bars communications about uncharged offenses), *and In re* Burrows, 629 P.2d 820 (Or. 1981) (en banc) (same); *compare also* 28 C.F.R. § 77.6(c)(1)-(2) (allowing prosecutors to respond to indicted defendant's overtures), *with* State v. Suarez, 481 So. 2d 1201, 1205 (Fla. 1985) (making no exception to no-contact rule for situation in which defendant initiates conversation), *and* People v. Green, 274 N.W.2d 448, 452–53 (Mich. 1979) (same).

clearly authorizes states to make at least some of these distinctions.[182] It may leave that authority to federal courts as well.[183] Congress retains the authority to adopt further legislation on the subject.[184] The only regulatory body the CPA clearly disqualifies is the Department of Justice itself.[185]

On the assumption that the Justice Department will not easily give up its claim to distinct treatment, we can expect it to press its demands before one or more of the other regulatory bodies. But, as our discussion suggests, simply noting the conceptualizations of federal prosecutors that the CPA discarded without analysis only opens the debate. The unresolved substantive questions are complex. They include the following: Should federal prosecutors be required to play by precisely the same rules as private lawyers in some or all respects? Should regulators accept the CPA's mandate that federal prosecutors should never be held to a lower standard? Alternatively, should federal prosecutors be held to precisely the same standards as state prosecutors, insofar as these may be either more or less demanding than the standards applied to lawyers in general? Or, with respect to particular areas of professional conduct, is there sometimes a convincing reason for regulating federal prosecutors somewhat differently from their state counterparts?

Because of the events leading to the Reno Rule, the question of how to

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182. It is not clear whether, after the CPA, states may choose to show greater deference to federal prosecutors than to state prosecutors. Given their acknowledged expertise in the area of legal ethics, one would think that states would be well qualified to draw ethical distinctions between federal and state prosecutors. Federal ethics regulation has always depended on the states. Federal courts do not have separate bar examinations or character investigations; they assure the qualification of applicants principally by requiring them to be members of a state bar. Most local federal district courts follow the ethics provisions of the states where they are located, adopting alternative or interstitial rules only on an ad hoc basis. Only states have professional staffs to enforce ethics violations. Federal ethics regulators depend on state disciplinary agencies to sanction misconduct in federal proceedings and rely on state-court determinations to justify suspending or disbarring lawyers from practice in federal court. Thus, one could fairly argue that states have the most expertise in deciding issues relevant to whether state and federal prosecutors should be treated the same.

183. As discussed earlier, the CPA's requirement that federal government lawyers comply with "state laws and rules, *and* local Federal court rules, governing attorneys" may mean that federal courts can only add to federal prosecutors' burdens. *See supra* text accompanying note 93. However, one might have expected Congress to be more explicit if its intent was to reduce federal courts' general authority to establish standards of conduct for lawyers engaged in federal criminal prosecutions. Nothing in the genesis of the CPA indicates skepticism about federal courts' competence to decide that federal prosecutors should be allowed to engage in particular conduct; the CPA's mistrust was directed at the Department of Justice, not the federal courts.

184. The CPA must be read against the background of other federal legislation governing criminal investigations and prosecutions, some of which authorizes federal investigators and prosecutors to engage in particular conduct—for example, to conduct wiretaps with judicial authorization—and thereby forecloses application of state ethics rules that might forbid that conduct. Congress clearly may draw ethical distinctions between federal and state prosecutors by passing future legislation authorizing federal prosecutors to engage in state-proscribed conduct.

185. Even this is not entirely clear. The Justice Department probably can impose additional restraints on federal prosecutors based on distinctions between federal and state prosecutors. The CPA, however, does reflect Congress's determination that the Department may not exempt itself from state ethical restrictions based on such distinctions.

regulate the professional conduct of federal prosecutors has become one the most hotly debated issues in federal criminal procedure during the past decade—drawing in the Department of Justice, Congress, the Judicial Conference of the United States, the Conference of State Chief Judges, and the organized bar, among others. When these institutions have addressed the merits, they typically have relied upon glib generalities about the traditional regulatory authority of the states, on the one hand, and about the importance of relevant federal interests, on the other. The previous pages have sought to encourage a more thoughtful evaluation of what the substantive content of federal prosecutorial ethics should be.

IV. THE OVERARCHING JURISDICTIONAL QUESTION—WHO MAY REGULATE?

Quite apart from the merits of regulating federal prosecutors, the CPA raises several basic issues relating to the authority of the potential regulators. First, what lawmaking body or bodies have the power to implement regulation of federal prosecutors? Second, what happens when multiple regulators adopt conflicting rules? Third, what is the power of Congress to adjust the authority of the different regulators?

Some aspects of the first question are simple. Unless preempted—and in the absence of a statute like the CPA—states have some power to regulate lawyers who practice, or are licensed to practice, within their jurisdictions, including federal prosecutors.[186] Congress, as the creator of federal agencies, has some authority to curtail the activities of those agencies, including the Department of Justice.[187] Federal courts may regulate federal prosecutors pursuant to their authority to regulate the admission of federal attorneys[188] and the activities of federal attorneys in the midst of litigation.[189] The Justice Department wields the

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186. There is some dispute as to whether states can regulate federal attorneys *as federal attorneys.* The original cases protecting federal officials from state interference are unclear with respect to whether states are precluded from regulating because they have no authority to regulate or because Congress implicitly has preempted all state law that interferes with federal functions. *See, e.g.*, Boske v. Commingore, 177 U.S. 459 (1900) (rejecting state court's attempt to require federal Internal Revenue officials to provide tax records); McCulloch v. Maryland, 17 U.S. 316 (1819), discussed *infra* text accompanying notes 224-28. Nevertheless, states do have the general authority to regulate all attorneys who practice within their boundaries (including prosecutors), absent some supervening federal law or policy. The CPA can be characterized simply as a congressional statement of policy that there is no supervening federal policy to preempt state law or as a statute that authorizes states to regulate federal prosecutors specifically.

187. *See* 28 U.S.C. § 501 (1994) (establishing Department of Justice as an executive agency).

188. *See, e.g.*, Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 719 n.62 (1966) (discussing federal district court examination and competency requirements); Malcolm Richard Wilkey, *Proposal for a United States Bar*, 58 A.B.A. J. 355, 356 (1972) (arguing against system of federal bar admissions that reflect local conditions); Hugh Williamson, *A Curious Checkerboard: Disparate Rules of Admission in Federal Courts*, 42 AM. BAR. J. 720 (1956) (describing confusing melange of district court admission standards); Fred C. Zacharias, *supra* note 176, at 403–06 (discussing standards for admission to practice before federal district courts).

189. *See infra* note 204.

general power of the executive branch. It has the right to make rules for its own employees.[190]

As these four potential regulators increase their involvement in regulating specifics, the contours of their authority become less clear. They risk adopting regulation that exceeds their authority. When one regulator's regulation conflicts with another's, the question of whose view controls must be resolved.

Because states, to date, have not pressed their authority to regulate federal prosecutors and federal courts have acted fairly deferentially to both Congress and the Department of Justice, the limits of the four regulators' respective powers have not been tested. The CPA flexes Congress's muscles, purporting to remove all but interstitial regulatory authority from the Executive. At the same time, the CPA invites states to exert their authority to the hilt. Thus, the ambiguity concerning the legal authority of the various regulators may soon be tested.

This ambiguity, rather than the merits of the no-contact with represented persons issue, is the true legacy of the Reno Rule and the CPA. Most of the recent scholarship addressing the Reno Rule has focused on the policy question of whether the rule is wise.[191] Commentators have glossed over the legal issues that are subsumed within the policy question, often without acknowledging their complexity.[192]

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190. For the most part, this authority stems from general provisions of the Administrative Procedure Act and from the Attorney General's statutory authority to supervise federal litigation and to make rules governing "the conduct of its employees." 5 U.S.C. § 301 (1994) (authorizing agency heads to "prescribe regulations for the government of [the] department, the conduct of [its] employees, . . . and performance of its business"); 5 U.S.C. § 553(b) (1994) (Administrative Procedure Act provision authorizing agencies to promulgate rules); 28 U.S.C. § 519 (1994) (authorizing Attorney General to "supervise all litigation . . . [and] direct all United States Attorneys [and] Assistant United States Attorneys"). As discussed in the text accompanying note 208, however, the executive branch's power to execute the laws may carry with it some inherent constitutional authority to make rules that are important to carrying out the agency's functions.

191. *See supra* notes 21, 29, 176.

192. Rory Little, for example, has suggested the existence of limits on federal courts' inherent and supervisory authority to regulate prosecutors, without delineating those limits. *See* Little, *supra* note 21, at 406–10 (arguing for limitations on federal courts ability to regulate federal prosecutors through local rules); *see also* Sarah Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 COLUM. L. REV. 1433, 1464–86 (1984) (discussing limitations on ability of federal courts to adopt supervisory rules); Cramton & Udell, *supra* note 21, at 384–86 (discussing "troublesome questions" regarding the extent of federal courts' supervisory authority over federal prosecutors). Other commentators have suggested limits on Congress's power to restrict the Justice Department's autonomy. *Cf.* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 YALE L.J. 541, 663 (1994) ("Since the President's grant of 'the executive Power' is exclusive, Congress may not create other entities independent of the President and let them exercise his 'executive Power.' ").

The authors of this article are guilty of the converse. One has assumed a largely plenary power to regulate on the part of Congress. *See* Zacharias, *supra* note 7, at 454 (assuming that Congress could determine what ethics rules apply to federal prosecutors). *See generally* Zacharias, *supra* note 176 (arguing that Congress has power to preempt field of legal ethics regulation). The other has assumed similar authority on the part of the federal judiciary. *See* Green, *supra* note 103, at 460 (urging federal courts to "develop a single set of highly detailed rules").

In an effort to focus the debate, the following pages highlight the core legal and constitutional issues, without attempting to resolve them. On the surface, the CPA seems simple. It removes the authority of the Justice Department to preempt state law. On the theory that the Department's preemptive power is derived from a Congressional delegation, Congress should be able to limit or cancel the delegation.[193] Congress, in short, appears to have the power to do whatever it wants in this regard.

The matter becomes more complicated as soon as one examines the statute carefully. Depending on how one reads the CPA, it may raise three different kinds of jurisdictional issues. Congress's mandate may conflict with the authority of the other federal branches. It may exceed Congress's own substantive or preemptive powers. And the CPA may unconstitutionally delegate authority that Congress in theory could have exercised on its own. Each of these issues is discussed in turn.

A. CONFLICTS BETWEEN CONGRESS AND OTHER FEDERAL BRANCHES[194]

1. The Conflict Between Congress and the Courts

There are two ways of interpreting the CPA with respect to who can regulate federal prosecutors. First, the CPA may subject federal prosecutors exclusively to state law.[195] Second, and more likely, it may subject federal prosecutors to both state and federal law. Federal law may stem from other congressional acts or federal court rules and decisions.

Suppose that a federal court adopts local rules[196] that conflict with state ethics standards in a way that grants federal prosecutors more discretion than

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193. *See, e.g.*, Zacharias, *supra* note 7, at 432 (describing Department of Justice's preemptive power as deriving from Congress); *see also* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 511 (1992) (discussing delegated preemption authority); English v. General Electric Co., 496 U.S. 72, 78–79 (1990) (listing acts of Congress that explicitly define extent of preemption); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("We start with the assumption that the historic police powers of the state were not to be superceded by the federal act unless that was the clear and manifest purpose of Congress.").

194. This article discusses only conflicts between Congress and the other federal branches because those are the only separation of powers issues the CPA raises. Others have addressed the potential separation of powers issues that might arise, in the absence of controlling legislation, when federal court rules conflict with regulations promulgated by the executive branch. *See, e.g.*, authorities cited *supra* notes 21, 30.

195. More accurately, it might subject federal prosecutors to state law and federal court rules, but not other federal law. In effect, the CPA could be read as overruling both of the Justice Department's positions in the Thornburgh Memo, while abdicating other federal regulatory responsibility. As discussed in the text, this reading of the CPA, while plausible, is somewhat strained.

196. Local federal courts have adopted a wide range of ethics rules. The spectrum of local rules is catalogued in STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 591–95 (1992 ed.). Some courts simply adopt the ethics standards of the states in which they are located, others adopt one or more of the three American Bar Association model codes (i.e., the *Model Rules of Professional Conduct* (1983), the *Model Code of Professional Responsibility* (1969), and the *Canons of Ethics* (1908)), and yet others have adopted no rules or idiosyncratic provisions. *See id.*

the state standards would allow.[197] When federal standards conflict with state standards, presumably the Supremacy Clause[198] accords them preeminence.[199] Here, however, the federal court rule arguably conflicts not only with state standards, but also with Congress's mandate that federal prosecutors be subject to state standards. To complicate the issue further, at least part of the federal judiciary's power to adopt local rules derives from congressionally conferred authority.[200]

One can interpret the text of the CPA as avoiding any conflict between Congress and the federal judiciary. The CPA arguably acknowledges federal court rules and allows them to preempt state standards.[201]

On the other hand, one can read the CPA as giving state standards preference over federal court rules. On this view, a direct conflict between Congress and

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197. For example, suppose a state adopts the original version of MODEL RULES, *supra* note 22, Rule 3.8(f), which required a prosecutor to avoid subpoenaing attorneys to testify when possible and to seek judicial approval of a subpoena before issuing one. *See* Zacharias, *supra* note 23 (discussing Rule 3.8(f)). Suppose then that the local federal court declined to adopt any version of Rule 3.8(f)—leaving attorney subpoenas to prosecutorial discretion—or adopted the less onerous provisions of the new Rule 3.8(f).

198. The Supremacy Clause supports federal legislation and the federal Constitution, so at first blush it does not appear to accord preeminence to judicial standards. However, because the judicial authority to make standards must derive either from a congressional grant of authority or directly from inherent authority derived from Article III of the Constitution, the Supremacy Clause should apply.

199. The CPA arguably puts state law and federal district court rules on an equal plane. *See* 28 U.S.C.A. § 530B(a). However, courts probably would interpret the CPA so as to comport with Supremacy Clause doctrine. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984) (holding that courts should interpret legislation in such manner as to "render unnecessary a federal constitutional question").

There is some question as to whether federal court rules are superior to state law in situations where state law applies. In diversity cases, substantive federal law has preemptive power, but federal procedural law only trumps state law when there is a sufficient federal interest in the procedure. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) (declining to follow state law in order to preserve "the judge-jury relationship in the federal courts"); *see also* Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 65, 72–73 (1998) (discussing federal courts' rulemaking authority). Some local practice rules that implicate legal ethics are essential to the federal courts' ability to operate—such as rules that require lawyers to abide by the court's orders—while others may have less federal content.

200. The power of the federal courts to promulgate local practice rules derives from at least four sources. First, Rule 83 of the Federal Rules of Civil Procedure authorizes federal district courts to promulgate local rules so long as those rules are consistent with the Federal Rules of Civil Procedure. FED. R. CIV. P. 83 (1998). Second, Rule 57 of the Federal Rules of Criminal Procedure also authorizes local practice rules. FED. R. CRIM. P. 57 (1998). Third, the federal Rules Enabling Act confers on the U.S. Supreme Court the power to make rules for the federal courts, which includes the authorization of local rules. 28 U.S.C. § 2072 (1994). Fourth, there is some—yet undefined—inherent authority of federal courts to prescribe rules independently of congressional delegation. *See* Chambers v. Nasco, 501 U.S. 32 (1991) (recognizing some inherent power of federal courts but declining to define that power or identify extent to which Congress may limit it); Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 800–01 (1987) (recognizing federal courts' inherent authority to punish contempt). *See generally* Beale, *supra* note 192, at 1474 (discussing power of federal courts to adopt procedural and substantive rules); Zacharias, *supra* note 7, at 442–43 and authorities cited at 443 n.58 (discussing inherent power of federal courts).

201. The CPA expressly subjects federal prosecutors to "State laws and rules, *and local federal court rules*." 28 U.S.C.A. § 530B(a) (emphasis added).

the federal courts arises and gives rise to a separation of powers issue.[202] In other words, to what extent may Congress control the federal judiciary's authority to regulate prosecutors and to preempt inconsistent state law? Insofar as the judicial authority derives exclusively from Congress, Congress should be able to limit it.[203] Yet the courts may also have some independent authority to regulate lawyers with which the CPA arguably interferes.[204]

There is a third plausible interpretation of the CPA. The CPA may subject federal prosecutors to the more onerous of the state and federal standards.[205] Even this more modest limitation on the federal judiciary's authority—preventing it from reducing the burdens on federal prosecutors in federal court—raises the separation of powers issue, though to a lesser extent. But assuming that this hurdle can be overcome, the limitation raises the specter of yet another intrabranch dispute—a dispute between Congress and the Executive. Is it possible that the CPA, thus interpreted, exceeds Congress's power to regulate executive activities?

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202. *See, e.g.*, Mashburn, *supra* note 21, at 500, 502, 525–26 (questioning Congress's authority to interfere with federal courts' exercise of their inherent authority); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1322 (1992) (arguing that Congress has limited control over courts' inherent rulemaking power); *cf.* Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 887 (5th Cir. 1968) (suggesting that courts' inherent power over orderly administration of justice goes beyond that which Congress confers).

203. *See* FED. R. CIV. P. 83(a)(1) ("Each district court acting by a majority of its district judges, may, after giving appropriate notice and opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with . . . Acts of Congress. . . . "); *cf.* Raymond C. Caballero, *Is There an Over-Exercise of Local Rulemaking Powers by the United States District Courts?*, 24 FED. B. NEWS 325 (1977) (questioning local rulemaking).

204. *See supra* note 200. Federal courts have some inherent authority to regulate proceedings before them. Congress could not, for example, prevent federal courts from holding federal prosecutors in contempt, because to do so would undermine judges' ability to carry out the judicial function. *See, e.g.*, Chambers v. Nasco, 501 U.S. 32, 55 (1991) (upholding courts' inherent power to impose sanctions for bad-faith conduct); Jencks v. United States, 353 U.S. 657, 667–68 (1957) (finding inherent judicial power to judicial proceedings); Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 724 (6th Cir. 1993) ("Federal courts have the inherent authority to discipline attorneys practicing before them and to set standards for their conduct); United States v. Klubock, 832 F.2d, 664, 667 (1st Cir. 1987) (en banc) (holding that federal courts have inherent and statutory authority to prescribe local ethics rules); Iacono Structural Eng'g, Inc. v. Humphrey, 722 F.2d 435, 439 (9th Cir. 1983) (finding inherent authority of courts to issue gag orders to participants in litigation); *see also* authorities cited in Delker, *supra* note 21, at 885–88 (discussing supervisory authority of federal courts over attorneys); Kelleher, *supra* note 199, at 65; Edwin J. Wesely, *The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What?*, 154 F.R.D. 563, 567 (1994) ("Congress could not through its rulemaking power so hamstring the federal courts so as to deprive them of carrying out their constitutional functions."); Zacharias, *supra* note 7, at 440–41 (discussing federal courts' authority). There is some reason to suspect that the Supreme Court might limit lower courts' inherent authority over federal prosecutors to in-court proceedings, but that has yet to be determined. *Cf.* United States v. Williams, 504 U.S. 36, 46–47 (1992) (acknowledging courts' supervisory power to establish standards for at least in-court prosecutorial conduct, but questioning further authority to regulate lawyers).

205. *See supra* text accompanying note 94 (discussing this option); *see also* Joan C. Rogers, *Congress Enacts Statute that Subjects Federal Prosecutors to State Laws and Rules*, 14 Law. Man. on Prof. Conduct (ABA/BNA) 498, 500 (1998) (reporting suggestion by law professor that this option will effectively be the way federal prosecutors will implement law).

2. The Conflict Between Congress and the Executive

Congress is the creator of federal agencies. Congress has great power to define the powers of those agencies.[206] Yet there are limits on Congress's ability to intervene in the day-to-day activities of federal agencies,[207] because the agencies exercise the Executive's constitutional authority to implement the law.[208] In the law enforcement context, for example, Congress could not order the cessation of a particular prosecution[209] or order the indictment of a particular defendant.[210] It might, on the other hand, achieve the same results through less specific legislation.[211] Where does Congressional power over the Depart-

206. *See* Little, *supra* note 21, at 378–92 (describing congressional establishment of Department of Justice); *see also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) (holding that Congress's constitutional authority to establish federal courts gives Congress auxiliary authority to make rules that are necessary and proper to help courts function). *See generally* CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 15–35 (1992) (describing early history of Department of Justice); Susan L. Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561 (describing early history of Attorney General).

207. Once Congress enacts a law, its legislative function ends. Congress may influence implementation of the law only by adopting new legislation for the future. *See* Bowsher v. Synar, 478 U.S. 714, 722 (1986) (striking down executive reporting requirements on ground that Congress should not participate in execution of laws). Overly specific legislative orders to the executive arguably partake less of legislation and more of implementation of the laws. *See id.* at 732–33; *cf.* Morrison v. Olson, 487 U.S. 654, 694 (1988) (upholding Independent Counsel Act because Congress "retained for itself no powers of control or supervision over an independent counsel").

208. *See, e.g.*, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1349–50 n.105 (1983) (discussing *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983), in which executive branch refused to prosecute case that federal statute required to be enforced).

209. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). Despite the dictum of the *Nixon* case, this precise issue has never been tested in practice nor been decided in litigation. The analogous issue has, however, been decided in the judicial context. Congress has plenary power to control the jurisdiction of federal courts. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) (holding that Congress, through general legislation, may withdraw jurisdiction of federal courts to proceed with a case *sub judice*). However, when Congress exercises that power in an attempt to control judicial decisionmaking in a particular case, the court will strike the CPA action down as an unwarranted interference with the judicial function. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (striking down congressional attempt to change final judgment by courts); United States v. Klein, 80 U.S. 128, 146 (1872) (refusing to give effect to laws that "prescribe rules of decision to the Judicial Department of the government in cases pending before it"); Glidden v. Zdanok, 370 U.S. 530, 567–68 (1962) (reaffirming *Klein*). Likewise, the courts have disclaimed any authority to interfere with federal attorneys' discretion to "execute the laws" in making enforcement decisions. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 761 (1984) (holding enforcement decisions to be province of the executive, not the judiciary). One would logically expect the Court to protect specific exercises of the executive function from congressional interference in the same way. *Cf.* Pillsbury Co. v. Federal Trade Comm'n, 354 F.2d 952 (5th Cir. 1966) (negating attempt by congressional oversight committee to influence adjudicatory proceeding before FTC on grounds that Congress was intervening in the agency's nonlegislative functions).

210. Attempts by federal courts to require the initiation of prosecutions have been found to violate separation of powers notions. *See, e.g.*, United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965). The same reasoning should apply with respect to Congress.

211. Congress undoubtedly could change the underlying law for which a defendant is being

ment of Justice end and where does the agency's independent authority begin?[212]

The Justice Department's independent authority, if it exists, may simply derive from the executive branch's general constitutional authority to execute the laws[213] or "take care" that they be "faithfully executed."[214] Some types of Justice Department decisions might be viewed as more executive than others.[215] Alternatively, one might be able to craft some legal theory under which the tripartite structure of our government gives the Executive, in general, and the Department of Justice, in particular, a limited sphere of "inherent authority" over law enforcement that is free from Congressional or judicial control.[216]

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prosecuted in a way that eliminates the illegality of defendant's actions and may even be able to do so retroactively. *See, e.g.*, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438–41 (1992) (upholding Congress's authority to change legal standards that affect outcome of pending cases, even if intent of change was to influence those cases). *But see* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (limiting Congress's authority to undo final judgments). Congress also can influence the Department of Justice's ability to prosecute particular cases by adjusting its resources. *Cf.* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 793–810 (1999) (discussing indirect congressional controls of federal law enforcement). The ability to control Justice Department actions, therefore, may depend on the form of Congress's effort to exert control.

212. It is theoretically possible that the "executive branch would most likely resist the overbroad assertion of congressional power to prescribe the conduct of executive officers," but it is unclear from where the executive authority to resist would derive. An analogous issue arose in *City of Boerne v. Flores*, 521 U.S. 507 (1997), involving an attempt by Congress to overrule a substantive constitutional decision by the Supreme Court under the rubric of Congress's power to enforce section 5 of the Fourteenth Amendment. *See id.* The Court held that Congress's power under section 5 is limited to remedial authority and that Congress's effort to craft substantive constitutional law intruded on the Court's judicial power. *See id.* at 519. With the CPA, Congress arguably interferes, at least potentially, with the Department of Justice's ability to carry out its executive functions in a similar way. *Cf.* Loving v. United States, 517 U.S. 748, 757 (1996) (holding that one federal branch may not impair performance of the constitutional functions of a separate branch).

213. *See* Gerald V. Bradley, *Law Enforcement and the Separation of Powers*, 30 ARIZ. L. REV. 801, 803, 855–85 (1988) (outlining argument that President "enjoys a broad, constitutionally grounded discretion over how the law is enforced").

214. U.S. CONST. art. II, § 3. It is important to note that the U.S. Supreme Court has long rejected the proposition that the power to execute the law gives the President blanket authority to control all administrative functions free of congressional oversight. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 611 (1838). The critical questions are when Congress begins to intrude on the Executive's ability to function, and when the Executive begins to assume or interfere with Congress's ability to establish the law.

215. For example, a prosecutor's decision of whether to institute or terminate a prosecution may be viewed as implementing a policy decision that is peculiarly executive in nature, while the decision of whether to engage in typical lawyerly activities such as cross-examination may be viewed more subject to regulation by Congress or the courts. *See, e.g.*, *Cox*, 342 F.2d at 171 (holding that prosecutor's exercise of discretion not to indict is peculiarly executive function).

216. *See* Bowsher v. Synar, 478 U.S. 714, 726, 727 (1986) ("structure of the Constitution does not permit Congress to execute the laws" or extend indirect congressional "control over execution of the laws"); *cf.* 4B Op. Off. Legal Counsel 756 (1980) (asserting plenary authority of the Attorney General to compromise disputes against the United States"); 38 Op. Att'y Gen. 98, 102 (1934) (asserting broad independence of the Attorney General); Bradley, *supra* note 213, at 804 (cataloguing arguments in favor of inherent executive authority, but concluding that no such authority exists). It is difficult to see where the Executive's independent authority might derive from, if not the constitutional provisions

Defining those theories is beyond this article's scope. The goal of this part is simply to point out that the issue of Congress's plenary power is more complicated than it appears at first glance. The complication stems in part from ambiguities in what the CPA itself is mandating and in part from ambiguities in the background law governing the rulemaking (or "lawmaking") authority of both federal courts and executive agencies.[217] In the past, the courts and executive agencies have dodged the constitutional issues that these ambiguities raise by avoiding direct conflicts with Congress. The CPA, in subordinating (or appearing to subordinate) the other branches, has challenged them either to assert their authority or to abandon all authority in the field.

B. FEDERAL-STATE CONFLICTS[218]

Thus far, this article has focused on the potential conflicts among the three federal branches. It now considers the second jurisdictional complication raised by the CPA's mandate—namely, the relative authority of the state and federal governments to set rules for attorneys. To what extent may the federal government preempt state authority, and who within the federal government has the power to take that step?

Until now, most scholars have assumed that Congress's power to preempt state rules is plenary and that, when Justice Department regulations displace state rules, they do so because Congress has implicitly delegated preemption authority to the Department.[219] It has been suggested, independently of the preemption issues, that the Department has inherent authority to make federal rules that are not subject to congressional oversight.[220] That novel theory has yet to be vetted, and we do not adopt it as our own.[221] The theory, however,

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relating to "execution" of the laws. General structural arguments concerning executive power seem ill-supported when they cannot be grounded in constitutional text.

217. As Rory Little suggests, there is some ambiguity in the source and extent of the federal courts' rulemaking authority. *See* Little, *supra* note 21, at 405–09. Congress has authorized federal courts to create local rules, but has defined the subject matter for those rules as "rules for the conduct of [the courts'] business." 28 U.S.C. § 2071(a) (1994). In addition, there are other potential sources of rulemaking authority, including the Rules Enabling Act, the Federal Rules of Civil and Criminal Procedure, and the courts' inherent authority. *See supra* note 200. Little argues that recent case law limiting the courts' "supervisory authority" over federal lawyers to in-court conduct provides a standard that should be applied to the courts' rulemaking authority as well. Little, *supra* note 21, at 405–09.

218. Because the CPA supports state regulation, this article does not address whether there are aspects of the regulation of lawyers that are within exclusive state authority and therefore immune from federal preemption.

219. *See, e.g.*, Little, *supra* note 21, at 378 ("[T]he only question is whether Congress may, and has, authorized the Attorney General to act preemptively in the area of lawyer ethics rules."); Zacharias, *supra* note 7, at 432 & n.16 ("To the extent an agency has pre-emptive authority, that authority derives from Congress.").

220. *But cf.* Bradley, *supra* note 213, at 882 (rejecting the argument for any "inherent" executive authority over prosecutions).

221. As Gerald Bradley discusses at length, the case law does provide some support for a theory of executive power over prosecutions. *See* authorities cited in Bradley, *supra* note 213, at 883–85. Bradley suggests, however, that the precedents overgeneralize and, ultimately, are wrong. *See id.* at 884.

suggests another possibility—namely, that the Department's preemptive authority does not derive directly from Congress, but rather reflects a separate executive preemptive power.

An old line of precedent, dating to the times of Chief Justice Marshall, suggests that some federal institutions are constitutionally protected from state regulation. In *Wayman v. Southard*,[222] Chief Justice Marshall held that states had no authority to regulate federal court proceedings, even in the absence of federal legislation preempting state regulation.[223] He applied similar reasoning in no less of a case than *McCulloch v. Maryland*.[224] There, the State of Maryland attempted to impose a tax on the Second National Bank of the United States.[225] Declaring that the "power to tax involves, necessarily, a power to destroy,"[226] Marshall struck down the tax without considering whether Congress would have objected.[227] The federal agency itself, apparently, was entitled to protect itself from certain kinds of state regulation whether or not Congress authorized it to do so.[228]

Of course, one can read *Wayman* and *McCulloch* consistently with the principle of congressional control over preemption. Congress arguably implicitly authorizes every federal agency to preempt state rules that threaten their existence. On the other hand, one can also interpret the cases as recognizing a sphere of preemptive authority—or, more accurately, immunity from state regulation—that the Constitution itself accords federal instrumentalities (including the Executive).[229]

This immunity can be conceptualized in two separate ways. *Wayman* and *McCulloch* may mean that states have no residual authority to regulate federal

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222. 23 U.S. (10 Wheat) 1 (1825).

223. *See id.* at 47–48. In *Wayman*, Congress had incorporated pre-existing state law with respect to the form and execution of writs applicable in local federal courts. When confronted with the assertion that Congress had decided to defer to future state rules, Chief Justice Marshall concluded that the states had no independent ability to regulate state courts and that Congress could therefore not defer to state decisionmaking on the issue. *See id.* at 48.

224. 17 U.S. (4 Wheat) 316, 328–30 (1819).

225. *See id.* at 326.

226. *Id.* at 327.

227. *See id.* at 330.

228. Justice Marshall's vision was carried forward in subsequent cases protecting federal agents from complying with or being affected by state regulation. *See, e.g.*, Johnson v. Maryland, 254 U.S. 51, 56 (1920) (reversing conviction of federal postal employee for failing to comply with state drivers' license regulations); Ohio v. Thomas, 173 U.S. 276, 283 (1899) (holding federal administrator not subject to the jurisdiction of the State for activities conducted within scope of his duties); *cf.* Hancock v. Train, 426 U.S. 167, 178–79 (1976); Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 190 (1956) (immunizing federally selected contractor from state licensing requirements); Reno Rule, *supra* note 25, at 39,917 ("under the intergovernmental immunity doctrine, states may not directly regulate or punish federal officials for acts undertaken in their official capacities, or otherwise substantially interfere with the lawful functions of federal officials").

229. *Wayman*'s theory is that state legislators and state courts represent only the state citizens and therefore cannot affect federal instrumentalities that are designed to benefit citizens of the whole union. *See Wayman*, 23 U.S. at 47–48.

instrumentalities because such instrumentalities did not exist at the time the Constitution was adopted. Thus, one could argue that the power to regulate these instrumentalities could not have been "reserved" by the Tenth Amendment.[230] Alternatively, *Wayman* would support an interpretation that the independent authority of a federal branch of government (in *Wayman*, the judiciary) gives that branch power to withstand, or preempt, state law.[231]

In a recent article, Professor Michael Ramsey spells out a similar argument in the foreign affairs realm.[232] He analyzes the claim that states may adopt laws affecting other countries and that these laws can coexist with federal foreign policy. Responding to this claim, Ramsey develops a theory of presidential power to preempt state foreign policy laws—preemption authority that Ramsey suggests may exist independent of any Congressional delegation.[233] State law that "impedes the President's exercise of a constitutional power" is unconstitutional.[234] Ramsey's reasoning is confined to foreign affairs, over which Article II of the Constitution arguably vests the Executive with independent authority.[235] Nevertheless, the theory's logic easily could be extended to cover the President's authority to execute the law.[236]

If one accepts either the *Wayman-McCulloch* or the Ramsey theory, one must confront some difficult questions both about the extent of the executive immunity from state regulation and about how the immunity relates to Congress's general preemption power. First, if an agency's immunity exists initially, can Congress waive it? In *McCulloch*, for example, could Congress have agreed to state taxation of the federal bank?

Congress had the power to shut down the bank altogether, so it is probably correct to assume that Congress could have approved a lesser interference with the bank's functions.[237] On the other hand, Chief Justice Marshall's theory in *Wayman* seems to have envisioned a sphere of constitutional immunity beyond

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230. U.S. CONST. amend. X.

231. *McCulloch* does not support this theory, because the agency in question (i.e., the bank) probably did not constitute an arm of the Executive. It seems to have been more of a private institution chartered by Congress to serve national goals.

232. *See* Michael Ramsey, *The Power of the States in Foreign Affairs: The Originalist Case for (and Against) Foreign Policy Federalism*, 75 NOTRE DAME L. REV. (forthcoming Winter 1999).

233. *See id.* at 53. We note, in fairness, that Ramsey ultimately does not adopt this theory, but rather simply offers it as a possibility.

234. *Id.* In the one Supreme Court case touching upon the issue, *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court found a constitutional preclusion of state regulation of foreign affairs, without relying upon any evidence of congressional intention to preempt state action, because the state law intruded into a field the "Constitution entrusts to *the President and the Congress.*" *Id.* at 432 (emphasis added).

235. Ramsey, *supra* note 232, at 53.

236. Indeed, because Congress and the Executive share constitutional authority in most areas—Congress to legislate and the Executive to administer—one could argue that the executive preemption authority, or immunity from state interference with its administrative functions, always exists.

237. *See, e.g.*, First Agric. Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 346 (1968) (holding that federal statute defines extent to which state may tax national bank); Van Brocklin v. Anderson, 117 U.S. 151, 175 (1886) (holding that federal government property is immune from state taxation *unless* Congress authorizes such taxation).

Congress's authority.[238] Would this immunity be waivable by the agency itself? If not, what are the contours of the agency immunity?

Second, assuming that Congress does ultimately control the decision of when the operation of federal institutions requires the preemption of state law, how must Congress exercise its ability to consent to state regulation? Must Congress state explicitly in which respects states may regulate the initially immune agency? Or does a blanket waiver, like the CPA suffice?

For reasons we have already discussed, we do not resolve these issues here. But characterized in this way, the application of the issues to the CPA become both simpler and more complex. At one level, it seems obvious that if Congress may control preemption, it has waived the immunity in the CPA. But that conclusion gives rise to our third jurisdictional complication: The CPA may delegate congressional legislative authority to states in an unconstitutional way.

C. DELEGATION OF FEDERAL POWER TO THE STATES

The CPA delegates to states the powers to decide when to regulate federal attorneys, now or in the future, without exercising or retaining specific congressional oversight over the interference with federal functions. In other areas, courts have limited Congress's power to delegate its legislative authority.[239] The CPA thus must be analyzed with a view toward the improper delegation cases.[240]

It is important to note the difference between the preemption and delegation

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238. In *Wayman*, Justice Marshall repeatedly acknowledged the power of Congress to prescribe rules for the federal courts. *See* 23 U.S. (10 Wheat) 1, 50 (1825). At the same time, Marshall characterized the possibility of state regulation of the federal courts as "extravagant," even in the absence of federal legislation forbidding or preempting such regulation. *Id.* at 49.

239. *See, e.g.*, Loving v. United States, 517 U.S. 748, 758–59 (1996) (holding that Congress may not delegate legislative authority); Touby v. United States, 500 U.S. 160, 165 (1991) ("Congress may not constitutionally delegate its legislative power to another branch"); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) (same); Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.").

240. The chief theoretical objection to congressional delegation is that it enables Congress to shift accountability for legislation from itself to the states. *Cf.* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671, 673–75 (1980) (Rehnquist, J., concurring) (discussing policies against delegation of congressional authority and urging broader use of the nondelegation doctrine). *See generally* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 105–08 (1998) (setting forth arguments for and against enforcement of the nondelegation doctrine). Chief Justice Marshall expressed a form of this objection in *Wayman*, 23 U.S. at 48, noting that because state legislators did not have in mind the interests of the whole union, they could not regulate federal agencies or exercise federal authority that belonged to all citizens. For discussions of the objection, see DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 102 (1993) (arguing that delegation allows Congress to avoid responsibility for its actions); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 76 (1990) (arguing that delegation to states eliminates constitutional checks and balances); Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 209–10, 270–80 (1997) (arguing against permitting congressional delegation of power to the states).

issues. If states have residual authority to regulate federal prosecutors, the issue clearly is one of preemption; namely, has Congress implicitly or explicitly removed from the states the right to exercise their residual authority?[241] If, on the other hand, Congress has exclusive power to regulate federal prosecutors—if states could not regulate even if Congress abandoned the field—then the issue becomes one of delegation.[242]

The broad character of the CPA heightens the potential delegation problem. If the CPA merely subjected prosecutors to existing state law, one could make the argument that Congress was incorporating the state law as its own by reference.[243] By deferring to states even with respect to future legislation, however, the CPA eliminates the argument that Congress was itself legislating. The CPA specifically gives states the authority to legislate on Congress's behalf.[244]

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241. *See, e.g.*, *In re* Rahrer, 140 U.S. 545, 548–50 (1891) (holding that Congress did not improperly delegate when the state possessed sufficient power to regulate in the absence of preemption). This distinction stems from Chief Justice Marshall's decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). In striking down a state's regulation of interstate commerce, Marshall presumed that Congress could not authorize state legislation contravening the "dormant" Commerce Clause. Marshall's theory was that Congress had no power to delegate its own regulatory authority to the states. *See id.* at 207–09; Cooley v. Board of Wardens, 53 U.S. (1 How.) 299, 318 (1851).

242. *See, e.g.*, Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (forbidding Congress from delegating authority over exclusively federal matter).

William Cohen suggests a slightly different way of looking at the issue. *See* William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983). Professor Cohen argues that, even if states have no residual power to regulate, Congress has, or should have, the power to remove federalism restrictions on the states if Congress itself would have the power to regulate directly. *See id.* at 388. While admitting a split in the relevant authorities, Cohen takes the position that Congress may authorize what would otherwise be unconstitutional state law. *See id.*

243. *See, e.g.*, *Cooley*, 53 U.S. (12 How.) at 318 (holding that Congress could have adopted a previous state regulation of interstate commerce as its own, but could not prospectively authorize states to promulgate such regulation); *cf.* Loving 517 U.S. at 777 (Scalia, J., concurring) (noting that Congress may never delegate its legislative function, but that usually assignments of authority do not rise to the level of such a delegation); *In re* Rahrer, 140 U.S. at 562–64 (Congress may authorize a state to regulate interstate commerce by removing a bar to state regulation deriving from congressional silence).

244. The CPA, therefore, calls to mind the specific situation addressed by Chief Justice Marshall in *Wayman*, 23 U.S. at 47–48. Marshall held that Congress could incorporate by reference prior state law in regulating federal courts. However, because states had no residual power to regulate federal courts, Congress could not delegate to states the power to adopt future legislation governing federal court practice. *See id.* at 48.

The courts sometimes have conceptualized this distinction in another way. When Congress assigns general rulemaking functions to another public or private regulator, courts have looked to whether the secondary regulator is acting under Congress's supervision or must adhere to some guiding principle established by Congress. *See, e.g.*, Sunshine Anthracite Coal v. Adkins, 310 U.S. 381, 387–88 (1940) (approving delegation because private rulemaking was accomplished under federal "surveillance"); Hampton & Co. v. United States, 276 U.S. 394 (1928) (upholding delegation where Congress provided "intelligible principle" to govern exercise of delegated power); *cf.* Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813) (holding that delegation of fact-finding to President was permissible so long as Congress maintained control of making of substantive policy). In practice, however, the courts seem to have accepted congressional delegations that leave policymaking to other branches or state regulators. *See* Sarnoff, *supra* note 240, at 244–48.

The CPA therefore raises a tricky constitutional question. Most delegation precedent involves situations in which Congress has delegated power to decide an issue to another federal branch.[245] Whether courts would apply those directly analogous decisions to the federal-state context is unclear.[246]

It is not altogether unusual for Congress to prospectively incorporate state law. For example, federal bankruptcy law refers to property exemptions in state law,[247] and federal banking law incorporates state usury provisions.[248] These and other provisions are justified based on the principle of promoting comity, or deference, to state legislative processes.[249] However, most of this legislation is highly specific, incorporating only a single aspect of nonfederal legislation. In only one distinguishable case has the Supreme Court upheld prospective incorporation of a general body of state law.[250]

One related line of cases does involve state-federal delegation, but viewed from the perspective of whether federal mandates impose undue burdens on the states. Some federal legislation gives states the authority to enforce particu-

245. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (reaffirming that Congress may not delegate its legislative power to another branch, but finding that Congress had not done so). In practice, the Supreme Court rarely has struck down an effort by Congress to assign other branches rulemaking authority as a violation of the nondelegation doctrine. *See* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-federal Actors*, 50 RUTGERS L. REV. 331, 359 n.168 and authorities cited therein (1998).

246. Neither the text nor the structure of the constitution definitively answer the question. *See* Sarnoff, *supra* note 240, at 222–38 (describing the constitutional arguments). For an argument that delegation to nonfederal actors is permissible, see Kinkopf, *supra* note 245, and compare Cohen, *supra* note 242 (arguing that Congress may lend states authority to act even where states could not constitutionally act on their own). For an argument that such delegations should be impermissible, see Sarnoff, *supra* note 240, at 271–80.

247. *See* 11 U.S.C. § 522(b)(1) (1994).

248. *See* 12 U.S.C. § 85 (1994).

249. *See* Kinkopf, *supra* note 245, at 362 (discussing these and other examples).

250. In *United States v. Sharpnack*, 355 U.S. 286 (1958), the Court considered a federal law that incorporated state criminal law for federal enclaves located in the state. *See id.* at 291. The need for such legislation was clear. *See id.* To prevent federal enclaves from being targets for crime, Congress either needed to adopt a separate criminal code for federal enclaves or to incorporate state law. *See id.* at 293–96. Comity and competence considerations militated in favor of the latter approach. To limit Congress to incorporating existing state law, and thereby requiring Congress to monitor state law and adopt new legislation each time any state amended its criminal laws, would have placed a significant burden on Congress. *See id.* at 293–94, 296; *see also* United States v. Mazurie, 419 U.S. 544, 547 (1975) (applying *Sharpnack* to idiosyncratic context of sovereign tribal jurisdictions); Sarnoff, *supra* note 240, at 249–50 (discussing *Sharpnack* and *Mazurie*).

There is no similar need for Congress to act upon the subject matter of the CPA. Indeed, it is not even clear what body of state law the CPA is incorporating. *See supra* text accompanying note 60. Unlike the regulation of crime, states have little substantive interest in the regulation of federal prosecutors. Some comity concerns may exist, but not nearly to the same extent as in *Sharpnack*. Moreover, as a practical matter, regulating federal prosecutorial ethics would not be nearly so burdensome for Congress, particularly because alternate federal regulators (i.e., the federal courts and the Department of Justice) already are in place to fill in the gaps in the law.

lar federal laws.[251] The recent decision in *Printz v. United States*[252] suggests that there are limits on Congress's ability to assign enforcement authority to state governments.[253] *Printz*, however, involved legislation different in character from the CPA—legislation through which the federal government *forced* state governments to act on its behalf.[254] Courts generally have upheld voluntary delegations against claims that the delegations are ultra vires.[255]

One might most accurately characterize the CPA as a statute that delegates lawmaking power that the states implicitly agree to assume when they promulgate laws covering federal prosecutors.[256] In *New York v. United States*,[257] the Supreme Court upheld the federal government's power to offer inducements to states to implement federal law, provided that the states remain free to accept or reject those inducements.[258] Yet in *New York*, again, the Court was deciding the federalism question of whether Congress had gone too far in constraining the states.[259] The Court did not even consider the delegation issue of whether Congress exceeded its lawmaking authority in deferring to state rule. The CPA squarely presents this issue.[260]

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251. For example, states are authorized by Congress to hear cases involving and to enforce the federal civil rights statutes. *See* Martinez v. California, 444 U.S. 277, 283–84, n.7 (1980) (state courts may entertain federal civil rights actions pursuant to 42 U.S.C. § 1983); Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 358 (1990) (state courts must entertain jurisdiction over section 1983 cases that resemble similar state-law actions); *see also* Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI. L. REV. 381, 386–99 (1984) (recommending that civil rights plaintiffs bring their claims in state court). For a discussion on whether or not state courts have an obligation to hear federal civil rights claims, see Kenneth J. Wilbur, Note, *Concurrent Jurisdiction and Attorney's Fees: The Obligation of State Courts to Hear Section 1983 Claims*, 134 U. PA. L. REV. 1207 (1986).

252. 521 U.S. 98 (1997).

253. *See id.*; *see also* New York v. United States, 505 U.S. 144, 174–83 (1992) (striking down aspects of Low Level Radioactive Waste Policy Act of 1985). *See generally* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law*, 95 COLUM. L. REV. 1001 (1995) (arguing that such directives are constitutional).

254. *See Printz*, 521 U.S. at 923 n.12 (distinguishing forced assignments of federal authority to state officials from voluntary assignments).

255. *See, e.g.*, Testa v. Katt, 330 U.S. 386, 389–94 (1947) (upholding federal requirement that state courts accept jurisdiction over claims arising under federal price-ceiling statute); CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 45, 47, at 288–89, 296–306 (5th ed. 1994) (cataloguing cases and minimizing the exception that state courts may avoid jurisdiction if they have "a valid excuse").

256. *See* Kinkopf, *supra* note 245, at 343 (discussing cases involving consensual assignments of power).

257. 505 U.S. 144.

258. *See id.* at 145 (upholding right of Congress to offer states incentives to comply with federal legislation).

259. *See id.* at 145–46.

260. The issue, of course, is a difficult one. There is some authority to the effect that Congress may not defer. *See, e.g.*, Washington v. Dawson & Co., 264 U.S. 219 (1924) (striking down congressionally authorized state workers compensation laws applicable to shore-based maritime employees because Congress had exclusive authority to regulate compensation for injuries on navigable waters); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (same for law governing water-based employees); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) discussed *supra* note 241. On the other hand, some courts have taken the position in analogous situations that if Congress can regulate in an area, congressional recognition of state regulation creates a "coordination" of legislation that deserves

D. CONCLUSIONS REGARDING THE JURISDICTIONAL ISSUES

The CPA raises far more questions than it answers—questions that will linger even if the CPA itself is adjusted or eliminated. The CPA raises serious concerns about the breadth of Congress's authority to control federal prosecutorial ethics and to delegate that authority. At the same time, it inevitably prompts consideration of whether and to what extent federal courts and executive agencies themselves have authority to promulgate rules governing federal prosecutorial ethics initially, to preempt state law, and to resist congressional oversight or control. Now that these issues have been invoked, they will become relevant to virtually any future regulation of federal prosecutorial ethics, adopted by any of the possible regulators.

The CPA highlights the complexity of the subject matter. If the goal of the CPA was to clarify the limits of Department of Justice authority, it utterly fails in that regard. If its goal was to weaken the power of federal prosecutors, it accomplishes that goal only insofar as it promises to embroil the Justice Department in satellite litigation for many years to come.[261]

CONCLUSION

The controversy surrounding the Thornburgh Memorandum and Reno Rule opened the debate concerning the regulation of federal prosecutorial ethics. The CPA has expanded the controversy and inflamed the rhetoric of affected parties on both sides. This article has attempted to pierce the rhetoric, to identify the legal and theoretical issues that the controversy raises, and to clarify the debate.

One conclusion seems clear. The CPA itself is casual and flawed legislation. The CPA conflates far too many questions, including what should be done with respect to the Reno Rule, whether federal prosecutors generally are vested with too much power, who should regulate that power, and from where the authority to regulate derives. If this article shows nothing else, it shows that the lawmakers, before adopting regulatory legislation, must understand what they are trying to regulate, why, and in what way. Failure to reach such an understanding can

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respect. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434–36 (1946) (involving congressional authority to states to impose discriminatory tax on insurance premiums). The conflicting authorities are discussed at length in Cohen, *supra* note 242, at 389–405.

261. If the Department of Justice were to resist congressional attempts, like the CPA, to limit the Department's authority to prescribe its own rules of conduct that may give criminal defendants grounds to challenge prosecutions in court. *Cf.* United States v. Lopez, 106 F.3d 309, 310 (9th Cir. 1997) (relating history of unsuccessful challenge to conviction in criminal prosecution because of the controversy over the no-contacts rules). The Department has already made it clear that it is willing to commence litigation to challenge local federal rules with which it *disagrees*. *See, e.g.*, Baylson v. Disciplinary Bd., 975 F.2d 102, 105 (3d Cir. 1992) (rejecting district court's authority to adopt state rule limiting grand jury subpoenas); United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (upholding federal local court rule applying state ethics provision against federal prosecutors); Stern v. Supreme Judicial Court for Massachusetts, 184 F.R.D. 10 (D. Me. 1999) (suit by U.S. Attorney challenging state ethics rule regarding subpoenas to attorneys); United States v. Colorado Supreme Court, 189 F.3d 1281 (10th Cir. 1999) (federal challenge to state rule governing subpoenas to attorneys); *In re* Doe, 801 F. Supp. 478, 480 (D.N.M. 1992) (rejecting Supremacy Clause argument).

only lead to generalized legislation, like the CPA, that presents more issues than it resolves.

This article's analysis also highlights that the regulation of federal prosecutorial ethics is a far more complicated subject than any legislator, regulated party, or disinterested academic has ever perceived it to be. To date, the Thornburgh Memorandum and Reno Rule have produced mostly facile assumptions or claims about the character of federal prosecutors and the powers of various potential regulators. These have included largely untested assumptions that federal prosecutors are like other lawyers and untested assertions regarding the force of the Supremacy Clause,[262] separation of powers,[263] the authority of Congress to regulate, preempt, and delegate,[264] the inherent authority of states to set ethics rules governing all lawyers,[265] the inherent authority of federal courts to control federal litigation,[266] the inherent and supervisory authority of federal courts,[267] and the inherent authority of the Department of Justice to regulate its own attorneys. The CPA implicates each of these claims. This article has illustrated the importance of coming to grips with their merits.

The article has not attempted to resolve the issues. Each is worthy of independent analysis. That is a task not only for academics, but for each of the potential regulators as well. The article has demonstrated that, as each of the regulators presses the limits of its own authority—as Congress has done in the CPA—the incentive of other potential legislators to assert their independent power grows.

In the past, Congress, the Executive, and the federal judiciary have, for the most part, restrained their regulation of federal prosecutors so as to accord the other regulators a measure of independence. Congress has shown deference to the Department of Justice,[268] federal courts have adopted only limited practice

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262. *See, e.g.*, Reno Rule, *supra* note 25, at 39,916 (arguing that the Supremacy Clause allows Justice Department regulations to preempt state rules); Lupert, *supra* note 29, at 1132–36 (rejecting the Supremacy Clause argument with little analysis); Saylor & Wilson, *supra* note 29, at 483–85 (asserting that the Supremacy Clause forecloses application of state ethics rules to federal prosecutors).

263. *See generally* Reno Rule, *supra* note 25, at 39,917 ("It would raise significant separation of powers concerns for a district court to assert supervisory authority to regulate and sanction the conduct of executive branch attorneys when the Attorney General has adjudged such conduct legitimate and necessary."); Little, *supra* note 21, at 409–10 (making a separation of powers argument against judicial regulation of the out-of-court ethics of federal prosecutors).

264. *See generally* Zacharias, *supra* note 7, at 454–45 (assuming Congress's power to make rule or to preempt and delegate); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (discussing the power of Congress to federalize legal ethics).

265. *See, e.g.*, Dash, *supra* note 29, at 138–39 ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the states."); *cf.* Monroe Freedman, *Dirty Pool in the Prosecutor's Office*, LEGAL TIMES, Sept. 24, 1990, at 24 (expressing the author's and the ABA's position that state ethics rules apply to all lawyers, including prosecutors).

266. *See generally* Green, *supra* note 103, at 531 (arguing for increased judicial involvement in regulating federal attorneys); Mashburn, *supra* note 21, at 523–26 (raising issues regarding the source and extent of federal courts' "inherent" powers).

267. *See generally* Little, supra note 21 (arguing that the inherent power of federal courts is extremely limited).

268. *See, e.g.*, SUBCOMM. ON GOV'T INFORMATION, JUSTICE, AGRIC., COMM. ON GOV'T OPERATIONS,

rules,[269] and the Department of Justice has taken steps to accommodate state and federal regulators even as the Department has made its broadest case for independent regulatory authority.[270] That approach has avoided confrontation. It also has avoided any clear, nonpolitical appraisal of the regulators' claims of authority.[271]

As the mutual deference dissipates, so will the possibility of sidestepping the competing claims. The regulators have a choice. They may press their authority, as Congress has in the CPA. In that event, the courts ultimately will decide the issues in cases in which they are raised. Alternatively, each branch—including Congress—may reassess its own authority and, based on that assessment, avoid a legal confrontation. This article has clarified the pertinent issues. That is the first step towards resolving them.

FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED, H.R. REP. NO. 986, at 86 (1990) (recommending no immediate congressional action on challenged conduct of Department of Justice, promising instead continued oversight).

269. *See* Rand v. Monsanto Co., 926 F.2d 596, 601–03 (7th Cir. 1991) (collecting and cataloguing federal district court rules); GILLERS & SIMON, *supra* note 196, at 591–95 (summarizing local district court rules on attorney discipline).

270. *See supra* text accompanying note 26; *see also* Little, *supra* note 21, at 424 (encouraging the Department of Justice to voluntarily forego full implementation of its authority).

271. In other words, because each regulator ultimately has backed off from implementing the full scope of their asserted powers, no court has ever had to decide the legal issue of whose authority controls in a case of direct conflict between regulators. Instead, the issues has been argued rhetorically in public statements, congressional hearings, and sometimes in law review pieces written by authors aligned with particular views. *See, e.g.*, Little, *supra* note 21 (authored by former and subsequent member of the Department of Justice); Saylor and Wilson, *supra* note 29 (authored by two members of the Criminal Division of the Department of Justice).