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Regulating Federal Prosecutors: Let There Be Light

The Office of Professional Responsibility (OPR), housed within the U.S. Department of Justice (DOJ), investigates alleged misconduct by federal prosecutors and other DOJ personnel. Under the Bush administration, even when OPR found serious prosecutorial misconduct, DOJ kept the disciplinary investigation and outcome private to avoid embarrassing the prosecutor.¹ This practice superseded a public disclosure policy adopted by the previous administration. This essay submits that DOJ's recent practice is contrary to the public interest and that the new administration should regulate its prosecutors more transparently, consistent with President Obama's call for open government.

After investigating accusations made against federal prosecutors, OPR refers its findings to the Deputy Attorney General, who decides whether and how to punish wrongdoers. OPR's lawyers have an ethical duty to preserve the confidentiality of their work, which is also protected from public disclosure by the attorney-client privilege and work-product doctrine. Although DOJ may therefore insist on the confidentiality of OPR's investigations, it may also waive confidentiality. DOJ encourages corporations to disclose the results of their internal investigations to promote compliance with the law;² it ought to apply the same standard of transparency to itself.

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1. Richard B. Schmitt, *More Scrutiny, Secrecy at Justice*, L.A. TIMES, July 6, 2008, at A14 (quoting Associate Deputy Attorney General David Margolis as saying that OPR would not file summaries of cases to avoid "unnecessarily or gratuitously ... publicly humiliating our line attorneys as individuals").
 2. See, e.g., Memorandum from Deputy Attorney Gen. Paul J. McNulty on Prosecution of Business Organizations to the Heads of Dep't Components, U.S. Attorneys' Offices 4, 7, 17 (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

Although other bodies regulate federal prosecutors,³ OPR is at the forefront of this process. Like other lawyers, prosecutors are overseen by state attorney disciplinary agencies⁴ and are subject to sanction by federal judges.⁵ Given these alternatives, DOJ might regard its own investigations as serving an essentially private function with little regulatory role. But in practice, state disciplinary agencies hesitate to investigate and charge federal prosecutors, in part out of concern for the confidentiality of criminal investigations and prosecutions.⁶ Further, attorney disciplinary agencies cannot initiate proceedings against federal prosecutors who may have violated internal DOJ rules or other obligations implicit in their “duty to seek justice” but not codified in the disciplinary rules.⁷ Similarly, federal judges often refer allegations of prosecutorial wrongdoing to DOJ rather than initiate their own inquiries.⁸

Of course, to many observers, asking a DOJ office to regulate federal prosecutors is like asking the fox to guard the henhouse.⁹ Skepticism is especially warranted because OPR discloses few details of its work. Although OPR issues annual reports that summarize its investigative conclusions, the reports are untimely, do not name names, and offer few details. OPR’s statistical summaries indicate that most allegations are not investigated and that most investigations go nowhere. The annual report does not even say what happened to federal prosecutors charged with misconduct in court opinions. A year ago, a federal district judge criticized this DOJ policy upon learning that a federal prosecutor received only a private reprimand when his discovery violation led to the release of a mobster.¹⁰ As a result, the same judge, recognizing that only public discipline can send a broad message to prosecutors, commenced judicial disciplinary proceedings against another

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3. See generally Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995) (discussing the role of federal trial judges, federal district court disciplinary bodies, OPR, and state disciplinary authorities in regulating federal prosecutors).
 4. See, e.g., *In re Howes*, 940 P.2d 159 (N.M. 1997).
 5. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).
 6. See generally Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid False Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. (2009) (discussing why disciplinary authorities would be reluctant to bring proceedings against prosecutors for “incompetence” conduct that risks leading to a false conviction).
 7. See generally Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607 (1999) (analyzing rationales for prosecutors’ duty to “seek justice”).
 8. See, e.g., *United States v. Gross*, 41 F. Supp. 2d 1096, 1100 (C.D. Cal. 1999).
 9. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE* 159 (2007).
 10. Jonathan Saltzman, *U.S. Judge Chastises Dept. of Justice*, BOSTON GLOBE, Jan. 5, 2008, at B1.

prosecutor who withheld exculpatory evidence, rather than referring her to OPR.¹¹

DOJ's practices under the Bush administration were consistent with pre-1993 DOJ policy under which it publicly disclosed the results of OPR's investigations only in rare cases involving deliberate misconduct by senior officials. In December 1993, however, DOJ decided to disclose the results of OPR's findings more frequently to "promote public accountability and further the fair administration of justice and the law enforcement process."¹² Under the 1993 policy, DOJ disclosed reports of OPR's investigations when it found knowing prosecutorial misconduct and in certain other cases except when it determined that the public interest in disclosure was outweighed by the attorney's privacy interest and countervailing law enforcement interests. Before DOJ decided whether to make a report public under this balancing test, the prosecutor in question, his or her supervisor, OPR, and DOJ's Office of Information and Privacy, which manages DOJ's compliance with the Freedom of Information Act (FOIA), were all entitled to have input. In the remaining years of the Clinton administration, DOJ released a series of OPR reports that named the prosecutor under investigation and described the allegations, the investigative findings, and the disposition. Several reports exonerated prosecutors who had been criticized in judicial opinions or found the prosecutors to be less culpable than courts had believed.¹³ Collectively, the reports enabled readers to form an impression as to whether prosecutors were practicing ethically and whether DOJ adequately policed those prosecutors who were not. Nothing indicates that law enforcement investigations or prosecutions, or DOJ's general ability to function effectively, suffered when OPR's work became more transparent.

Under the Bush administration, however, DOJ replaced the 1993 policy with one making the publication of disciplinary reports entirely discretionary.¹⁴ It stopped publishing reports involving trial prosecutors' misconduct, and only published reports involving managerial attorneys' misconduct in personnel

11. *United States v. Jones*, No. 07-10289-MLW, 2009 WL 15187 (D. Mass. Jan. 21, 2009).

12. Memorandum from Deputy Attorney Gen. Philip B. Heymann to Michael E. Shaheen, Jr., Counsel, Office of Prof'l Responsibility 1 (Dec. 13, 1993) (on file with author).

13. *See, e.g.*, Summary of an Investigation by the Office of Prof'l Responsibility into the Conduct of Criminal Div. Attorney John Michelich (Oct. 18, 1996) (finding, contrary to the court, that the prosecutor's jury argument was proper) (on file with author).

14. *See* Office of Prof'l Responsibility, U.S. Dep't of Justice, Policies and Procedures ¶ 12, <http://www.usdoj.gov/opr/polandproc.htm> (last visited Feb. 15, 2009).

matters.¹⁵ Moreover, DOJ applied its secrecy policy to the prior administration's public reports. Recently, DOJ denied a law professor's FOIA request for a copy of the first OPR report publicly issued under the 1993 policy. The report related to a senior federal prosecutor found by federal courts to have wrongfully withheld his key witness's prior exculpatory testimony in a white-collar criminal case.¹⁶ DOJ explained its denial of the FOIA request on the ground that "the release of this summary 'would constitute a clearly unwarranted invasion of personal privacy.'"¹⁷ DOJ was invoking FOIA case law suggesting that once-public law enforcement records may be withheld if they are "practically obscure" and if producing them would invade a private citizen's personal privacy while "reveal[ing] little or nothing about an agency's own conduct."¹⁸ But DOJ's position was dubious. The attorney in question was acting on behalf of the government when the conduct occurred. The report casts light not only on the prosecutorial conduct itself, but also on the measures subsequently taken by DOJ to address the alleged wrongdoing.

OPR's work is even more secretive than ordinary attorney disciplinary processes, which have themselves been criticized as too opaque because they make public the records of disciplinary investigations and proceedings only if a court finds serious misconduct.¹⁹ Under the Bush administration's policy, DOJ could and did withhold OPR's reports no matter how serious the prosecutor's misconduct was. Yet there is a far greater public interest in transparency when it comes to wrongdoing by prosecutors than by private attorneys. As Deputy Attorney General Philip B. Heymann observed in justifying the 1993 policy, "serving as an attorney with the Department of Justice carries with it a responsibility to observe high ethical standards," and the public therefore has a weighty "interest in knowing whether all of our attorneys are consistently

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15. See, e.g., OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), <http://www.usdoj.gov/oig/special/so809a/final.pdf>.
 16. *United States v. Isgro*, 751 F. Supp. 846 (C.D. Cal. 1990), *rev'd*, 974 F.2d 1091 (9th Cir. 1992).
 17. Letter from Marlene M. Wahowiak, Special Counsel for Freedom of Info. and Privacy Acts, U.S. Dep't of Justice, to author (Dec. 22, 2008) (on file with author) (quoting 5 U.S.C. § 552(b)(6) (2000)).
 18. See, e.g., *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); see also *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276 (D.C. Cir. 1992) (denying FOIA request for tape recordings introduced in evidence at criminal trial except insofar as they were played or quoted publicly).
 19. See RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* 509 (2008).

satisfying those standards.”²⁰ Conversely, DOJ’s secrecy undermines public confidence in prosecutorial accountability. Furthermore, when kept secret, OPR’s work fails to effectively deter future prosecutorial misconduct or to educate federal prosecutors about where the disciplinary lines are drawn.²¹

At the start of his administration, President Obama issued a directive calling for a “clear presumption” in favor of disclosing government documents under FOIA and stating that nondisclosure is not justified “merely because public officials might be embarrassed by disclosures.”²² Particularly given this presidential commitment to transparency, DOJ should give OPR’s work greater visibility as it did in the last seven years of the Clinton administration. A fully transparent internal disciplinary process is too much to expect, given countervailing confidentiality and privacy concerns. But DOJ’s experience in the 1990s showed that it will not hurt to let in substantially more light, and doing so will promote important regulatory objectives.

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20. Memorandum from Deputy Attorney Gen. Philip B. Heymann to Michael E. Shaheen, Jr., Counsel, Office of Prof'l Responsibility, *supra* note 12, at 1.
 21. See Ellen Yaroshefsky, *Wrongful Convictions: It Is Time To Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 297 (2004).
 22. See Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).