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Who Should Regulate the Ethics of Federal Prosecutors?

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WHO SHOULD REGULATE THE ETHICS OF FEDERAL PROSECUTORS?

Rory K. Little*

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* Associate Professor, Hastings College of the Law, University of California. B.A. University of Virginia, 1978; J.D. Yale 1982. This article was first presented at a Professional Responsibility Section Panel of the American Association of Law Schools in San Antonio in January 1996, and I am deeply grateful to Section Chair, Professor Ted Schneyer, for that opportunity, as well as for his insightful comments. All my colleagues at the Hastings College of the Law have been wonderfully supportive. Particular thanks go to Ash Bhagwat, Joe Grodin, Lou Schwartz, and John Malone. I am also grateful for the thoughts of Professor Geoffrey Hazard and Chief Justice Michael Zimmerman. Geoffrey Holtz, Richard Chisholm, and Marie Blosh provided wonderful research assistance. For endless clerical support, I thank Bill Herman and Ted Jang. Thanks also to Professor Robert Kagen at the Center for the Study of Law and Society at the University of California at Berkeley for providing a forum for my initial thinking, and to Dean Leo Martinez and the Hastings Summer Research Stipend for assistance in completing this project.
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ETHICS OF FEDERAL PROSECUTORS

INTRODUCTION

EARLY in 1995, legislation appeared in the United States Senate containing a startling one-sentence provision: "Notwithstanding the ethical rules or the rules of the court of any State, Federal rules of conduct adopted by the Attorney General shall govern the conduct of prosecutions in the courts of the United States."1

The idea that the Attorney General should promulgate "Federal rules of [professional] conduct" for her prosecutors that would preempt the field was virtually unprecedented.2 The preemption was not requested by the Attorney General,3 and apparently unconsidered in any systemic way.4 Although the legislation appears moribund today,5 it obviously raises questions about the Attorney General's power over, and appropriate role in, the ethical regulation of federal prosecutors.

In his 1992 article Who Should Regulate Lawyers?, Professor David Wilkins described "a heated debate over who should have responsibility for regulating lawyers."6 While providing generalized and provocative answers, Professor Wilkins did not address one of the significant sources of heat: beginning in the mid-1980s (and more heatedly since

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2. Id. Actually, the language of § 502 is better read not to mandate that the Attorney General promulgate such rules, but rather simply to authorize explicitly that if she does, such rules will preempt other ethical rules. Section 502's words are also ambiguous regarding whether the envisioned "rules of conduct" would apply only to prosecutors, or to all lawyers involved in federal "prosecutions" including defense counsel. But even the strongest proponents of Attorney General action in this area have not yet proposed that the Attorney General generate a preemptive code of ethics for defense attorneys.
4. No report or explanation accompanied § 502, nor was there any known discussion of the idea with the Attorney General or the Department of Justice prior to the bill's introduction. One hearing has been conducted on § 502, but the legislation was not enacted by the close of the 104th Congress.
5. Moribund, of course, does not mean rejected. Congressional inaction on a topic could mean at least three very different things: (i) that Congress decided the legislation was a bad idea; (ii) that Congress decided the legislation was unnecessary because the Attorney General already has sufficient statutory authorization, as discussed in part II infra; or (iii) that Congress did not think about the legislation at all while occupied with what it considered more pressing matters. Simply put, no conclusions can be drawn from this congressional inaction.
6. Moribund, of course, does not mean rejected. Congressional inaction on a topic could mean at least three very different things: (i) that Congress decided the legislation was a bad idea; (ii) that Congress decided the legislation was unnecessary because the Attorney General already has sufficient statutory authorization, as discussed in part II infra; or (iii) that Congress did not think about the legislation at all while occupied with what it considered more pressing matters. Simply put, no conclusions can be drawn from this congressional inaction.

Moreover, at the close of the 104th Congress, a subcommittee of the House Judiciary Committee held a hearing on an entirely contradictory bill, H.R. 3386, which would provide that "[a]n attorney for the Government shall be subject to State laws and [ethics] rules," and would direct the Attorney General to ensure accordingly. H.R. 3386, 104th Cong., 2d Sess. (1996); Letter from Henry Hyde, Chairman, Committee on the Judiciary, to Janet Reno, Attorney General (July 18, 1996) (on file with author). While this legislation also appears moribund, it muddies even further any effort to draw a clear picture of present congressional intentions.

Wilkins's article), a controversy has raged about who should regulate the ethics of federal prosecutors. Wilkins's article does not expressly refer to this small but important group of public lawyers. While sharing some similarities to the issues that Wilkins addressed, the question about the regulation of federal prosecutors bears a number of unique characteristics that merit separate attention, and perhaps, some different answers.

The controversy about federal prosecutors' ethics is currently in an "on-the-brink" posture. Not only has legislation been introduced that could expressly preempt all state regulatory control, but in September 1994, the Attorney General promulgated regulations that expressly state a preemptive intention regarding one discrete area of ethics. Before the Attorney General takes further action toward ethical preemption, it is vital for all interested parties to consider the implications of experimentation in this area and of the general effort to preempt state authority. Two overarching questions present themselves, one substantive and one normative: (1) does the Attorney

7. See infra notes 14-50 and accompanying text. Professor Wilkins of course explained that his was a theoretical "framework" for structuring lawyer regulatory systems in general, one which would require specific modeling and refinement when applied to discrete groups of lawyers in the future. See Wilkins, supra note 6, at 803, 873, 885-86. See, e.g., Ted Schneyer, From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers, 35 S. Tex. L. Rev. 639 (1994) (analyzing the ethical regulation of banking lawyers). Indeed, the necessary application of Professor Wilkins's constructs to specific contexts provides the happy occasion for the January 1996 American Association of Law Schools panel now published in this issue of the *Fordham Law Review*.

8. This is perhaps unsurprising; federal criminal prosecutions constitute less than six percent of all criminal litigation, the bulk of which is handled by state prosecutors. See Rory K. Little, Myths and Principles of Federalization, 46 Hastings L.J. 1029, 1031 n.5 (1995). Moreover, criminal litigation is less than fifty percent of all litigation; civil cases far outnumber the criminal in all federal jurisdictions. Id. at 1039 n.41. Thus the roughly 7500 federal prosecutors are dwarfed by (they are less than one percent of) the roughly 846,000 total lawyers in the United States. Professor Wilkins's article therefore addresses the huge majority of all lawyers. See, e.g., Wilkins, supra note 6, at 865 n.291 (noting the small number of criminal defense attorneys). Nevertheless, federal prosecutors wield immense power with broad and largely unreviewable discretion. See, e.g., United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996) (stating that United States Attorneys have broad discretion to enforce criminal laws); Wayte v. United States, 470 U.S. 598, 607-08 (1985) (stating that the United States retains broad discretion as to whom to prosecute subject to constitutional constraints). See generally Steven A. Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1365-66 (1987) (noting the judiciary's lack of a systematic approach to reviewing prosecutorial activity). They thus comprise a lawyer-group whose significance is perhaps belied by their relatively small numbers, and who are worthy of specific attention.


General have the legal power to preempt state and local authority over ethical rules applied to federal prosecutors?; and (2) if she does have such authority should she exercise it?

This Article proceeds to address these questions in three parts. Part I summarizes the origins and contours of the controversy, and attempts to produce a rational answer to the question "Why would the Attorney General want to preempt local ethical rules?"

Part II analyzes the scope of the Attorney General's legal authority in this area. The conclusion that the Attorney General does possess legal authority to preempt ethical rules for federal prosecutors will likely be unsettling to opponents of federal authority.11 While no precedent settles this issue specifically, the conclusion flows naturally from a dispassionate application of relatively clear federal preemption principles to the Attorney General context. This Article finds particularly strong support in two venerable Supreme Court cases not previously addressed in any depth in the context of this debate.

Part III contends, however, that the various state supreme courts should, as a normative matter, remain the primary sources of regulation in this area. Wholesale federal preemption for federal prosecutors is unnecessary, and would be immensely costly to the Department of Justice in monetary terms as well as in trust and good will. This Article argues that federal preemption would be hugely unsettling to current practice and severely confrontational to a delicate and historical state/federal balance. This Article concludes that it would be destructive to overarching values that the Attorney General should apply to achieve the just and effective administration of federal law enforcement.12

I. THE CURRENT CONTROVERSY ABOUT THE ETHICS OF FEDERAL PROSECUTORS

Concern about federal prosecutorial ethics is not new; Justice Sutherland's famous epigram, "[t]he United States Attorney is the representative not of an ordinary party . . . whose interest, therefore . . . is not that it shall win a case, but that justice shall be done," was penned well over half a century ago.13 But the ethics of federal prosecutors has emerged as a distinct area of increased concern over the last dec-


The origins of this increased concern are diffuse and complex, and are often clouded by rhetoric. But at least six distinct developments in the 1980s contributed to the increase: (i) restriction by the U.S. Supreme Court of federal courts' "supervisory authority" to suppress evidence or dismiss indictments as a sanction for perceived prosecutorial misconduct; (ii) federal grand jury subpoenas directed to defense attorneys; (iii) federal investigative communications with persons who have counsel; (iv) forfeiture to the government of monies paid by indicted defendants to their chosen counsel; (v) dramatically increased resources made available for federal criminal investigations and prosecutions; and (vi) new non-discretionary federal sentencing provisions leading to greatly increased sentences. Indeed, the ethical concerns emerging out of these discrete yet conjunctive issues were so strong that by 1992, a university law review devoted an entire symposium issue to discussion of federal prosecutors' ethics.

A. Six Points of Origin for Concerns About Federal Prosecutors' Ethics

What follows does not purport to be an exhaustive examination, but rather simply a sketch of discrete events that, in the aggregate, have made the ethics of federal prosecutors a matter of great current concern.

1. The Attorney Subpoena Issue

In the early 1980s, federal prosecutors increasingly began to turn to private defense attorneys as a source of information about organized


and international crime; in light of strong claims of attorney privileges, grand jury subpoenas were increasingly issued to attorneys in order to compel information. Rather than attempt to regulate attorney-subpoenas by some substantive mechanism, for example, by legislation or through a negotiated agreement with the Department of Justice, the organized bar’s response in some states was to attempt to regulate the practice by an ethical rule. Beginning with Massachusetts in 1986, a number of states—and in 1991 the ABA—enacted a prohibition against prosecutorial subpoenas of attorneys unless judicial approval was first obtained. This development made the investigative methods of federal prosecutors a matter of specific ethical concern.

2. The Contacts with Represented Parties Issue

In early 1988, the Second Circuit issued an unprecedented ruling that federal prosecutors supervising a pre-indictment undercover criminal investigation could run afoul of the traditional ethical rule prohibiting attorney communications with parties known to be represented by counsel. This Article will refer to this issue as the “con-

21. Professor Zacharias noted the phenomenon and collected relevant authorities in 1992. See Zacharias, A Critical Look, supra note 16, at 917, 919; see also Cramton & Udell, supra note 14, at 359-386 (discussing the conflict between attorney-client privilege and subpoena power over defense attorneys).


23. Id. at 917 n.3; see Model Rules of Professional Conduct Rule 3.8(f) (1992) [hereinafter Model Rules] (providing inter alia that “[t]he prosecutor in a criminal case shall . . . not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless . . . the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.”).

The decision to inject procedural restrictions on particular investigative techniques into an ethical code of general applicability may be questioned; some have argued that “it’s not ethics” and have criticized turning the ethical codes into strategic weapons. See generally Richard L. Abaj, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639 (1981) (arguing that the ABA rules do not promote ethical behavior); Frank O. Bowman, III, A Bludgeon By Any Other Name: The Misuse of “Ethical Rules” Against Prosecutors to Control the Law of the State, 9 Geo. J. Legal Ethics 665 (1996) (arguing that these ethical rules are in conflict with long-standing principles of federal criminal law and are illegitimate as rules of ethics and rules of positive law). While the author strongly agrees with such concerns, the general debate about the appropriate content of ethical rules is not one this Article attempts to resolve.


tacts” issue. Prior to Hammad, Rule 4.2 and its state equivalents had never been applied to undercover law enforcement operations. Yet the Hammad court not only applied the rule in that context but also ordered a serious substantive sanction, suppression of highly incriminating evidence.

The reaction of the Department of Justice to this dramatic “expansion of the [traditional] interpretation” of the no-contacts rule was to assert, in a memorandum signed by the Attorney General and nationally distributed, that federal prosecutors were not governed by state bar ethical rules that interfered with “legitimate law enforcement techniques.” As Professors Cramton and Udell have noted, this


27. Hammad, 846 F.2d at 861.


29. In re Doe, 801 F. Supp. 478, 489-93 (D.N.M. 1992) [hereinafter Thornburgh Memo] (reprinting the “Thornburgh Memo,” so named after the Attorney General who issued it); see also United States v. Lopez, 765 F. Supp. 1433, 1445-46 (N.D. Cal. 1991) (describing “The Thornburgh Memo”), vacated and remanded, 989 F.2d 1032, superseded, 4 F.3d 1455 (9th Cir. 1993), appeals docketed, No. 95-10366 and No. 95-10394 (filed Aug. 18, 1995 and Sept. 1, 1995). There is no direct subsequent history regarding the hotly debated Doe case because it was an opinion remanding the removal of a state disciplinary proceeding against a federal prosecutor; such remand orders are unappealable. Things Remembered, Inc. v. Petrarca, 116 S. Ct. 494, 497 (1995). The disciplinary proceeding in Doe is, however, the subject of later decisions following the Department of Justice’s efforts to enjoin the New Mexico State Bar’s disciplinary proceeding. See United States v. Ferrara, 847 F. Supp. 964 (D.D.C. 1993), aff’d on other grounds, 54 F.3d 825 (D.C. Cir. 1995). Because the D.C. Circuit ordered dismissal of the government’s injunctive action solely due to lack of personal jurisdiction over the defendant (New Mexico’s disciplinary chief), the underlying dis-
high-profile policy announcement "outraged bar officials" and drew "immediate objections" from various bar associations.\textsuperscript{30} Again, the ethics of federal prosecutors was the centerpiece of the debate.

3. \textit{Hasting} and the Redirection Toward Ethics Charges Against Federal Prosecutors

In 1983, in \textit{United States v. Hasting},\textsuperscript{31} the Supreme Court addressed a case in which a Federal Court of Appeals had reversed "gruesome" sexual abuse convictions "to discipline the prosecutor—and warn other prosecutors" about their perceived prosecutorial misconduct.\textsuperscript{32} The Supreme Court ordered that the convictions be reinstated, and stated a more restricted view of federal courts' "supervisory power" than was prevalent in many lower courts.\textsuperscript{33} The court noted that a remedy "more narrowly tailored" than reversal on the merits was available: ethical chastisement and discipline of the offending federal prosecutors.\textsuperscript{34} Thus, federal courts, and opposing counsel, interested in "sending a message" to prosecutors or deterring prosecutorial excesses were expressly directed to consider making \textit{ethical} charges against the prosecutor, rather than adversely acting on the merits of the litigation.\textsuperscript{35}

cipinary matter remains pending in New Mexico without a ruling on the substantive contacts issue. The tortured history of the cases on the "contacts" question—with opinions on the merits vacated, remanded and unresolved on the merits—demonstrates the controversial and emotional character of the issues.

\textsuperscript{30} See Cramton & Udell, supra note 14, at 319 n.89, 321; see, e.g., William Glaberson, \textit{Thornburgh Policy Leads to a Sharp Ethics Battle}, N.Y. Times, Mar. 1, 1991, at B11 (quoting a letter from the president of the ABA to Deputy Attorney General William P. Barr which stated the ABA's disagreement with the ethics rules announced by Thornburgh); Monica Bay, \textit{ABA Rips Thornburgh Policies}, The Recorder, Feb. 13, 1990, at 1 (reporting Thornburgh's belief that Justice Department employees do not have to follow certain professional responsibility rules); see also Mashburn, supra note 11, at 487 (describing the reaction of the ABA to Thornburgh's assertion of power); Burke, supra note 26, at 1648 (quoting an ABA report that denounced the Thornburgh memo).

\textsuperscript{31} 461 U.S. 499 (1983).

\textsuperscript{32} Id. at 504.

\textsuperscript{33} Id. at 505-07.

\textsuperscript{34} Id. at 506. Whether the prosecutors had actually committed misconduct was not addressed by the Court. See id. at 505.

\textsuperscript{35} \textit{Hasting} was accompanied by what some have described as the Burger and Rehnquist Courts' restrictions on constitutional avenues of attack on various law enforcement techniques. See, e.g., Stephen A. Saltzburg, \textit{Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts}, 69 Geo. L.J. 151, 208 (1980) (arguing that the Burger Court was overprotective as well as underprotective of criminal defendants); Robert Weisberg, \textit{Foreword: Criminal Procedure Doctrine: Some Versions of the Skeptical}, 76 J. Crim. L. & Criminology 832, 835 & n.6 (1985) (stating that "most writers on the Supreme Court simply assume that literal changes in doctrine or outcome carry important social and political influence," and giving examples of such writers). Thus, after \textit{Hasting}, it could be argued that one of the very few tactical tools left for litigating against federal prosecutors was making ethics charges.
4. Attorney Fee Forfeiture Actions

In the late 1970s and early 1980s, as the "war on drugs" intensified, federal prosecutors began to realize the breadth and scope of the broad narcotics forfeiture laws enacted by Congress in 1970. In 1989, the Supreme Court confirmed that the reach of these laws properly could extend to fees paid by accused narcotics defendants to their defense attorneys, if those fees appeared to have been paid out of, or were traceable to, drug proceeds.

The fact that federal prosecutors thereby held potential power over the defense bar's bank accounts, even if this power was in fact seldom exercised, dramatically increased the suspicion and hostility with which defense lawyers viewed their professional adversaries. Some critics charged that federal prosecutors were now employing their new or strengthened tools illegitimately and unethically to discourage lawful and constitutionally protected criminal defense representation. Fighting back with ethical charges against federal prosecutors seemed to be fair, as well as the only recourse left to beleaguered defenders.

5. Increased Resources for Federal Prosecutions and Investigations

By the late 1980s, the resources for federal law enforcement agencies were increased dramatically. Large budget increases in, for example, the law enforcement budgets of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Customs Service, and the Bureau of Alcohol Tobacco and Firearms. Not surprisingly, similarly increased prosecutorial resources, including many more prosecutors, were necessary to handle the new cases gener-


39. Review of various statistical sources reveals, for example, that the FBI budget has increased from $621 million in 1980 to over $2.5 billion today, and the DEA budget is up from $203 million in 1980 to $823 million today. Interview with DOJ budget official (Aug. 30, 1996).
For example, in 1979 there were 8033 federal prosecution employees and 32,688 criminal cases filed; by 1990 the numbers were 24,947 and 48,904, respectively.

The addition of more federal prosecutors yields at least two relevant observations. First, based on an assumption that at least some small percentage of any group of human beings will be flawed, an increase in prosecutors must yield an increase in the small number of unethical prosecutors. This phenomenon can be exacerbated if large numbers of new federal prosecutors enter service in a relatively short amount of time; training suffers and supervision is spread thin.

Second, the dramatic increase in federal prosecutorial resources increases the pressures on a relatively underfunded federal criminal defense bar. Ethical charges against the prosecutor can derail, or at least temporarily distract, the prosecutorial juggernaut. Thus, personal charges against prosecutors, which in a more genteel age might have been foregone, have now become a necessary component in the "bare-knuckles approach" of an increasingly besieged adversary.

6. The New Federal Sentencing Regime

Finally, a less specific but no less powerful cause of heightened concerns about federal prosecutorial ethics arises out of large changes in federal sentencing policies in the mid-1980s, changes that have been perceived as significantly increasing the power of federal prosecutors. In 1984 Congress mandated a significant change in how federal defendants are sentenced, moving from a system of virtually unregulated discretion lodged with federal judges to a detailed set of constraints

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43. In 1979, the total expenditures for federal prosecutors and legal services was almost $16 million; for federal public defenders it was $587,000. Justice Expenditures, 1979, supra note 41, at 37. This imbalance increased dramatically by 1990. In 1990 the prosecution expenditures had reached over $82 million, and defender expenditures were just over $2 million. Justice Expenditures, 1990, supra note 42, at 6. Also compare the federal prosecution employees figures cited in the text at notes 41-42, supra, with the 251 full-time federal public defender employees in 1979 and 589 employees in 1990. Justice Expenditures 1990, supra note 42, at 6; Ann. Rep. of the Director of the Admin. Off. of the U.S. Courts 1979 at 7 (1979).

called the federal sentencing guidelines. A significant component of this “Sentencing Reform Act” was a statutory expression by Congress that “current sentences do not accurately reflect the seriousness of the offense[s].” The resulting federal sentencing regime has substantially increased the length and frequency of federal criminal sentences of imprisonment.

Moreover, beginning in 1986 and continuing in almost every subsequent federal crime bill, Congress has directed that entirely non-discretionary “mandatory minimum” sentences of imprisonment be imposed upon every person convicted of violating various federal statutes. The increasingly harsh and non-discretionary federal sentencing structure has generally been perceived as “increasing” the power of federal prosecutors, because in a system of dramatically decreased judicial discretion, federal prosecutors retain great discretion to charge and plea bargain in ways that can significantly affect sentences. This perception of recently increased prosecu-


46. 28 U.S.C. § 994(m) (1994); see also §§ 994(h), (i), (k) (expressing congressional desires for more, or longer, federal imprisonment sentences).


48. The required terms are often quite substantial, ranging from a minimum of five years up to life without parole. See, e.g. 21 U.S.C. § 841(b) (1994) (providing mandatory minimum terms of imprisonment for narcotics violators).

49. See, e.g., Lee, supra note 19 at 109 (arguing that the government motion requirement to avoid mandatory minimums gives prosecutors great discretion in sentencing); Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681 (1992) (concluding that prosecutors retain greater discretion in sentencing than judges). This author would argue that, in fact, the discretion of federal prosecutors has not been “increased” by changes in sentencing policies; rather, the discretion of other actors in the system (judges, defense attorneys, and parole authorities) has been so reduced that by comparison, the prosecutor’s remaining discretion looks larger. Yet mandatory minimum sentencing statutes and specific sentencing guidelines also restrain prosecutors’ discretion. In addition, internal Department of Justice constraints on charging decisions and plea agreements also limit federal prosecutors’ bargaining discretion. See, e.g., Memorandum from Attorney General Re: Principles of Federal Prosecution (Oct. 12, 1993, “bluesheet”) (on file with author) (directing that federal prosecutors consider in evaluating plea agreements: (i) the sentencing guidelines applicable to a particular charge; (ii) the proportionality of the sentencing range to the seriousness of the defendant’s conduct; and (iii) “whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation”). The fact is, the sentencing discretion of every federal actor in the criminal justice system has been reduced by congressional legislation in the area since 1984. This Article, however, is not the place for a debate about the extent of federal prosecutors’ discretion. Needless to say, they do retain significant discretion, and whether entirely accurate or not, perceptions of increased federal prosecutorial power since the mid-1980s are widespread and fuel the debate about prosecutors’ ethics.
torial power has also fueled concerns about federal prosecutors' ethics.50

B. The Hottest Pressure Point: Contact with Represented Persons

Extensive literature describing the debate about applying the no-contacts ethics rules to federal prosecutors can bring the reader current to mid-1994.51 Most of this literature fails, however, to describe the rationale or evaluate the depth of the concerns generated in the Attorney General (and federal prosecutors in general) by the implications of a few prominent “contacts” cases.52 Yet an understanding of these concerns is vital, because it is the implications of the initial court decisions in the area of “contacts” that have driven the debate to its current “on-the-brink” posture.

The specific ethical rule at issue in the contacts debate is entitled “Communication with a Person Represented Represented by Counsel.”53 Of the various specific issues that comprise the general debate regarding federal prosecutors’ ethics, the “no contacts” issue is currently the hottest pressure point. This is because in August 1994, the Attorney General exercised her statutory rulemaking authority to adopt a formal, final regulation addressing the topic, and expressly stated the Attorney General’s intent that the regulation “preempts” any contrary state or local rules.54 Great opposition to this assertion

51. See Burke, supra note 26; Cramton & Udell, supra note 14; Saylor & Wilson, supra note 26; Moore, supra note 14.
52. The article by F. Dennis Saylor and J. Douglas Wilson, supra note 26, provides a notable exception and was written by two Department of Justice attorneys who were involved in the initial Thornburgh policies regarding contacts. See also Moshburn, supra note 11, at 485 (noting the “crippling uncertainty” created by the contacts cases).
53. Model Rules, supra note 23, Rule 4.2 (1994). Until an August 1995 amendment by the ABA, the rule used to say “parties,” not persons; most states still retain the old language. See Model Rules, supra note 23, Rule 4.2 (1996). The effect of the amendment was to liberalize the applicable scope of the rule, and not restrict it only to persons who are “party to a formal adjudicative proceeding.” Model Rules, supra note 23, Rule 4.2 cmt. 3 (1996). It is relevant to note that the Attorney General independently decided to write her own rule by reference to “persons”, and not just parties, in 1993, prior to the ABA amendment. Thus it is counter-factual to assume that Attorney General-generated ethical rules will necessarily, or even likely, be narrowly construed.

For convenience this Article will generally use the ABA’s Model Rules as its reference point; of course the states have often adopted rules that differ in greater or lesser degrees. But the basic “no-contact” rule is a conception expressed in every jurisdiction. See generally Gillers & Simon, supra note 25, at 219-20 (listing state variations on Model Rule 4.2).
54. Contacts Rule, supra note 10, § 77.12. The Attorney General has the same statutory authority as is granted to all “Department heads” in 5 U.S.C. § 301, to issue regulations governing (inter alia) the “conduct of its employees.” See infra notes 137, 154-65 and accompanying text.
of preemptive power has been voiced by judges, state disciplinary authorities, and the private bar.\footnote{55}

Meanwhile, the Rule 3.8(f) attorney subpoena debate has quieted in light of two developments: a Third Circuit opinion, and denial of certiorari, declaring Rule 3.8(f) to be preempted because it is inconsistent with Federal Rule of Criminal Procedure 17;\footnote{56} and the ABA’s recent deletion of the prior judicial approval portion of subsection (f) from its Model Rule 3.8.\footnote{57}

In contrast, the Rule 4.2 situation remains volatile. There is no federal statute with which 4.2 can be said to be specifically inconsistent, other than the Attorney General’s 1994 regulation;\footnote{58} and rather than revise Rule 4.2 to be congruent with the Attorney General’s interpretation, the ABA’s Standing Committee on Ethics and Professional Responsibility has issued an opinion stating that 4.2 applies even more strongly to criminal investigations.\footnote{59} Thus, it seems likely that the “contacts” issue is where battle over the Attorney General’s preemptive regulatory authority in the field of ethics will be firmly joined.\footnote{60}

\footnote{55. See, e.g., Resolution of the Conference of Chief Justices (Aug. 4, 1994) (“strongly oppos[ing]” the regulation and urging Conference members not to defer to it); Marla Rubin, The Thornburgh Memo, Now the Reno Rule: A Case of Ethics, N.Y. L.J. 1 (Sept. 23, 1994) (arguing that the “Reno rule . . . threatens serious disruption of the attorney-client relationship protected by the Code of Professional Responsibility”).}

\footnote{56. Baylson v. Disciplinary Bd., 975 F.2d 102 (3d Cir. 1992) (invalidating the analogous Pennsylvania rule). \textit{But see} Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1366 (1st Cir. 1995) (reaching the opposite conclusion regarding a federal court’s “local” rule similar to Model Rule 3.8(f)).}

\footnote{57. \textit{See supra} note 24 and accompanying text. It will be interesting to see whether state authorities that have adopted the ABA’s version of Rule 3.8(f) will now also adopt the ABA’s repeal of the judicial approval requirement. If they do, cases like \textit{Whitehouse} will be moot because most federal courts have simply adopted whatever formulation of ethical rules their state has adopted by reference.}

\footnote{58. And in fact, Rule 4.2 is \textit{not} inconsistent with the Attorney General regulation, because 4.2 has an “authorized by law” exception and the Attorney General’s regulation, if it is valid, constitutes “law.”}

\footnote{59. ABA Comm. on Professional Ethics and Professional Responsibility, Formal Op. 396 (1995). The opinion was divided, with two of eight members dissenting. It represents an extreme interpretation of Rule 4.2. For example, it extends the no-contact rule for corporate employees beyond a “control group” to “\textit{anyone ‘whose . . . statement may constitute an admission.’}” \textit{Id.} at 16; cf. Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984) (en banc) (limiting rule to those with “managing” authority). The author is currently a member of this ABA Committee, but was not a member when Opinion 95-396 was issued.}

\footnote{60. Interestingly, while there has been sabre-rattling regarding the Attorney General’s regulation since it was adopted in late 1994, \textit{see infra} note 112, there has yet to be a direct litigation conflict about it. A direct resolution was anticipated in the \textit{Ferrara} case, but the D.C. Circuit declined to address the substantive issue, issuing instead a narrow procedural ruling that the district court had lacked personal jurisdiction over the head of New Mexico’s disciplinary authority. United States v. Ferrara, 54 F.3d 825, 832 (D.C. Cir. 1995).}
1. Why Did the Attorney General Believe a Preemptive Rule Was Necessary?

Having flourished for 205 years without issuing preemptive ethical regulations, why was the Attorney General moved to do so regarding contacts with represented persons in 1994? More compellingly, in light of the fact that the contacts regulation had first been proposed in 1992 by a different Attorney General under a Republican President, why did Janet Reno, the first Democrat-appointed Attorney General in over a decade, decide to pursue the regulation in final form? Indeed, private bar opponents of the initial proposed regulation were now members of the Attorney General’s staff. Why wasn’t the confrontational, preemptive federal contacts regulation squelched?

The answer is that the situation facing federal prosecutors under this particular ethical rule had become intolerable, from any point of view. In the 1980s with the perceived powers of federal prosecutors expanding, federal courts began to apply ethics rules in new, substantive ways to criminal cases, and particularly to the investigative, pre-charge stage in which prosecutors previously had had to worry only about constitutional and Federal Rules restraints. In addition, federal criminal investigations had become increasingly national in scope, routinely cutting across state lines. Yet state ethical codes had become increasingly non-uniform and “balkanized,” as Professor Roger Cramton has noted. Concomitantly, federal court applications of

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61. The Office of Attorney General was created in the first Judiciary Act in 1789, ch. 20, 1 Stat. 92-93 (1789) (establishing the office of the Attorney General, presumably an Executive Branch official “whose duty it shall be to prosecute and conduct all suits ... in which the United States shall be concerned, and to give his advice ... when required by the President of the United States”). See generally Cornell W. Clayton, The Politics of Justice: The Attorney General and the Making of Legal Policy 15-40 (1992) (discussing the history of the office of the Attorney General and the 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, 567 (discussing the position and responsibility of the Attorney General at its inception).

62. Undeniably, Reno’s regulation differed from Attorney General Barr’s initial proposal, in tone as well as in some matters of substance. It was also far better developed than the simple seven-page Thornburgh memo. Nevertheless, it did not retreat from Attorney General Thornburgh’s initial claim of preemptive authority; and it carries forward six exceptions for contacts made by federal prosecutors with post-indictment represented parties. Contacts Rule, supra note 10, § 77.6. To many outside observers, the “Reno Rule” is more similar to the Thornburgh memo than politics would have predicted.


64. See supra notes 14-50 and accompanying text (discussing root causes in mid-1980s).

65. Cramton & Udell, supra note 14, at 315; see also Fred C. Zacharias, Federalizing Legal Ethics, 73 Tex. L. Rev. 335, 339-41 (1994) (“The rules governing professional conduct in the various state and federal jurisdictions have become irreconcilably diverse.”).
the no-contact rules specifically became inconsistent, and federal prosecutors actually had bar charges filed against them based on varying state rule interpretations.\textsuperscript{66} Indeed, federal prosecutors could not
know with any certainty which set of rules would later be used against them.\textsuperscript{67}

As a result, by the early 1990s, Department of Justice prosecutors who often must act in more than one state, and Assistant U.S. Attorneys who while based in one state are often members of a different state’s bar,\textsuperscript{68} suddenly faced the prospect of personal bar licensing discipline for actions taken in pursuit of their official duties and authorized by their employer, the effect of which could not be predictably evaluated in advance. This situation was seen as having a concrete, adverse effect on the enforcement of federal criminal law, because reasonable prosecutors, if faced with the uncertain prospect of personal licensing discipline if they act, will forego even valid contacts with criminal suspects. Thus, when promulgating the final contacts rule in 1994, the Attorney General expressly noted “the chilling effect

\textsuperscript{66} Compare, e.g., United States v. Hammad, 846 F.2d 854, 858-60 (2d Cir. 1988) (holding that ABA Model Code rule prohibiting lawyer from communicating with a party reopresented by counsel applies to criminal prosecutions), \textit{modified}, 858 F.2d 834 (2d Cir. 1988), \textit{aff’d}, 902 F.2d 1062 (2d Cir.), \textit{cert. denied}, 498 U.S. 871 (1990), with United States v. Ryans, 903 F.2d 731, 734-41 (10th Cir. 1990) (rejecting \textit{Hammad} and interpreting ABA Model Code provision as not applying to “undercover investigations of unindicted suspects” who have counsel).

This was an entirely new development; contrary claims of “historically” imposed state bar discipline against federal prosecutors are unsupported and simply inaccurate. \textit{Cf.} Corinna B. Lain, \textit{Prosecutorial Ethics Under the Reno Rule: Authorized by Law?}, 14 Crim. Just. Ethics 17, 26 (Summer/Fall 1995) (supporting the “historical” claim only by reference to a law journal article, which itself cites cases only from 1979 and no cases based on violation of an ethical rule as opposed to a federal statute).

\textsuperscript{67} For example, in \textit{United States v. Lopez} the federal prosecutor acted in San Francisco but was a member only of the Arizona State Bar. 765 F. Supp. 1433 (N.D. Cal. 1991), \textit{vacated and remanded}, 989 F.2d 1032 (9th Cir.), \textit{superseded}, 4 F.3d 1455 (9th Cir. 1993), \textit{appeals docketed}, No. 95-10366 and No. 95-10394 (filed Aug. 18, 1995 and Sept. 1, 1995). A reasonable prosecutor attempting to evaluate a proposed course of action \textit{a priori} might plausibly consider California’s unique rules, Arizona’s rules, the ABA’s 1970 Model Code, its 1983 Model Rules, or the Department of Justice’s memoranda emanating from Attorneys General of both parties (Bush’s and Carter’s). These rules have many differences in language, not to mention in interpretive application by their respective disciplinary bodies.

\textsuperscript{68} For example, in the “Unabomber” case, federal prosecutors from New Jersey, California, Montana and Washington D.C. have been assigned to the prosecution team. \textit{See} Victoria Slind-Flor, \textit{New Unabomber Prosecutor Team}, Nat’l L.J., Apr. 22, 1996, at A13. Almost all sections in the Department of Justice’s Criminal Division, based in Washington D.C., employ attorneys to investigate and prosecute cases within their subject matter areas in many different jurisdictions across the nation. Historically, there have not been sufficient numbers of Assistant U.S. Attorneys in all districts to handle particularly complex or unusual matters, and the Attorney General has had to move her attorneys around to meet the Department’s needs. Congress has recognized this reality, by requiring only that federal prosecutors be a member of the bar of any recognized jurisdiction rather than of the particular State in which they are based. \textit{See infra} notes 262-66 and accompanying text (discussing this legislative requirement).
on prosecutors” that disciplinary uncertainty “has created,” to the detriment of “legitimate investigative activities.” She explained that a uniform regulation was necessary to “eliminat[e] the uncertainty and confusion arising from the variety of interpretations of state rules.”

Three cases primarily drove three different Attorneys General from both parties to promulgate a preemptive federal contacts rule: United States v. Hammad, United States v. Ferrara, and United States v. Lopez. The Hammad decision germinated the idea of a federal contacts policy, but was subsequently limited to its unusual facts by court amendment and did not lead to any bar charges against a prosecutor. The Ferrara case is a referral of bar charges against a federal prosecutor employed in Washington D.C. to New Mexico, his home jurisdiction. The case raises the question whether contacts initiated by a defendant and authorized by superiors can serve as a basis for personal discipline of the contacting attorney; the matter is still pending.

But while Hammad was amended and Ferrara was dismissed without substantive decision, Lopez ordered full dismissal of a significant narcotics indictment and resulted in state bar proceedings against a federal prosecutor. Thus, neither Hammad nor Ferrara had quite the visceral effect on federal prosecutors that the Lopez decision had. If there is any single case that dispassionately explains the need for a preemptive federal contacts rule, it is Lopez. The extreme interpretation of the no-contacts rule by the district court in Lopez, not fully reversed until over two years later, and the chilling and unfair personal consequences that the district court’s decision had on the federal prosecutor involved, impelled the Attorney General to seek some uniform security for her troops across the nation. A somewhat detailed

70. Id.
71. Specifically Richard Thornburgh, William Barr, and Janet Reno.
75. See supra note 25 (describing Hammad's subsequent history).
76. See Ferrara, 54 F.3d at 826-827.
77. Although the Ninth Circuit initially vacated the district court’s opinion in May 1993, its opinion contained damaging, and clearly erroneous, factual statements about the federal prosecutor’s personal behavior. Thus the Solicitor General took the unusual step of authorizing a rehearing en banc petition. It was not until the panel amended its erroneous statements about the prosecutor in September 1993 that the Department was able to live with the opinion; by that time both Attorneys General Barr and Reno had published proposed versions of the preemptive contacts regulation.
presentation of *Lopez* is helpful to understand the extreme and apolitical nature of the problem.\textsuperscript{78}

Jose Lopez had been indicted in December 1989 for his role in a large-scale cocaine and heroin distribution conspiracy, and was facing at least a statutory ten-year mandatory minimum sentence.\textsuperscript{79} Although represented by a lawyer, Lopez indicated to the attorney for his codefendant that he wished to explore a plea bargain with the prosecutor, as the only way to avoid the mandatory ten-year sentence and possibly to obtain an immediate release on bail pending trial.\textsuperscript{80} The codefendant’s attorney in whom Lopez confided conveyed Lopez’s desire to discuss plea possibilities to the assigned federal prosecutor; this defense lawyer also indicated that Lopez had told him that he, Lopez, did not want his own lawyer to know about any such discussion.\textsuperscript{81}

\textsuperscript{78} In the interest of full disclosure the author must note that he was Chief of the U.S. Attorney’s Appellate Section in San Francisco during the pendency of *Lopez*, and was a member of the legal team representing the government’s position, as well as the interests of the individual prosecutor involved, on appeal.

\textsuperscript{79} 21 U.S.C. § 841(b) (1994) provides that at least a ten-year imprisonment sentence must be imposed on persons convicted of violations involving over five kilograms of cocaine. Lopez’s recommended sentence under the sentencing guidelines likely would have been in excess of ten years. But the statutory mandatory minimum is most significant, because only a government motion reciting “substantial assistance” by the defendant to the government’s prosecution efforts can result in a sentence lower than a required mandatory minimum. See 18 U.S.C. § 3553(e) (1994). The intent of this provision, and one of its very real effects, is to compel defendants with helpful information to plea bargain with the government at an early stage of the proceedings. Other aspects of the mandatory minimum penalty structure render it highly controversial. See generally Hon. William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. Cal. L. Rev. 405 (1992) (disclosing research finding about sentencing disparities under the mandatory minimum sentencing laws); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan. L. Rev. 1283, 1286-89 (1995) (discussing mandatory minimum sentencing for offenses involving crack cocaine and the disparate impact of penalties on black defendants).

\textsuperscript{80} The Federal Bail Reform Act, 18 U.S.C. § 3142(e) (1994), states a rebuttable presumption that narcotics traffickers should be detained pre-trial. Lopez was not likely to be released unless he could strike a cooperation deal with the government. See United States v. Lopez, 765 F. Supp. 1433, 1439-40 (N.D. Cal. 1991), vacated and remanded, 989 F.2d 1032 (9th Cir. 1993), superseded, 4 F.3d 1455 (9th Cir. 1993), appeals docketed, No. 95-10366 and No. 95-10394 (filed Aug. 18, 1995 and Sept. 1, 1995).

\textsuperscript{81} The co-defendant’s lawyer later testified that this was because Lopez “feared that [his lawyer] . . . would resign,” *Lopez*, 4 F.3d at 1457, because Lopez understood that his lawyer had a policy of not representing any criminal defendant who wanted to cooperate with the government. *Lopez*, 765 F. Supp. at 1438-39. The co-defendant’s lawyer did not say this to the prosecutor, however, and the prosecutor assumed that Lopez did not want his lawyer to know about possible cooperation because that lawyer was being paid by others higher up in the drug ring, a common problem in narcotics conspiracy cases. *Lopez*, 4 F.3d at 1457. This was not an unreasonable assumption, in light of investigative information the prosecutor possessed that Lopez’s family had been threatened. See Brief for the United States at 6, United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993) (No. 91-10274) (filed with the Ninth Circuit on Oct. 25, 1991) [hereinafter *Lopez* Brief] (on file with author).
Fully recognizing that some version of the contacts rule could apply to such a meeting, the federal prosecutor refused to speak with Lopez, unless and until a judicial officer authorized him to do so. The prosecutor therefore referred the matter to the assigned district judge, who referred it to a magistrate judge for action. The magistrate then conducted a lengthy interview of Lopez personally, on the record and with the prosecutor excluded.82 The magistrate, a former federal public defender, gave Lopez stern and repeated warnings about the dangers of any unrepresented discussion with the prosecutor.83 Nevertheless, "Lopez insisted on going forward with the meeting" without his attorney (counsel for Lopez's codefendant did attend).84 In the face of such fully-informed insistence, the magistrate found that Lopez was voluntarily waiving his right to counsel and authorized the meeting.85

One would have thought that such judicial authorization, based on an unequivocal, insistent record of the defendant's expressed initiation and desire, would fully comply with any possibly applicable no-contacts rule, since there is a constitutional right to criminal self-representation86 and virtually all contacts rules permit direct communications with a represented party if "authorized by law."87 In addition, such a contact was authorized by Department of Justice authorities.88 Indeed, the prosecutor had gone well beyond the Department of Justice requirements by informing two judicial officers and receiving written judicial authorization. The Ninth Circuit agreed when it reversed the district court some two years later, holding that "contact with a represented party could be excepted from [the no-contacts rule] by court order."89

But the Ninth Circuit's reversal was too little, too late. In 1990, when Lopez's attorney learned that his client had met with the prosecutor, he withdrew unilaterally and made a complaint to state discipli-

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82. Lopez brief, supra note 81, at 7.
84. Lopez, 4 F.3d at 1457; see Lopez, 765 F. Supp. at 1442-43.
85. Lopez, 4 F.3d at 1457; Lopez, 765 F. Supp. at 1442. There is no constitutional problem with such an initiated waiver by a defendant in custody. Moreover, there is a strong counter-balancing constitutional right of self-representation under Faretta v. California, 422 U.S. 806 (1975), which is undoubtedly at odds with any reading of Rule 4.2 that would prohibit a defendant's waiver. An entirely prohibitory reading is likely unconstitutional, and should be avoided.
86. Faretta, 422 U.S. at 812.
87. Cramton & Udell, supra note 14 at 351-52; see Model Rules, supra note 23, Rule 4.2; Ariz. R. Prof. Conduct ER 4.2; Cal. R. Prof. Conduct 2-100 (C)(3) (West 1996). Only Florida has eliminated the "authorized by law" exception, although the comment to its rule still confusingly retains a reference to the concept. See Fla. R. Prof. Conduct 4-4.2 & cmt. (West 1996).
89. 4 F.3d at 1461.
nary authorities about the federal prosecutor.\textsuperscript{90} Those proceedings had been held in abeyance while the court case was pending and they were resolved in favor of the prosecutor only in July 1996.\textsuperscript{91} The personal toll that unresolved disciplinary charges have on any lawyer is significant, and these hovered over the Lopez prosecutor for over half a decade.\textsuperscript{92} Moreover, the district judge completely dismissed the indictment against Lopez, an unfathomable windfall to the criminal defendant, whose rights had been scrupulously observed by all government actors (judges as well as prosecutors) involved.\textsuperscript{93}

Not only did the Ninth Circuit's reversal of this extreme opinion come too late, but it also came grudgingly at best.\textsuperscript{94} In the meantime,

\textsuperscript{90} United States v. Lopez, 765 F. Supp. 1433, 1462 n.49 (S.D. Cal. 1991), vacated and remanded, 989 F.2d 1032 (9th Cir.), superseded, 4 F.3d 1455 (9th Cir. 1993), appeals docketed, No. 95-10366 and No. 95-10394 (filed Aug. 18, 1995 and Sept. 1, 1995).

This complaint was made in Arizona, where the prosecutor (a former Chief of the U.S. Attorney's criminal division in Phoenix) is a member of the bar. The propriety of filing this complaint is highly debatable, even if regrettably consistent with an increasing tendency to use personalized ethical charges as strategic weaponry. Indeed, even the critical district judge in Lopez noted, while dismissing the indictment against Lopez, that because the federal prosecutor had followed Department of Justice policy, "referral [of the prosecutor] to the state bar for disciplinary proceedings would be unfair." \textit{Id.}\textsuperscript{91} at 1462.

91. Order of Dismissal, \textit{In re Member of the State Bar of Arizona, No. 90-1922} (July 23, 1996) (on file with author). In the interim, defendant Lopez was tried, convicted, and sentenced to over 11 years (135 months) imprisonment. Lopez is currently appealing that sentence, but the government is cross-appealing because of the same district judge's unfounded critical remarks in support of a downward departure. Lopez Brief, \textit{supra} note 81, at 17-18.

92. The toll is psychological, as well as monetary if the prosecutor must retain counsel or pay any costs at all associated with the charges, such as simple long-distance telephone charges to keep track of events hundreds of miles away.

93. The final cruel irony is that Lopez's lawyer's decision to block Lopez's potential cooperation effectively sent Lopez to jail for the very mandatory imprisonment term that he might have avoided by contacting the prosecutor. \textit{See supra} note 91. Thus the Ninth Circuit had no kind words for Lopez's original lawyer; two judges wrote separately to condemn the ethics of that attorney's apparent policy of refusing to pursue cooperation with the government even when it represents the only possible relief for a client facing a lengthy mandatory imprisonment sentence. Lopez, 4 F.3d at 1464-65 (Fletcher, J., concurring, joined by T. Nelson, J.).

94. \textit{See Lopez}, 4 F.3d at 1463-64. Although the Ninth Circuit panel's initial opinion in March 1993 reversed the sanction of dismissal, it was hostile in tone and left in place the district judge's completely unsupported personal accusation of misleading conduct against the individual federal prosecutor. \textit{See Lopez}, 989 F.2d at 1041. The Solicitor General authorized a petition for rehearing with a suggestion of rehearing en banc. In response to the government's demonstration that there was absolutely no record evidence to support any accusation of misconduct against the prosecutor and the serious suggestion that an en banc court should review the panel's opinion, the panel amended its earlier opinion to remove the language offensive to the individual prosecutor. \textit{Compare Lopez}, 4 F.3d at 1462 ("the finding is not sustainable" based on the record) with Lopez 989 F.2d at 1041 (accepting the district court finding). However, this did not occur until September 1993, and the erroneous prior opinion damaging to the prosecutor was printed in the hardbound Federal Reporter volume. That initial opinion continues to be erroneously cited by researchers. \textit{See} Lyn M. Morton, Note, \textit{Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismis-
the district court's Lopez decision was widely publicized, and its damage to the Department of Justice's—and the public's—substantive interest in criminal law enforcement, as well as to the personal interests of its prosecutors, drove demand for a rational and uniform contacts rule to a fever pitch. If the various state contacts rules could be interpreted and applied so unpredictably and broadly that strong cases could be dismissed and honest prosecutors threatened with discipline, federal intervention appeared essential. Politics were put aside: no Attorney General could idly sit by and watch a case like Lopez wreak havoc with valid federal, as well as human, interests.95

C. The Preemptive Contacts Regulation, 28 C.F.R. § 77

In July 1993, the new Attorney General96 was confronted with the strategic manipulation of ethical rules against federal prosecutors, in contexts where the rules plainly appeared to be wrongly interpreted, in order to achieve substantive litigation goals.97 The lack of uniformity in ethical precepts for a national attorney work force was unsettling and showed no signs of dissipating. Damage to the public's interests in effective law enforcement, as well as to the morale of federal prosecutors, seemed clear. Issuing a national and substantively acceptable rule to govern all federal prosecutors, and providing that a single disciplinary body would interpret the rule,98 would provide the

95. Lopez is not over even now. Although the Ninth Circuit directed that on remand, "resolution of [evidentiary] conflicts would be essential" before imposing any sanction for the government's actions in the case, Lopez, 4 F.3d at 1462, the district court granted a downward sentencing departure for Lopez on the basis of alleged "government misconduct" but without conducting any hearing to resolve the evidentiary conflicts. See Lopez Brief, supra note 81, at 32-35. Such unsubstantiated statements continue to besmirch an experienced and honest prosecutor, and the government has filed an appeal from the sentencing judgment. Id.


97. See generally Bowman, supra note 23 (explaining how ethical rules conflicted with long-standing principles of federal criminal law). In issuing its Model Rules, the ABA has strongly advised against such tactical use of ethical provisions: "The Rules are designed to provide guidance . . . [T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Model Rules, supra note 23, Scope at 8.

98. Contacts Rule, supra note 10, § 77.11. Under the final regulation, the Attorney General has "exclusive authority" to interpret and apply the regulation to specific factual contexts. Id. Only when the Attorney General determines that a federal prosecutor's violation of her regulation has been "willful" does the rule leave to state disciplinary authorities the decision of what discipline (in addition to any Departmental discipline) to impose on that attorney. Id. § 77.12.
uniformity necessary to getting on with the substantive job of federal criminal law enforcement.

In July 1993, Attorney General Reno reissued her predecessor's proposed rule for public comment. After significant responsive redrafting, she issued a revised proposed rule for further comment in March 1994, together with further proposed restrictions to be placed on federal prosecutorial contacts via the United States Attorney Manual. After a final evaluation of public comments and some further readjustment of the regulation's provisions, the result was 28 C.F.R. § 77, issued as a final rule in August 1994 after three separate comment periods spanning almost two years and two administrations.

Substantively, the final rule is at least as restrictive of federal prosecutors as the great bulk of ethical authority, outside of Lopez and Hammad. It expressly extends the contacts rule to the criminal setting; it prohibits almost all unrepresented post-charge contacts; it extends significant protections to represented "persons" rather than just "parties," including persons in the investigative stage of a criminal case; and it generally prohibits contacts with all "controlling individuals" employed by corporations represented by counsel. The six exceptions to the ban on contacts with represented persons are all consistent with, or more restrictive than, the great bulk of existing authority.

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100. See Communications with Represented Persons, 59 Fed. Reg. 10,086 (1994) (to be codified at 28 C.F.R. § 77) (proposed Mar. 3, 1994). Publication of proposed changes in the United States Attorneys Manual is not required by law and is quite unusual. It is a measure of Attorney General Reno's good faith that she chose to advise all interested parties of the content of these proposed internal rules, and sought their comments on these changes as well as on the substantive rule.


102. See, e.g., United States v. Balter, 91 F.3d 427, 435-36 (3d Cir. 1996) ("[W]ith the exception of the Second Circuit, every court of appeals . . . has held . . . that rules such as . . . Rule 4.2 do not apply to pre-indictment investigations."). As noted in the final publication notice, "this rule is not designed to diminish the ethical responsibilities of government attorneys," but rather only to clarify them and "provide a uniform rule." 59 Fed. Reg. at 39,913.


104. Contacts Rule, supra note 10, § 77.5.


106. See Contacts Rule, supra note 10, § 77.10.

107. See Contacts Rule, supra note 10, § 77.6; see also 59 Fed. Reg. at 39,919-22 (discussing comments received by the department in response to the proposed exceptions). Of course it is true that the regulation is less restrictive than the Hammad
The Attorney General’s regulatory structure also imposes significant departmental review over proposed contacts before such contacts occur, by requiring all federal prosecutors contemplating a contact first to obtain supervisory approval unless exigency precludes it. 108 Finally, the Attorney General promised “fully to enforce these rules and to issue appropriate and strong sanctions for any violation.”109 Such a warning carries great force among federal prosecutors, whose jobs depend upon a clean disciplinary record.110

The Attorney General’s intent to “completely preempt state or federal court regulation of ex parte contacts in law enforcement matters by government attorneys,” could not be more boldly stated.111 Yet perhaps because the “Reno rule” equals or exceeds most existing ethical authorities, perhaps because of careful Department of Justice oversight, or possibly for other reasons unknown, anticipated constitutional confrontations regarding the Attorney General’s authority to issue § 77 have not yet materialized.112 The prevailing, albeit uneasy, hiatus provides an opportunity to examine the question: can she do it at all?


109. 59 Fed. Reg. at 39,918. This enforcement promise extended to violations of U.S. attorney regulations, not merely to violations of the C.F.R.

110. There is absolutely no evidence that Attorney General Reno will not enforce her promise on the no-contacts regulations; any suggestion to the contrary is unsupported cynicism flowing from a prior time when there was no regulation, and the Department’s internal disciplinary office was relatively new. More significantly, no state has ever disciplined a federal prosecutor for violation of an ethical rule. Thus to suggest that Department of Justice monitoring will be less effective than “polic[ing] by an external source,” is entirely ahistorical. Lain, supra note 66, at 19, 21 (making such a suggestion).


112. Immediately after promulgation of the contacts regulation, a number of state authorities threatened to discipline federal prosecutors who violated state contacts rules, “proliferation of the proposed regulation notwithstanding.” Letter from Stanley G. Feldman, Chief Justice, Arizona Supreme Court, to Janet A. Napolitano, United States Attorney, District of Arizona (Aug. 26, 1994). Accord Resolution of the Ill. State Bar Assoc. (Nov. 18, 1994) (threatening enforcement of state rules notwithstanding 28 C.F.R. § 77); Letter from Joseph T. Walsh, Justice, Supreme Court of Delaware, to David C. Glebe, Delaware Disciplinary Counsel (Sept. 21, 1994) (warning that “federal prosecutors in Delaware relying on the Department’s new rule may be acting at their peril”).
II. The Attorney General's Preemptive Regulatory Authority

The issue of whether the Attorney General can "preempt" local ethical rules poses two questions: (1) can she preempt state rules? and (2) can she override local federal court rules? The inquiry assumes that the Attorney General would formally promulgate such regulations pursuant to the Administrative Procedure Act, which requires that notice of any proposed rule be published in the Federal Register and that the rules are subject to judicial review for "arbitrary or capricious" content.

The preemption of state rules requires congressional authorization and regulatory intention. Because the hypothetical issue assumes an express and unambiguous regulatory intention to preempt, the only question is whether Congress may, and has, authorized the Attorney General to act preemptively in the area of lawyer ethics rules. While the question is not entirely free from doubt, the general powers of the Attorney General are so broad and deep that an affirmative answer seems unavoidable. Moreover, since 1789 Congress has fully authorized the Attorney General to engage in rulemaking to govern "the conduct of [her] employees."

As for federal "local" court rules, their own authority over out-of-court lawyer conduct is so uncertain that, in a conflict with validly promulgated executive branch rules, they provide less than solid opposition. Of course, to speak of actual congressional "intent" in this area is specious, since Congress had not specifically expressed its intentions regarding the regulation of federal prosecutor ethics. Nevertheless, it is difficult to imagine that Congress would intend the statutory rulemaking power granted to local courts, which is limited to "their" business, to override nationally promulgated and approved regulations governing federal prosecutors, particularly when these regulations further the fair and effective enforcement of federal crimi-

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113. Such "local" federal court rules are adopted for use by a particular federal district or circuit court by authority of 28 U.S.C. § 2071 (1994), as opposed to uniform rules of national application promulgated by the U.S. Judicial Conference under the Rules Enabling Act, Pub. L. No. 100-702, 102 Stat. 4648-50 (codified at 28 U.S.C. §§ 2072-74) and approved by Congress. There are, as of now, no such national court rules addressing lawyer ethics. Because of the congressional submission requirement in § 2074, such national rules undoubtedly would pose a far more difficult issue if they were in conflict with an Attorney-General-promulgated set of ethical rules. An unadulterated separation of powers confrontation likely would be presented.


116. 5 U.S.C. § 301 (1994); see infra notes 137, 154-64 and accompanying text. A less formal promulgation, such as the "Thornburgh Memo," lacks preemptive power because congressional authorization cannot be said to embrace such a large, informal power.

nal law and are issued by the agency specifically concerned with that topic (i.e., the Department of Justice).

Two early cases, *In re Neagle* and *Boske v. Comingore*, provide interesting and strong support for the Attorney General's preemptory authority. They have not heretofore been analyzed for this debate; but old age often is accompanied by wisdom rather than outdatedness. Thus I discuss these cases at some length below.

**A. The Attorney General's Authority**

It is easy to forget, by assumed familiarity, the broad and historic grants of authority given by Congress to the Attorney General. A brief review is in order.

The Attorney General is a constitutionally anticipated Department Head, one of fourteen congressionally-designated heads of Executive branch departments. Unlike much of the President’s Cabinet, created well after 1789, the Attorney General’s authority virtually coincides with that of the Union: the Office of the Attorney General was authorized by the First Congress in September 1789, barely a month after the federal government was created. In this sense, the Attorney General’s authority is as fundamental to the government as are the Secretaries of Treasury or of State; she is an original cabinet-level figure in the Executive Branch.

Thus Congress has explicitly authorized the President to appoint, by and with the Senate’s advice and consent, “an Attorney General of the United States . . . [as] the head of the Department of Justice.”

The Department of Justice was established by Congress in 1870 as “an executive department of the United States.”

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118. 135 U.S. 1 (1890).
119. 177 U.S. 459 (1900).
120. See infra parts II.C.2, II.C.3.
123. See 1 Stat. 92-93 (1789).
124. Professor Susan Bloch has usefully noted that the 1789 Attorney General’s position was “much weaker than the position we know today,” and that the first Congress was relatively more concerned with the other three original cabinet offices of Secretary of War, Foreign Affairs, and Treasury. Bloch, supra note 61, at 567, 570-82. Much rich historical data is provided by Professor Bloch. Her conclusions, however, do not detract from those offered here: all executive branch offices are more powerful today than envisioned in 1789; and the Attorney General’s position as one of the original “Big Four” cannot be ignored as indicative of her deep historical stature.
125. 28 U.S.C. § 503 (1994). Interestingly an initial draft of the First Judiciary Act would have had the Attorney General appointed by the Supreme Court; and the bill as finally passed was simply silent as to who would appoint the Attorney General. See Bloch, supra note 61, at 567 n.24, 571 n.32.
The Attorney General's authority is constitutionally, as well as statutorily, derived. First, of course, the Constitution recognizes the status of Department Heads. More significantly, the Constitution directs the President to "take Care that the Laws be faithfully executed." The President in turn delegates this authority to the Attorney General. The Attorney General's authority to ensure that execution of federal criminal laws is "faithful" may carry with it some force over ethical regulation of her prosecutors.

In addition, Congress has long assigned broad and important duties to the Attorney General, collected in Chapter 31 of Title 28 in the United States Code. Among these duties is the supervision of all litigation to which the United States is a party; this encompasses civil as well as criminal litigation, whether prosecuted by Department of Justice litigators based in Washington D.C. or by the various United States Attorneys around the nation. Thus the Attorney General and her designees are authorized to "conduct any kind of legal proceeding . . . which United States attorneys are authorized by law to conduct," and Congress has provided that "the conduct of litigation in which the United States . . . is a party, or is interested, and securing evidence therefor, is reserved to . . . the Attorney General." Congress has directed that, in general, "the Attorney General shall supervise all litigation to which the United States . . . is a party, and shall direct all United States attorneys . . . in the discharge of their respec-

128. U.S. Const. art. II, § 3.
129. This is not an argument I have seen anywhere; it is the subject of an article on which I am currently working. The idea is that "faithfully" carries with it some connotation of good ethics, as well as "loyalty" to congressional directives. Leading discussions of the President's "faithful execution" obligations do not address this question. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 582-85 (1994) (arguing that the hierarchical structure of Article II is confirmed by the Take Care Clause); Arthur S. Miller, The President and Faithful Execution of the Laws, 40 Vand. L. Rev. 389 (1987) (addressing the Faithful Execution provision in the contexts of (1) presidential power when the Constitution is silent; (2) the presidency and statutory mandates; (3) the president's constitutional duty to enforce Supreme Court decrees; and (4) the President and international law).
130. See 28 U.S.C. § 519 (1994) ("[T]he Attorney General shall supervise all litigation . . . and shall direct all United States attorneys [and] assistant United States Attorneys."); see also 28 U.S.C. § 547 (1994) ("[U.S. Attorneys] shall (1) prosecute for all offenses against the United States"). Centralized supervisory authority has not always been the case; until 1870 when the Department of Justice was created, the federal "District Attorneys" were "not responsible to the Attorney General." Clayton, supra note 61, at 16; see generally John G. Heinberg, Centralization in Federal Prosecutions, 15 Mo. L. Rev. 244 (1950) (discussing the development of centralized supervisory authority).
132. Id. § 516 (1994) (emphasis added).
tive duties."  

Moreover, Congress has granted broad investigative authority to the Attorney General and her designees. The power to secure evidence for federal litigation necessarily envisions effective investigation, including undercover work. And it is by Congress's direction that the Attorney General appoints the Director of the Federal Bureau of Investigation and other "officials . . . to detect and prosecute crimes."  

In furtherance of these duties, Congress has granted the Attorney General plenary rulemaking authority—the same authority granted to all the Executive Department heads. She is expressly authorized to "prescribe regulations for the government of her department, the conduct of its employees, [and] the distribution and performance of its business."  

The force of all these provisions is, generally, that the Attorney General is authorized to regulate the litigation and investigatory conduct of federal prosecutors and investigators. If the Attorney General were to promulgate uniform, preemptive, rules of ethical conduct for her attorneys, she would necessarily act pursuant to this broad authorization to regulate the "conduct of [Department of Justice] employees [and] the . . . performance of its business," as described by Congress in the Title 28 provisions: the detection, investigation, and litigation of criminal and civil cases in the federal courts.  

The question is not, however, whether the Attorney General may issue an ethical code for her prosecutors, but rather whether she may make it exclusive—that is, whether she has authority to "preempt" local regulations that address the same subjects. Because no statute expressly so provides, this question necessarily becomes whether the Attorney General's various statutory authorizations carry implied preemptive authority over the ethical regulation of federal prosecutors.

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133. Id. § 519 (1994).
134. Id.
135. See, e.g., Hoffa v. United States, 385 U.S. 293, 315 (1966) (Warren, C.J., dissenting) (agreeing with majority that "[t]here are some situations where the law could not adequately be enforced without" undercover investigative activity); Lewis v. United States, 385 U.S. 206, 208 (1966) (noting "the necessity for some undercover police activity"); Sorrells v. United States, 287 U.S. 435, 441 (1932) (holding that undercover work is "frequently essential to the enforcement of the law").
139. It is only the preemptive assertion of such regulations that is new; the Attorney General has of course long employed internal, written conduct rules governing federal prosecutors. See U.S. Dep't of Justice, The United States Attorney's Manual (1995) [hereinafter USAM].
B. General Preemption Doctrine

"The question whether federal law preempts state action," says Professor Tribe in a *tour de force* of understatement, "cannot be reduced to general formulas."140 Some general principles exist, but the results of their application to specific scenarios are far from predictable or uniform. As one respected text notes, all but the obvious cases "present sui generis problems whose resolutions depend largely on widely variant considerations."141 If all law is to some extent result-driven, preemption law strongly contends for the position of first among equals.142

Moreover, rather than being a solidly collected body of law, the law of preemption occupies the interstices of various well-established subject areas, such as constitutional law, administrative law, and federal courts. No one authoritative source exists, necessitating a brief essay on preemption here.

1. General Preemption Principles

What general principles are settled and relevant? First, as Chief Justice Marshall made clear early on, federal lawmakers "is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."143 This of course flows from the Constitution’s Supremacy Clause, which provides that: "the Laws of the United States . . . shall be the supreme Law of the land . . . , and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."144

Thus, when a congressional intention to preempt conflicting state laws is expressly stated, preemption is undeniable, so long as Congress itself acts within constitutional limits.145

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140. Lawrence H. Tribe, American Constitutional Law 479 (2d ed. 1988); see Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
141. William B. Lockhart et al., Constitutional Law 287 (7th ed. 1991); see also Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1008 (1995) ("The proper scope of federal authority [with regard to the States] has been in dispute since the Framing . . . .")
144. U.S. Const., art. VI. The supremacy of federal laws over state law was perhaps the premier distinction of the Constitution, as compared to the prior Articles of Confederation which left the federal union ineffective as against the states. *See* Jesse H. Choper, *The Scope of National Power Vis-B-vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552, 1555-56 (1977).
Federal preemption need not be accomplished by express statement to be effective, however. The second relevant principle of implied preemption is equally powerful.\textsuperscript{146} Even if a congressional intent to preempt is not expressly stated, preemption will be found where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,"\textsuperscript{147} or where a state law "stands as an obstacle to the accomplishment and execution of the full [federal] purposes and objectives."\textsuperscript{148} An Attorney General who expressly states an intention to preempt state ethical rules nevertheless relies on a concept of \textit{implied} preemption: no congressional statute expressly authorizes such preemption, and the Attorney General must assert some claim that state ethical rules "stand as an obstacle" to her faithful execution of federal criminal laws.\textsuperscript{149}

The third relevant preemption principle is that "state laws can be pre-empted by federal regulations as well as by federal statutes," as the Supreme Court has "held repeatedly."\textsuperscript{150} Moreover, when a Department Head's validly promulgated regulations\textsuperscript{151} express a preemptive intent, the subsequent inquiry is said to be a "limited" review of congressional authorization:\textsuperscript{152}

If [the Secretary's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by

\textsuperscript{146} Rath Packing, 430 U.S. at 525-26. In fact, the only difficult preemption cases arise where federal preemption is asserted by implication. Lockhart, supra note 141, at 287; see Tribe, supra note 140, at 501 (describing express preemption cases as relatively "simple"). Indeed, one leading scholar has \textit{defined} the term "federal preemption" as referring only to those instances where "federal law overrides state laws... even though Congress has not expressed its intent with clarity." Ronald D. Rotunda, \textit{Sheathing the Sword of Federal Preemption}, 5 Const. Commentary 311. 311 (1988).

\textsuperscript{147} Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

\textsuperscript{148} Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

\textsuperscript{149} Were the hypothecated full ethical code promulgated by the Attorney General, we may assume that she would expressly state an intention that it preempt local authorities (as she has done with regard to the discrete contacts regulation). But such an express statement by a Department Head, as opposed to one by Congress, is not sufficient in itself to establish preemption. The difference is the basic constitutional distinction between Legislative and Executive federal powers. A regulation must be valid federal law to preempt, and a regulator's bare pronouncement is not law unless it falls within authority granted by Congress. Even if a regulator's express intention is to preempt, the question remains whether such a result is within the regulator's statutory grant of power from Congress. If it is not, then even the most vigorous express regulatory statement of preemption is impotent.

\textsuperscript{150} Hillsborough County v. Automated Medical Labs., 471 U.S. 707, 713 (1985) (citing cases).

\textsuperscript{151} It is a fundamental preliminary requirement that federal regulations must first be validly promulgated under the relevant section of the Administrative Procedure Act, 5 U.S.C. § 553 (1994), before they can be given preemptive effect, because procedurally invalid regulations are of no effect. 5 U.S.C. § 552(a)(1) (1994); see United States v. Allegheny-Ludlum Steel, 406 U.S. 742, 758 (1972).

\textsuperscript{152} Fidelity Fed. Savings & Loan v. De la Cuesta, 458 U.S. 141, 153-54 (1982).
the statute, we should not disturb it unless it appears . . . that the accommodation is not one that Congress would have sanctioned.\textsuperscript{153}

\section*{2. \textit{Boske v. Comingore}}

Perhaps the earliest expression of such federal regulatory preemption analysis occurred in \textit{Boske v. Comingore}.\textsuperscript{154} While not involving the Attorney General, \textit{Boske} did involve one of the same grants of regulatory authority that the Attorney General invokes today: 5 U.S.C. \S 301. Moreover, the result in \textit{Boske} was that a federal regulation preempted the exercise of state judicial authority,\textsuperscript{155} the same authority that underlies state bar discipline. Thus, although \textit{Boske} has not heretofore been relied upon by proponents of the Attorney General's ethical rulemaking authority, its teachings seem quite relevant to the current debate.

In \textit{Boske}, a federal Internal Revenue Collector refused to provide federal tax records in response to a Kentucky state court's order, relying on a Treasury Department \textit{regulation} which forbade him to divulge such records to any party.\textsuperscript{156} Ordered into custody by the state judge for contempt, the IRS collector sought a federal writ of habeas corpus and was ordered released by the local U.S. District Court because his imprisonment was "in violation of the . . . laws of the United States."\textsuperscript{157}

On the State's appeal to the Supreme Court, Justice Harlan broadly affirmed for a unanimous court: "If these regulations were such as the Secretary could legally prescribe, then . . . the state authorities were without jurisdiction . . ."\textsuperscript{158} In effect, the state court was preempted. Noting that "'[t]he Secretary was authorized by statute to make regulations . . . for the custody, use and preservation of . . . records," the court found that his absolute regulatory ban on divulgence of records

\footnotesize{\textsuperscript{153.} United States v. Shimer, 367 U.S. 374, 383 (1961). In Shimer, as in virtually all such cases of regulatory preemption, there was a broadly stated policy in a congressional statute, but an executive department head decided on a particularly strong interpretation of those policies that preempted state law, where the statute easily could have been read otherwise. Id. at 381-83. The same is so here, because the Attorney General seeks, and needs, no deference as to whether a general \textit{policy} of effective federal law enforcement has been congressionally authorized. She has merely interpreted that general congressional purpose in a specifically preemptive manner. See Fred C. Zacharias, \textit{Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response To Little}, 65 Fordham L. Rev. 429, 434-35 (1996) [hereinafter Zacharias, \textit{Who Can Best Regulate}].}

\footnotesize{\textsuperscript{154.} 177 U.S. 459 (1900).}

\footnotesize{\textsuperscript{155.} Id. at 470.}

\footnotesize{\textsuperscript{156.} Id. at 462-63.}

\footnotesize{\textsuperscript{157.} Id. at 467 (emphasis added).}

\footnotesize{\textsuperscript{158.} Id. at 467.}
was valid.\textsuperscript{159} The statute referred to was the general regulatory grant for all department heads, now § 301.\textsuperscript{160}

It is important to note that § 301 plainly did not require a regulation that forbade providing documents pursuant to a state court's subpoena. Yet such was the force that the Secretary asserted for his regulation in \textit{Boske}.\textsuperscript{161} Responding to the State's argument that such a broad claim and regulation exceeded the statute's authority, Justice Harlan's words ring loudly in today's debate. He explained that even though "[t]he regulations in question may not have been absolutely or indispensably necessary to accomplish the objects indicated by the statute . . . [T]hat is not the test to be applied."\textsuperscript{162} Rather, "[w]here the law . . . is really calculated to effect any of the objects entrusted to the Government," then "to inquire into the degree of its necessity would be to . . . tread on legislative ground."\textsuperscript{163} Justice Harlan concluded with a strong endorsement of deference to federal regulations that are preemptive:

Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.\textsuperscript{164}

Because the statute that authorized the Treasury Secretary to regulate in \textit{Boske} is, for purposes of employee conduct regulations, one of the same statutes that authorizes the Attorney General to regulate today, Justice Harlan's deferential test cannot be ignored.\textsuperscript{165}

\textsuperscript{159} Id. at 467-68.

\textsuperscript{160} At the time, § 301 provided that department heads were authorized "to prescribe regulations, not inconsistent with law, for . . . the custody, use, and preservation of the [Department's] records, papers and property." 5 U.S.C. § 301 (1900). Not until 1958 did Congress amend the statute to provide that: "This section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301 (1994). It is this amendment that generated the Supreme Court's decision in \textit{Chrysler Corp. v. Brown}, 441 U.S. 281, 311-12 (1979). \textit{See infra} note 253.

\textsuperscript{161} \textit{Boske}, 177 U.S. at 469-70. The statute merely authorized regulations to govern the "custody, use, and preservation" of agency records. 5 U.S.C. § 301. It did not require their nondisclosure, particularly not to a valid state court request.

\textsuperscript{162} \textit{Boske}, 177 U.S. at 468.

\textsuperscript{163} Id. at 468 (emphasis added). The Court cited no less authority than \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat) 316 (1819), for this statement.

\textsuperscript{164} \textit{Boske}, 177 U.S. at 470 (emphasis added).

\textsuperscript{165} Indeed, \textit{Boske}'s language was simply a precursor for the now well-established "\textit{Chevron}" deference due to executive agency interpretations of generalized statutory authority. \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837, 842-45 (1984); \textit{see Babbitt v. Sweet Home Chapter}, 115 S. Ct. 2407, 2416 (1995); \textit{cf. Lain, supra} note 66, at 28 (asserting that \textit{Chevron} established a "new" deferential approach).
3. The States' Historic Role Is Not Irrelevant, But Neither Is It Dispositive

Counterpoised to the foregoing three preemption principles, however, is a presumptive weight against preemption when a federal authority acts "in a field which the States have traditionally occupied." In such a context, analysis must "start with the assumption that the historic police powers of the States [are] not to be superseded." This presumption applies, of course, only where a congressional intent to preempt is not express. Moreover, this presumption is far from "an absolute bar" to preemption. To the contrary, the Supreme Court has stated unabashedly that "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers . . . provided that the federal law must prevail."

For example, even in the family law arena, where the federal courts have long abstained from interfering because it is an historic area of state concern, state law may be, and has been, "overridden" where it "sufficiently injure[s] the objectives of the federal program." Significantly, at least one of the Supreme Court's family law cases recognized the preemptive force of regulations in this area of traditional state concern. In *Ridgway* the court stated the same burden as Justice Harlan noted in *Boske*: "There has been no suggestion that [the] regulations are unreasonable, unauthorized, or inconsistent with the [statute]." Absent a challenger's demonstration of such circumstances, the regulation was valid.

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167. *Id.*
168. *Id.* (noting that such is the presumption "unless [preemption] was the clear and manifest purpose of Congress," in which case the Supremacy Clause plainly controls).
173. *Id.* at 57; *see also McCarty*, 453 U.S. at 236-37 (Rehnquist, J., dissenting) (arguing that no preemption of state community property law could be inferred because no federal statute positively required it by direct enactment). The *McCarty* majority plainly rejected this dissenting view. *Id.* at 210.
174. Corinna Lain, a third-year law student, has rested an argument against the Attorney General's preemptive contacts regulation on a purported general "presumption against preemption." *Lain, supra* note 66, at 24, 25. Her argument, however, conflates the burden on a proponent to demonstrate that the regulation at issue is within the general "ends" of Congress's purpose, *see Boske v. Comingo*, 177 U.S. 459, 470 (1900), with the burden on a challenger to demonstrate inappropriate means once the ends of Congress are established. *See Lain, supra* note 66, at 25 & n.155. Undoubtedly the Supreme Court has demonstrated shifting analysis in specific pre-emption cases. *See supra* notes 140-43 and accompanying text. But no case states an
Nevertheless, where a federal executive officer states an express intention to preempt in furtherance of more general statutory authority, the analysis is one step removed from express congressional preemptive intent. That step is the significant one of determining congressional authorization. Historic state regulation cannot be overcome simply by federal regulatory assertions of preemption. Where the Attorney General’s regulation of federal prosecutorial ethics is concerned, it is necessary to measure the likelihood of implied congressional authorization for federal regulatory preemption, against the force of the states’ historic role of regulation in the area.

C. The Attorney General’s Power to Preempt State Ethical Codes

Imagine a world that provided the Attorney General with good reason to believe that national ethical uniformity for her prosecutors was necessary in order to achieve the law enforcement objectives that the Constitution and Congress has set for the Department of Justice. Such a world is in fact close at hand. From the near national acceptance of the ABA’s Model Code of Professional Responsibility only twenty-five years ago, the ethical regulation of attorneys has become “balkanized” with substantive differences among various states codes now more the norm than the exception. Various federal district courts have added to this “disuniformity” by adopting as “local” rules various amalgamations of ethical codes. As Daniel Coquillette has noted, “[n]o area of local [federal district court] rulemaking has been more fragmented than local rules governing attorney conduct.”

The Department of Justice prosecutor who has cases in various districts, or the Assistant U.S. Attorney who belongs to the bar of a state different from that in which he practices, or any federal prosecutor unbending “presumption against preemption” in all cases. Rather, preemption is analyzed neutrally and contextually in an effort to honestly discern congressional purposes as well as subsequent regulatory compatibility with those purposes.

175. Professor Zacharias has noted that while “[f]orty-nine states adopted the [ABA’s 1969] Model Code, with virtually no changes... [m]any jurisdictions rejected the [ABA’s 1983] Model Rules” and “[o]thers adopted idiosyncratic mixtures.” Zacharias, Federalizing Legal Ethics, supra note 65, at 339.

176. See id. at 340 & n.24 (citing Stephen B. Burbank, State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform, 19 Fordham Urb. L.J. 969, 969-72 (1992)); see also Rand v. Monsanto Co., 926 F.2d 596, app. at 601-03 (7th Cir. 1991) (demonstrating the dissimilarity between federal district courts in their adoption of various ethical codes and rules).

177. Memorandum from Daniel Coquillette, Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Local Rules Regulating Attorney Conduct In the Federal Courts (July 5, 1995) at 1. Having been “directed to prepare a study of all federal local rules governing attorney conduct,” Professor Coquillette identified “seven fundamentally different approaches” among the 94 districts. Id. “[W]ithin these ‘groups’ there are great variations.” Id. Finally, the Federal Circuit courts have adopted non-uniform and “independent conduct codes” of their own. See Linda S. Mullenix, Multiforum Federal Practice: Ethics and Erie, 9 Geo. J. Legal Ethics 89, 101 (1995).
who operates in a district that applies inconsistent or vague norms,\(^\text{178}\) all face serious problems that obviously could chill effective \textit{and generally permissible} law enforcement techniques.\(^\text{179}\) Thus the Deputy Attorney General\(^\text{180}\) has realistically noted that although "the department [of Justice] does not assert that its attorneys are exempt from state ethics rules . . . there are 50 different sets of state ethics rules, subjecting department attorneys to conflicting requirements."\(^\text{181}\)

In the face of such uncertainty and inconsistency, it simply cannot be ignored that even for federal prosecutors, "[a] lawyer's ability to practice law is more than a matter of honor, it is a livelihood."\(^\text{182}\) Federal prosecutors as a group are no less apt to protect their personal licenses to practice than anyone else. The chilling effect of ethical disarray on federal law enforcement efforts thus seems undeniable. The reality of such a situation regarding a single rule was in fact what the Attorney General confronted when she issued her final contacts regulation in late 1994. As the Deputy Attorney General then explained: "Without a uniform federal rule, prosecutors would inevitably reduce their participation in the investigative phase of law enforcement, leading to a loss in the effectiveness of criminal law enforcement . . . ."\(^\text{183}\)

A vital point underlying the argument for validity of such a preemptive regulation is that "the effectiveness of criminal law enforcement" is a central, express, and intended purpose of the authorizations granted by Congress to the Attorney General.

The 1994 regulation addressed only one narrow aspect of ethics. But in light of the dramatic overall "disuniformity" increasingly confronting federal prosecutors in applicable ethical codes, it would not be irrational for an Attorney General to conclude that a complete and uniform ethical code for federal prosecutors would further the pursuit of her department's statutory duties, while nonuniform state and local

\(^{178}\) For example, Professor Coquillette identifies two federal districts in California whose local rules state that they will apply both the 1992 California Rules of Professional Conduct and one of the ABA models—but these sets of rules are quite divergent. Coquillette, \textit{supra} note 177, at 4-5. He also identifies some federal districts that apply undefined "standards of attorney conduct not included in any rule." \textit{Id.} at 15.

\(^{179}\) For example, an attorney practicing in the Northern District of California after Judge Patel's \textit{Lopez} decision would not be irrational in refraining from speaking with any represented defendant, despite the defendant's initiation, voluntary and adamant waiver, \textit{and} written judicial authorization, even though such communication would seem to be permitted by every jurisdiction in the nation. Indeed, even the qualifier, "would seem to be," in the preceding sentence reflects the uncertainty that pervades this area.

\(^{180}\) The Deputy Attorney General is a congressionally authorized position, and is second in command at the Department of Justice.

\(^{181}\) Jamie S. Gorelick, \textit{Within the Law}, Wash. Post, May 21, 1995, at C7; \textit{accord} Mullenix, \textit{supra} note 177, at 131 ("[O]ne is reminded of the old adage that no person can serve two masters. Nor can one serve three or four . . . .").

\(^{182}\) Coquillette, \textit{supra} note 177, at 19.

codes are obstructional. 184 If the Attorney General were reasonably to state such findings, and promulgate an ethical code for prosecutors in full compliance with Administrative Procedure Act “notice and comment” procedures, would such a preemptive code be lawful?185

States' claims to authority in the area of lawyer discipline are undeniable supported by historical tradition.186 Nevertheless, it is difficult to conclude neutrally that an Attorney General's national regulation of her prosecutors' ethics that is rationally related to the effective and fair enforcement of federal criminal laws would be invalid if it was in conflict with state codes.187 Without a doubt, regulations promulgated in compliance with the Administrative Procedure Act (“APA”)188 have the force and effect of federal law unless they are either “arbitrary and capricious” or beyond the implicit and explicit statutory authority of the issuing regulator.189

As for rationality, it simply cannot be maintained that an Attorney General's concern that multiple and conflicting local ethical rules can impede effective federal law enforcement is irrational, in light of cases

184. As Professor Coquillette has noted, “Certainly, the current disarray and the problematic application of rules governing attorney conduct in the federal courts should legitimately worry Congress.” Coquillette, supra note 177, at 37.

185. See 5 U.S.C. § 553(b) (1994) (notice and comment provisions). This hypothetical question assumes that Congress has issued no specific authorization for the Attorney General to so preempt. Proposed § 502, see supra notes 1-5 and accompanying text, would, of course, change this current reality. For if Congress were to so expressly authorize the Attorney General to promulgate preemptive ethical rules, it is difficult to imagine such a law lacking substantive preemptive validity. See Zacharias, Federalizing Legal Ethics, supra note 65, at 337 & nA. Even the recent revival of Commerce Clause limitations on congressional power in United States v. Lopez, 115 S. Ct. 1624 (1995), would not seem likely to apply to federal criminal law enforcement and its undoubtable effects on interstate commercial activity. See id. at 1630 (restricting congressional authority to activities that “substantially affect” interstate commerce). The case for validity seems even stronger in light of additional constitutional sources of authority for such legislation, such as Article I.

186. See, e.g., Leis v. Flynt, 439 U.S. 438, 442 (1979) (“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States . . . .”). Yet the Court's choice of words here is significant. The phrase “has been left exclusively to” plainly indicates that such regulation could, if necessary, become the object of federal regulation. The passive voice obscures the actor: it is Congress that has left this authority to the states, by non-action. It could assume, or delegate, these functions if it so desired.

187. The Conference of State Chief Justices apparently has so concluded. See Res. XII, Conference of Chief Justices (Aug. 4, 1994); Comment on Proposed Regulation, Special Comm. of the Conference of Chief Justices (March 31, 1994) [hereinafter Committee Report]. This group is composed of the chief justices of the highest court in each state, and as Professor Coquillette notes it “represents the interests of the state courts.” Coquillette, supra note 177, at 33. State courts could lose the power of promulgation as well as discipline over federal prosecutors, were a fully preemptive code of ethics to be accepted. But see infra notes 318-21 and accompanying text (suggesting that the Attorney General could preempt the promulgation function while leaving discipline with the states that desired to keep it). Thus, the state's interests in opposing federal preemption of their authority are neither neutral nor surprising.


like Lopez and Ferrara,\textsuperscript{190} and comprehensive studies like those of Dean Coquillette and Professor Mullenix.\textsuperscript{191} Confronted with federal regulations that are procedurally valid and rationally related to the important federal interest in effective criminal law enforcement, the legal argument against such preemptive Attorney General action must rest on the proposition that the Attorney General is insufficiently authorized by Congress to regulate in such a fashion.\textsuperscript{192}

Insufficient authorization is precisely what the Conference of State Chief Justices has argued in opposing the Attorney General's contacts regulation. In his report as Chair of the Conference's Special Committee on the issue, Delaware's Chief Justice Norman Veasy contends that a preemptive Attorney General ethical regulation cannot be valid because "[n]o Act of Congress" expressly authorizes such preemption.\textsuperscript{193} This assertion is apparently based on the historic and exclusive role that state courts have played in regulating the conduct of attorneys that they license and an implicit application of the presumption against preemption for traditionally localized areas.\textsuperscript{194} However, while the chief justices' concerns are certainly not without normative force, they lack support in the law of preemption.

First, the broad claim is made that "[t]o preempt state law, Congress must do so expressly."\textsuperscript{195} This is simply incorrect; "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law."\textsuperscript{196} Of course, specific preemptive language from Congress makes it easier, because it all but ends the


\textsuperscript{191} Coquillette, supra note 177; Mullenix, supra note 177, at 105 ("[T]he federal practitioner undoubtedly may sleep troubled in the knowledge that he or she has absolutely no way of knowing in advance what conduct standards apply . . . .").

\textsuperscript{192} This is indeed the substance of the arguments made by Professor Samuel Dash, Justice Department Contacts with Represented Persons: A Sensible Solution, 78 Judicature 137 (1994), and by the Conference of Chief Justices in their March and August 1994 resolutions against the Attorney General's proposed contacts regulation. See Committee Report, supra note 187. Yet as Judge Weinstein has noted in the contextually distinct field of class action litigation: "[T]o the extent the enforcement of a state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement." County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1415 (E.D.N.Y. 1989). The argument must be, therefore, that a preemptive ethical code promulgated by the Attorney General does not fall within existing "congressional ends."

\textsuperscript{193} Committee Report, supra note 187 at 23; accord Coquillette, supra note 177, at 29 ("The Conference of Chief Judges agreed that for a substantive regulation to have force and effect of law the regulation had to be rooted in a specific grant of power.").

\textsuperscript{194} Committee Report, supra note 187 at 12, 13; see supra notes 165-73 and accompanying text (discussing scope of federal preemption).


inquiry. Under the Constitution's Supremacy Clause, unless Congress acts unconstitutionally, a preemptive result is "compelled" where Congress expressly states such a purpose. But much federal preemption occurs in situations where preemptive intent is not express, but must be "inferred." Thus to note that Congress has not expressly authorized the Attorney General to preempt state ethical rules is only to begin the inquiry, not to end it.

The inferential inquiry into congressional purpose is, therefore, the meat of the debate; moreover, it is complex and multifaktored. A unanimous Supreme Court set out the following general guidance in 1985:

Under the Supremacy Clause, federal law may supersede state law in several different ways.... Pre-emption of a whole field also will be inferred where... "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Our hypothetical Attorney General seeks to preempt not all state regulation of attorneys, but only the states' regulation of federal prosecutors. Thus the Attorney General's claim would be of the latter character, partial implied preemption.

Under the doctrine of inferential preemption, the force of a conflict between state and federal law is not reduced by the fact that a preemptive intent is found by implication rather than by express statement. The Supremacy Clause uniformly requires preemption of any state law that conflicts with federal law. "This result is compelled whether Congress' command is explicitly stated in [a] statute's language or implicitly contained in its structure and purpose." Thus, if the "structure and purpose" of congressional authorizations to the Attorney General are frustrated by application of state ethical rules, then preemption is compelled despite the absence of any express congressional statement. Contrary assertions are rhetorical rather than reasoned.

The force of the implicit preemption doctrine must, however, quickly be tempered by noting that there is similarly no support for

197. Tribe, supra note 140, at 500, 505 n.23. The only inquiry left in such a case is whether Congress has legislated within its own constitutionally-delegated authority.
200. Id. (citations omitted) (emphasis added).
201. Rath Packing, 430 U.S. at 525.
the opposite broad assertion suggested in Attorney General Thornburgh’s infamous memorandum: that Congress has authorized federal preemption simply whenever state ethical rules “interfere” with a criminal investigation.\textsuperscript{202} Absent duly promulgated federal regulations, state bar rules must remain fully in force. This is because, although Congress has authorized the Attorney General and her agents “to detect and prosecute crimes,”\textsuperscript{203} this directive is not followed by an implied “without limitation.” To the contrary, it must be presumed that Congress intends for federal law enforcement to be conducted within the bounds of the Constitution and, moreover, conducted fairly even when the Constitution is silent on a point.\textsuperscript{204} A limitation of fairness can also be found, I would argue, in the Constitution’s directive that “Faithful” execution of the Laws be ensured.\textsuperscript{205} Such a presumption must, indeed, be the basis for Justice Sutherland’s famous aphorism.\textsuperscript{206}

Thus the present question is one of preemption, not exemption. The Attorney General cannot preempt without providing a fair substitute for existing state ethical rules. The question is not should federal prosecutors be subject to any ethical rules at all, but rather a significantly more limited inquiry: to which ethical rules should federal prosecutors be subject? Federal prosecutors cannot be exempted from state ethical rules simply whenever those rules impede federal law enforcement efforts. Until there is some specific, alternative federal law in existence with which local law conflicts, local law remains in force. There can be no preemption of state authority in this area without specific (and procedurally correct) rulemaking that provides a federal substitute. This too is basic regulatory preemption doctrine; broader assertions of federal preemption are ill-founded.\textsuperscript{207}

\textsuperscript{202} Thornburgh Memo, supra note 29; see United States v. Lopez, 765 F. Supp. 1433, 1447 (N.D. Cal. 1991) (critiquing the merits of the Thornburgh Memorandum), vacated and remanded, 989 F.2d 1032 (9th Cir.), superseded, 4 F.3d 1455 (9th Cir. 1993), appeals docketed, No. 95-10366 and No. 95-10394 (filed Aug. 18, 1995 and Sept. 1, 1995).


\textsuperscript{204} Indeed, it is Congress that proposed the Bill of Rights and enacted The Federal Rules of Criminal Procedure, both of which contain significant constraints on federal criminal investigation and prosecution. An implied legislative requirement of fairness, if it needs support, seems unmistakable.

\textsuperscript{205} See supra note 129 and accompanying text.

\textsuperscript{206} See supra note 13 and accompanying text. The Attorney General’s contacts regulation fully acknowledged state authority in this regard. She expressly did not seek to exempt federal prosecutors from all state ethics control: “The Department also recognizes that with respect to most matters, Department attorneys are subject to the bar rules and disciplinary proceedings of the states in which they are licensed.” Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,912 (1994) (to be codified at 28 C.F.R. § 77).

\textsuperscript{207} Thus proponents of the Attorney General’s regulatory authority also go too far, but in the other direction, when they assert that the “presumption against pre-emption [in traditional areas of state control] has been clearly overcome by the regulation’s express preemption provision.” Gorelick & Kleinberg, supra note 183, at 145
After all the underbrush is pushed aside, the state preemption issue is one of implied congressional purpose and authorization. Are Congress's broad descriptions of the Attorney General's powers and duties sufficient to encompass a rational decision to promulgate a preemptive, national ethics code for her federal prosecutors? There plainly is no precedent that compels a definitive answer in either direction. The debate too often devolves into arguments of rhetoric and parades of horribles down a slippery slope in both directions.

Two venerable cases in particular provide forceful support for the Attorney General's claim of preemptive authorization. The first, *In re Neagle*, is specific to her Department; the other, *Boske*, discussed above, specifically construes one of the statutory fonts of rulemaking power that the Attorney General relies upon and reaches a strongly preemptive result.

1. *In Re Neagle*

The earliest and perhaps the strongest case that addresses the Attorney General's preemptive authority, although not in those words, has not been fully explicated by any of the vigorous participants in this debate. Over a century ago in *In Re Neagle*, the Supreme Court had to decide whether an Attorney General's particular exercise of authority, in the face of absolutely no express statutory authorization, was nevertheless valid such that a state homicide prosecution could be terminated by federal court order. A greater federal pre-emption of state authority and a more sacrosanct area of historical state regulation (police power over alleged murderers) can hardly be imagined. The Supreme Court nevertheless affirmed that the At-
torney General's general powers were sufficient to impliedly place the specific action within his authority, and effectively preempt local efforts to sanction a federal officer.\textsuperscript{212} The parallels to state efforts to ethically discipline federal prosecutors are immediately apparent.

In a notorious sequence of events related to an 1888 case in which U.S. Supreme Court Justice Stephen Field had sat as Circuit Justice in San Francisco, David Terry publicly threatened to kill Justice Field.\textsuperscript{213} The Attorney General therefore authorized the appointment of David Neagle as a Deputy U.S. Marshal in the Northern District of California. Neagle was assigned to accompany and protect Justice Field during his official California visit in the summer of 1889.\textsuperscript{214} On August 14, 1889, Neagle shot and killed Terry after Terry physically assaulted Justice Field in a railroad dining car.\textsuperscript{215} Neagle was immediately arrested by local authorities, charged with murder, and imprisoned in the San Joaquin County jail.\textsuperscript{216}

Upon receiving a writ of habeas corpus for Neagle, the federal court in San Francisco ordered his release from state custody.\textsuperscript{217} Even though Neagle's claim of justified defense normally would be reserved for resolution at a state criminal trial,\textsuperscript{218} the court found that Neagle was entitled to immediate release and immunity from prosecution because his allegedly offending act had been committed "in pursuance of...murder statute), prosecutorial jurisdiction over such murders is dual, not exclusively federal—that is, the state as well as federal authorities may prosecute. Little, \textit{supra} note 8, at 1035-36.

\textsuperscript{212} \textit{Neagle}, 135 U.S. at 76.

\textsuperscript{213} \textit{Id.} at 47 ("[T]he press of California was filled with the conjectures of a probable attack by Terry on Justice Field."). Justice Field sat as the designated Circuit Justice for the Ninth Circuit; at that time, the Ninth Circuit had only one regular Circuit Judge. \textit{See} 39 F. at v. The facts of \textit{Neagle} are rich indeed. David Terry was a former California Supreme Court Justice (albeit of some ill repute; that Court was in its infancy in 1857), and thus a former colleague of Field's, who had sat on the California Supreme Court from 1857 to 1863 when President Lincoln elevated him to the Supreme Court in the middle of the Civil War. The underlying case over which Field later presided involved an apparently gold-digging younger woman who was contesting her paramour's estate and subsequently married her lawyer in that action. That lawyer was Terry. For a detailed account of "the Terry tragedy" and frontier justice in general, see Carl Brent Swisher, \textit{Stephen J. Field, Craftsman of the Law} 321-361 (1930).

\textsuperscript{214} \textit{Neagle}, 135 U.S. at 52.

\textsuperscript{215} \textit{Id.} at 52-53.

\textsuperscript{216} \textit{Id.} at 4-5. In this fascinating drama, an arrest warrant was also issued for Justice Field, but it was ultimately quashed upon orders from California's Governor and Attorney General. \textit{Id.} at 4 & n.1.

\textsuperscript{217} \textit{Id.} at 6-7; \textit{In re Neagle}, 39 F. 833, 865 (C.C.N.D. Cal. 1889). The suggestion has been made that this proceeding was not entirely free from influence by Justice Field, who of course was a colleague of the district judge. \textit{See} Swisher, \textit{supra} note 213, at 356 (quoting the State's lawyer, and future U.S. Senator from California, Stephen White, who charged that "[t]he case is practically being tried by Field, though he is behind the scenes.").

\textsuperscript{218} \textit{Neagle}, 135 U.S. at 54.
a law of the United States." Because Neagle plainly had acted pursuant to his federal marshal's commission, the case boiled down to whether the Attorney General had legal authority to authorize Neagle's deputization to protect Justice Field.\(^{220}\)

This was an interesting question, because no statute expressly authorized the Attorney General to provide protection for federal judges outside of court.\(^{221}\) The Supreme Court concluded, however, that such a power was fairly, and indeed necessarily, implied in the general statutory and constitutional grants of authority to the Attorney General.\(^{222}\) Moreover, the Attorney General's specific exercise of his implied powers constituted federal law; "any duty of the marshal . . . derived from the general scope of his duties under the laws of the United States, is 'a law.'"\(^{223}\) While the court did not use the word preemption, there is no doubt that Neagle's prosecution by local California authorities was preempted by the force of the Attorney General's action.\(^{224}\)

In affirming that the Attorney General possessed sufficient statutory authority to issue a specific order of judicial protection, the Neagle court quoted at length from *Ex parte Siebold*\(^{225}\) and its strong federal supremacy analysis:

"The power [of the federal government] to enforce its laws and execute its functions in all places does not derogate from the power of the State to execute its laws at the same time. . . . The one does not exclude the other, except where both cannot be executed at the same time."\(^{226}\)

Also relevant is the Neagle court's statement that federal officers are not dependent solely on the vagaries of states' laws for protection; the Attorney General is empowered to invoke "preventive means" even if those means preempt the exercise of state authority: "We do

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\(^{220}\) *Neagle*, 135 U.S. at 58-68.

\(^{221}\) *Id.* at 58, 63. Another question of implied statutory authority was whether Justice Field was on "official" business, when no statute required him to sit more than once every two years in any district within his Circuit. *Id.* at 55. The Supreme Court had no difficulty in finding Justice Field's more frequent trips to his home state of California to be "official," however, because the number of districts in the Ninth Circuit "required" more frequent visits. *Id.* The necessity of traveling by railroad to visit far-flung districts, while not expressed in the statute, was "as much an obligation imposed by the law as if it had said [so] in words." *Id.* at 56. This too demonstrates the Court's readiness to give broad contextual meaning to statutes when necessity so demands.

\(^{222}\) *Id.* at 58-59.

\(^{223}\) *Id.* at 59.

\(^{224}\) See *id.* at 76 (holding that Neagle "is not liable to answer in the courts of California" for his shooting of Terry). Justice Lamar, joined by Chief Justice Fuller, dissented at length. *Id.* at 76-99. Justice Field reportedly "took no part in [the] decision." *Id.* at 99.

\(^{225}\) *Ex Parte* Siebold, 100 U.S. 371 (1880).

\(^{226}\) *Id.* at 395 (1880) (emphasis added).
not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected."²²⁷

Finally, the Neagle court noted that because “[t]he legislation of a State may be unfriendly,” the federal government has the power to “interfere” for the “protection” of federal officers pursuing their duties.²²⁸

The Neagle court frankly explained that it was resolving the question whether the Attorney General’s executive duty “that the laws be faithfully executed” is “limited to the enforcement of acts of Congress . . . according to their express terms” or also extends to duties implied by general grants of power.²²⁹ By a series of real and hypothetical examples,²³⁰ the court reached a conclusion that today seems foregone: “We cannot doubt the power of the President to take measures for the protection of a [federal] judge . . . and we think it clear that . . . the Department of Justice is the proper one to set [the necessary orders] in motion.”²³¹

2. Lessons from Neagle

Neagle and cases like it are sometimes described today as “intergovernmental immunity” cases, defining the doctrine that states may not punish federal officers for actions taken in pursuit of their official federal duties.²³² That doctrine, however, is simply a subset of general preemption analysis: exercise of authorized federal duties is found to preclude conflicting state action. So considered, the issue of state ethical discipline of federal prosecutors can be perceived as an issue of intergovernmental immunity.

However, legal labels ought not obscure analysis: despite the absence of express statutory authorization, Neagle vigorously affirmed the authority of the Attorney General to issue a specific order that

²²⁷ Neagle, 135 U.S. at 59. Prior to killing Terry, deputy marshal Neagle had learned that Terry was on Field’s train and had telegraphed ahead to local authorities for assistance. The Court’s opinion does not reveal precisely what then transpired, but found it “sufficient to say that this resulted in no available aid to assist in keeping the peace.” Id. at 52.
²²⁸ Id. at 61-62 (quoting Tennessee v. Davis, 100 U.S. 257, 262-63 (1879)).
²²⁹ Id. at 64 (emphasis added).
²³⁰ Id. at 64-68.
²³¹ Id. at 67. The Court noted its view that in two earlier cases, the Attorney General had been found to have implied authority to take specific actions not expressly authorized by any congressional act. Id. at 66-67 (citing United States v. San Jacinto Tin Co., 125 U.S. 273, 279-80 (1887) and United States v. Hughes, 52 U.S. (11 How.) 552 (1850)). Upon reading these decisions, however, it is plain that neither case necessarily required the broad holding and statements that Neagle expressed.
²³² See, e.g., Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,917 (1994) (to be codified at 28 C.F.R. § 77) (the Attorney General notes the intergovernmental immunity doctrine, without citing Neagle); Tribe, supra note 140, at 511-514 & n. 12 (citing Neagle as the case in which the intergovernmental immunity doctrine emerged).
had the effect of preemption of the state's criminal law. A more intrusive federal foray into matters traditionally reserved to the States can hardly be imagined. If the Attorney General were to preempt state ethical rules by regulation because threatened state discipline ran counter to valid federal law enforcement actions, would it not simply be analogous to, and indeed less intrusive than, the intergovernmental immunity endorsed in *Neagle*?

As the *Neagle* court so diplomatically noted, "the legislation of a State may be unfriendly" to federal interests. So too may state ethical rules today seem unfriendly, such as a rule that could subject a federal prosecutor to career-threatening state discipline for *following* a judge's written order. Of course, one can argue that the threat posed to federal prosecutors by state ethical discipline is nowhere near as clear as Terry's threats to Justice Field. This, however, would be an argument about whether the Attorney General has sufficient *cause* for acting, not about her authority. *Neagle* provides strong support for the proposition that the Attorney General has implied legal authority to act preemptively if she has reasonable cause after due deliberation. The point of this proposition is to ensure that federal prosecutors comply with fair and uniform ethical rules rather than a multiplicity of rules "unfriendly" to the mission of federal law enforcement.

What express grants of general authority could support the Attorney General's hypothetical preemptive ethical code in today's debate? Of course, the basic authorization in the Constitution; the Executive, of whom the Attorney General is an agent, is directed to "take Care that the Laws be faithfully executed." This duty encompasses faithful enforcement of federal criminal laws that Congress has enacted, presumably even over any obstructional actions taken by states.

In *Neagle*, the court noted this basic constitutional authorization and Congress's creation of executive departments and their "heads," and then did not even discuss more specific statutory provisions applicable to the Attorney General. But Congress's general statutory

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233. 135 U.S. at 62.
234. See *supra* notes 74, 77-95 and accompanying text (discussing *Lopez*). See generally Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 575 (4th Cir. 1989) (ordering removal of state disciplinary proceeding against federal prosecutor because "state professional disciplinary proceedings could be used to interfere with the duties of federal officials."). So too does an "ethical" rule that unevenly sets a procedural hurdle (prior judicial approval) for federal prosecutors issuing subpoenas to other lawyers that is not placed before private practitioners; such unequal treatment could at least give a rational Attorney General pause. See United States v. Klubock, 832 F.2d 664, 675 (1st Cir. 1987) (Breyer, J., dissenting from equally divided *en banc* affirmance) (arguing that Rule 3.8(f) equivalent violates Supremacy Clause and "federal prosecutors . . . need not [follow it].").
235. U.S. Const, art. II, § 3; see *supra* notes 129 & 205 and accompanying text.
236. See *Neagle*, 135 U.S. at 63-65. The Court had briefly addressed other statutory grants. See *In re Neagle*, 39 F. 833, 858-59 (C.C.N.D. Cal. 1889). As an alternative
directions to the Attorney General today are broad and bear repeating: she is to conduct and supervise all federal legal proceedings, “including grand jury proceedings;” “secure[e] evidence therefor;” and supervise all federal litigators as well as the FBI’s investigators as they “detect and prosecute” federal criminal offenders. In other words (as the Attorney General reasonably summarized these authorities upon publishing the final contacts regulation), the Attorney General and her federal prosecutors are authorized by Congress “effectively to investigate and prosecute crimes.”

If state ethical codes conflict with a fair conception of this goal, is there not implied congressional approval of a preemptive Attorney General remedy?

The statutory authorization to supervise the conduct of federal prosecutors found in 28 U.S.C. § 519 itself seems sufficient to support issuance of a federal prosecutors’ ethical code. Indeed, the Attorney General promulgated “Principles of Federal Prosecution” for her prosecutors some time ago. The pressing question, however, is whether these statutory authorizations support the further step of making such an Attorney General-promulgated code preemptive. stands as strong, venerable, and heretofore unrecognized authority that if reasonably based, such a code may prevail where in conflict with the application of state ethical codes to federal officers.

ground for its decision, the Court also noted a statute that described the power of federal marshals. , 135 U.S. at 68. However, this was plainly a secondary basis for the Court's decision, coming as it did only after the far broader discussion of the Executive's implied powers. Moreover, it could not suffice to resolve the issue of the Attorney General's authority to direct any marshal to protect federal judges outside of court. Thus the federal marshal statute was an incomplete ground for the decision in Neagle, as well as an alternative one.


To take a more extreme hypothetical, if a State enacted a law that all federal undercover narcotics agents should be arrested and disciplined for common law fraud, the Attorney General's authorization of such investigative techniques would be held preemptive. See, e.g., Connecticut v. Marra, 528 F. Supp. 381, 384-85 (D. Conn. 1981) (dismissing prosecution of State bribery charges against an FBI informant); accord Baucom v. Martin, 677 F.2d 1346 (11th Cir. 1982) (finding that any conviction of an FBI agent for his participation in a bribery of a state prosecutor would contravene the Supremacy Clause).

See USAM, supra note 139, at § 9-27.001.

Neagle is not an isolated case. See, for example Ponzi v. Fessenden, 258 U.S. 254 (1922), in which the Attorney General was held to have the power to transfer certain prisoners. The Court noted that “there is no express authority authorizing the transfer ... Yet we have no doubt that it exists.” Id. at 261-62. That certainty was based on the Attorney General's position as “head of the Department of Justice” and the same general statutory authorities discussed above. Id. at 262. The point is that the Attorney General is an important federal figure, possessed by that very stature of many specific powers authorized in furtherance of Congress' general statutory purpose—effective enforcement of federal law.
3. Lessons from Boske

In addition to the substantive congressional grants of authority to the Attorney General, there is also Congress's express empowerment of the Attorney General to "prescribe regulations" in 5 U.S.C. § 301.242 The permissible objects of such regulations are explicitly stated; they include "the conduct of [Department of Justice] employees" as well as the "performance of [the Department's] business."243 Again, this language would seem immediately to encompass an Attorney General's Code of Conduct for Federal Prosecutors; and precedent firmly suggests that duly promulgated § 301 regulations are preemptive of conflicting state provisions.

The Boske decision, described more fully above is as significant and venerable on this issue as Neagle is regarding authorization.244 Somewhat surprisingly, neither Boske nor Neagle has been previously noted as relevant authority in this debate. Yet Boske construes one of the very same statutes that empowers the Attorney General to issue conduct regulations.245 It addresses (albeit not in so many words) the preemptive effect of such regulations. Boske involved the Secretary of the Treasury rather than the Attorney General; but this seems a distinction that can make no substantive difference so far as the preemptive effect of § 301 regulations is concerned. The preemptive effect of Treasury regulations over competing state provisions is accepted in large part because Boske settled the issue almost a century ago. Yet the statutory source of the Attorney General's regulatory power is the same. Perhaps the hesitancy to accept the same result regarding the Attorney General's regulations246 simply reflects the absence of history, rather than of authority. While it is true that "[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States,"247 one can argue that this authority has been left to the States only due to federal inaction, not by

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242. 5 U.S.C. § 301 (1994) reads in relevant part: "The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

243. Id.

244. See supra notes 154-64 and accompanying text.


246. See Zacharias, Who Can Best Regulate, supra note 153, at 440 (stating that the Attorney General's conclusion "feels wrong").

247. Leis v. Flynt, 439 U.S. 438, 442 (1979) (per curiam), quoted in the Committee Report, supra note 187, at 12. As a per curiam opinion and summary disposition, Flynt is somewhat less authoritative than a signed and argued Opinion of the Court. Edelman v. Jordan, 415 U.S. 651, 671 (1974); Robert L. Stern, Supreme Court Practice § 4.28 (7th ed. 1993). This seems particularly true in light of the odd fact that although four Justices voted to hear argument in Flynt, see 439 U.S. at 445 (White, J., dissenting); id. at 457 (Stevens, J. dissenting with Marshall and Brennan, JJ.), the case was apparently neither briefed nor argued after certiorari was granted. Id. at 438.
divine right. Whether or not Congress could entirely preempt this traditional state authority based on the commercial effects of lawyers' conduct is concededly an open, if not difficult question.  

But § 301—apart from, and more certainly in conjunction with 28 U.S.C. §§ 519, 547—specifically grants the Attorney General authority to regulate a smaller subset of the profession: her “employees,” which includes federal prosecutors.

Boske's rule regarding the regulatory deference granted to executive department heads has not changed since 1900. Whether a regulation is “necessary” is not the proper field for debate; once the department head has “deemed the regulation in question a wise and proper one,” it should be upheld “unless . . . palpably inconsistent with law.” But more recently, the Supreme Court has phrased the doctrine of deference to a department head's regulations in the following manner: “[i]f [her] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears . . . that the accommodation is not one that Congress would have sanctioned.”

It is vital to note that although this doctrine leaves the preemption question as one of congressional intent, it shifts the burden of proof specifically to a regulation's opponents, if the regulation is a "reasonable accommodation of conflicting policies" that are within the regulator's authority, it is valid even if controversial, unnecessary, or unwise, absent expression of a contrary congressional intent. Thus, the absence of express congressional direction on the precise point at issue favors the federal department head, not her opponents. Her settlement of competing policy concerns is final and preemptive, unless the

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248. Cf. Coquillette, supra note 177 at 31 (assuming the preemptive effect of federal regulation as well as federal judicial rulemaking in this area); Zacharias, Federalizing Legal Ethics, supra note 65, at 337 n.4 (suggesting that Congress could lawfully enact a preemptive federal ethical code); see also Flynt, 439 U.S. at 442 (suggesting that the authority is merely left to the States, not reserved to them). Additionally, the Flynt Court apparently felt it necessary to note that the lawyer's claim at issue was "not a right granted . . . by [federal] statute," suggesting that if it had been, the state would have been ousted of authority. Id.

249. Boske, 177 U.S. at 470.


251. Again, any assertion to the opposite effect—that Attorney General preemption requires express approval by Congress, is erroneous in light of these cases. See, e.g., Dash, supra note 192, at 138 (asserting that preemption requires congressional approval); see supra notes 146, 194-98 and accompanying text.
resolution is unreasonable or the subject matter itself lies beyond her statutory realm.

Does the subject matter of federal prosecutors' ethics lie beyond the Attorney General's statutory realm? It seems difficult to so contend. Congress has authorized the Attorney General to regulate the "conduct of [her] employees" in § 301, and there is no evidence that it did not intend such regulation to extend to federal prosecutors' ethics. Indeed, prosecutorial ethics is, hopefully, at the heart of any concern regarding federal prosecutors' conduct.

Would an Attorney General's assertion of ethical preemption over discipline of federal prosecutors be "unreasonable," in light of the disarray of today's ethical codes? It hardly seems so. Real cases, like United States v. Lopez, Matter of Doe and United States v. Ham-

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253. Without noting Boske, a student piece argues that § 301 cannot provide the Attorney General with preemptive authority here because a later Supreme Court decision, Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979), limits § 301 to procedural "housekeeping" regulations. Lain, supra note 66, at 22-23. Lain notes that "one can argue that Chrysler was improperly decided" but "it nevertheless remains the law." Id. at 23 n.12. Professor Zacharias apparently accepts this reading of Chrysler. Zacharias, Who Can Best Regulate, supra note 153, at 430 n.4.

Chrysler, however, ought not be read so broadly. First, it neither cited, nor purported to overrule, the Boske standard for regulatory deference in the preemption field. Second, Chrysler was undoubtedly limited to a very specific 1958 amendment to § 301 that was designed to prohibit nondisclosure regulations. Chrysler, 441 U.S. at 310. In the face of a specific statute forbidding disclosure of certain trade secret documents, the Court concluded that § 301 was insufficient to authorize certain disclosure regulations that contradicted the statute. Id. at 309-312.

Chrysler did not address, and did not involve, regulations issued under the unamended portion of § 301, in force since 1790, permitting department heads to regulate "their business" and "the conduct of [their] employees." Nor is there, in the ethics context, any specifically opposed federal statute—such as 18 U.S.C. § 1905 in Chevron—to limit the scope of § 301's authority over conduct.

Third, the "housekeeping statute" language and the procedural versus substantive rules distinction mentioned in Chambers v. NASCO, Inc., 501 U.S. 32, 51-55 (1991), came directly from House and Senate reports that were limited to the 1958 nondisclosure amendment. That language ought not to be read more broadly than its origin; similarly, the Court's decision in Chrysler ought not be read far beyond its specific context.

Finally, of course, the Attorney General relies on far more statutory authority for the present regulation than § 301 alone. Nothing in Chrysler requires, or even hints, that the Attorney General has no authority at all under § 301 to regulate the ethical conduct of her prosecutors. Whether such regulations have preemptive force in a particular context is unaddressed, and not controlled, by Chrysler.

have applied vague state rules in unprecedented ways that plainly damage legitimate law enforcement goals. Various state judges have expressed antipathy towards the Attorney General’s regulatory efforts in this area, as have some private bar associations, so that the danger to federal prosecutors may fairly be viewed as unabating. Surely there are conflicting views regarding the need for, as well as content of, any uniform prosecutorial ethics code. But if these conflicts on policy are “reasonably accommodated” in the regulatory decision, a decision to promulgate such a code cannot be described as unreasonable.

So what, then, of a concurrent decision to make such ethical regulation of prosecutors wholly preemptive? Again, there is no evidence that Congress harbors an intent contrary to preemption here. Venerable authorities such as Boske and Neagle indicate that Congress is well aware of the preemptive effect that Attorney General directives can have when conflicts with state authority arise. More immediately, Congress has been aware of the Thornburgh memo now for eight years, and the expressly preemptive contacts regulation for over two, and has given no express indication that it believes the Attorney General is powerless to so act. Certainly such

257. 846 F.2d 854 (2d Cir.); modified, 858 F.2d 834 (2d Cir. 1988); aff’d, 902 F.2d 1062 (2d Cir.); cert. denied, 498 U.S. 871 (1990).


260. There is, of course, authority for the proposition that congressional silence in the face of other activity can indicate acceptance. See Evans v. United States, 504 U.S. 255, 269 (1992); Ford Motor Credit v. Milhollin, 444 U.S. 555, 565-68 (1980). In addition, the introduction of § 502 suggests that if Congress does act, it will act to endorse the Attorney General’s actions in this area. On the other hand, the fact that a Senator has felt it necessary to introduce § 502 could suggest an inference that Congress believes the Attorney General needs a more express grant of authority; and the fact that § 502 has not been enacted could be read to indicate congressional disapproval. That such directly contrary inferences can be drawn from the same meager set of legislative facts is why reading such legislative records is often no better than reading tea leaves. See supra note 5 and accompanying text; see also Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (stating that the courts reliance on legislative history “is not merely a waste of research time and ink; it is a false and disruptive lesson in the law”).
evidence is not irrefutable. The necessary inquiry, however, is to determine unspoken implications—by any definition a murky task. In the absence of more explicit congressional expression, the Boske line of decisions requires that the doubtful state of the evidence inure to the Attorney General’s benefit.

The foregoing authorities point to the raw legal validity of preemptive ethical regulations, as long as the Attorney General duly promulgates a reasonable code of conduct in compliance with administrative law principles. It remains reasonable, however, to argue that the Attorney General should not preempt state ethical rules. But, where a contrary decision is also a “reasonable accommodation” of competing views on that normative question, a legal argument that the Attorney General cannot so decide seems untenable.

D. Has Congress Expressed a No-Preemptive Intent Through Appropriation Conditions?

In 1979, Congress’s appropriation bill for the Department of Justice directed that all Department of Justice attorneys “shall be duly licensed and authorized to practice . . . under the laws of a State.” The Conference of State Chief Justices and others have contended that this represents an expression of congressional intent that federal prosecutors must abide by state ethical codes. Of course, such a reading is purely guesswork; the words say nothing specifically on the subject. It seems more likely that Congress had nothing in mind at all on this topic in 1979, given the fact that the current ethics debate had not even begun to develop. Certainly, there is no legislative history to support—or deny—this reading. Yet application of the Capital Cities doctrine requires some express congressional direction to override the Attorney General’s “reasonable accommodation” of competing views.

261. See infra part III.
264. Nothing in the legislative history explains the insertion of this language, for the first time, in 1979. In fact, the Senate Report did contain a section entitled “Professional Responsibility,” which discussed the level of resources provided for the Department’s Office of Professional Responsibility, but this discussion did not mention the state bar licensing requirement. S. Rep. No. 173, 96th Cong., 1st Sess., at 8, reprinted in 1979 U.S.C.C.A.N. 2003, 2010. This suggests there was no congressionally perceived link between issues of professional responsibility and the licensing requirement of § 3(a).
An equally plausible reading of this statutory language is that it simply requires that prosecutors not only pass the state’s bar exam (be “duly licensed”) but that they also maintain an active status with some state’s bar (be “authorized to practice”). Many state bars now offer an inactive status, at substantially lower dues. But “inactive” members are not authorized to practice in that state. More significantly, they generally fly below the disciplinary radar of the bars to which they belong. In the absence of any federal regulatory oversight of lawyers, Congress could well have concluded that federal prosecutors must at least maintain an active status with their bar of choice, so that at least some body would be keeping an eye on them.

But this says nothing about what Congress would have thought if there had been any competing federal disciplinary authority upon which they might have relied. So read, § 3(a) would simply represent a congressional desire that federal prosecutors actively present themselves to some bar authority, not an objection to an Attorney General assertion of federal preemptive authority in the area if some reasonable need arose.

The “active status” reading of § 3(a) seems more plausible than ascribing to Congress a specific and aggressive intent to prohibit Attorney General rule-making regarding prosecutorial ethics. That is, at most Congress has accepted state ethical regulation of federal prosecutors; it has said nothing to favor it. Most importantly, however, § 3(a) really tells us nothing; neither its language nor related legislative reports suggests that Congress was ever conscious of the yet-to-emerge ethical preemption debate, let alone attempting to resolve it with such opaque language.

E. Conclusion Regarding State Preemption

The state preemption debate boils down to whether one believes Congress would expressly countenance exclusive federal regulation of federal prosecutors’ ethics by the Attorney General, in light of her generally described constitutional and statutory duties to enforce federal law. If this question is accompanied by an intensifier, like “when states use their ethical rules to frustrate valid federal law enforcement efforts,” an affirmative answer follows smoothly. If instead the question is qualified by “in light of the historically exclusive regulation of lawyer ethics by the states,” such an answer comes less readily.

But such pejorative loading of the question ultimately describes only the policy debate that the Attorney General must respond to. Her resolution would have to be “unreasonable” to be invalid. In light of the indisputable “disuniformity” of state ethical standards and the undisputed chilling effect this has on federal prosecutors, such a

266. See, e.g., Cal. Bus. & Prof. Code § 6125 (West 1996) (“No person shall practice law in California unless the person is an active member of the state bar.”).
description seems extreme. Unless one has first assumed the answer—that the Attorney General cannot preempt state ethical rules—then strong precedent favoring the Attorney General's authority, together with the "splintered" reality of today's ethical universe, \(^{267}\) leads to the conclusion that the Attorney General could preempt state ethical rules if she were to promulgate a reasonable federal ethical code in their place.

F. The Attorney General's Power to Override Conflicting Federal District Court "Local" Rules

Many, but not all, federal courts have simply incorporated another body's ethical code as their own by adopting a "local" rule. \(^{268}\) Some opponents of the Attorney General's authority in this area have noted that because such incorporated codes become federal court rules, any power to preempt state rules does not end the debate. \(^{269}\) While this is true, if the Attorney General's authority under § 301 and Title 28 to promulgate regulations in this area is accepted, then the primacy of such national regulations over "local" district court rules follows relatively clearly. This is because the issue, for both contexts, boils down to whether congressional statutes have authorized such preemptive regulations. \(^{270}\) Nevertheless, substantial separation-of-powers concerns suggest that the Attorney General may preempt only those ethical rules of federal district courts that purport to govern "out of court" behavior.

Federal district and circuit courts are statutorily authorized by 28 U.S.C. § 2071 to adopt rules that apply solely within their court—so-called "local" rules. The permissible subject matter is specified as "rules for the conduct of their business." \(^{271}\) Furthermore, such local

\(^{267}\) Zacharias, Federalizing Legal Ethics, supra note 65, at 341.

\(^{268}\) Coquillette, supra note 177, at 3-4 (reporting seven "variant models" within the district courts); id. at 8 (reporting that 11 districts have "no local rule at all" on the topic). See, e.g., Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1353 (1st Cir. 1995) (noting that the District of Rhode Island simply "issued an order incorporating the [state] Rules of Professional Conduct."); IBM Corp. v. Levin, 579 F.2d 271, 279 n.2 (3d Cir. 1978) (noting that the district court's local rule stated that "the conduct of practitioners before it was to be governed by the disciplinary rules of the Code as amended by the Supreme Court of New Jersey").

\(^{269}\) See, e.g., Whitehouse, 53 F.3d at 1355 (holding that "local rules" are valid unless they conflict with an act of Congress or the Federal Rules of Criminal Procedure, they are unconstitutional, or they are not within the district court's regulatory power); Dash, supra note 192, at 138 (discussing the limitations of the preemptive power of the Attorney General under the Supremacy Clause); Mashburn, supra note 11, at 520-21 (arguing that a federal court should preempt state rules of professional responsibility only to accomplish important federal objectives).

\(^{270}\) Accord Coquillette, supra note 177, at 31 ("[W]ith proper authority, through an Act of Congress, federal agencies could pass valid regulations which supersede local rules governing attorney conduct.").

district court rules must be “consistent with Acts of Congress.”\textsuperscript{272} Finally, local rules are valid only if adopted after “notice and an opportunity for comment.”\textsuperscript{273} Federal Civil Procedure Rule 83 and Criminal Procedure Rule 57 express similar local rulemaking authority.\textsuperscript{274}

At least four separate arguments support a conclusion that Attorney General regulations promulgated pursuant to the APA should override competing local court rules purporting to reach out-of-court conduct.

First, the rulemaking power that Congress has granted to federal courts is remarkably similar to the general rulemaking power given to the Attorney General in § 301.\textsuperscript{275} Federal courts may regulate “their business,”\textsuperscript{276} while the Attorney General may regulate her “business,”\textsuperscript{277} including her “employees.” If § 2071 empowers federal courts to adopt local rules governing the ethical conduct of lawyers practicing before it, it is impossible to argue that the identical grant of regulatory authority in § 301 can not similarly empower the Attorney General to adopt ethical rules governing her lawyers. Congress is the ultimate source of authority for both bodies’ rulemaking powers,\textsuperscript{278} and it has authorized both to act. Yet the federal district court rules are “local” only, while the department head’s are national (as well as Federal Register noticed and approved). When valid rules of national application, duly promulgated pursuant to the APA, conflict with “local” rules not so promulgated, ought not the latter give way?\textsuperscript{279}

Second, because the subject matter of § 2071 court rules must be limited to rules for conducting court business, the validity of local court rules that purport to govern the conduct of federal prosecutors, or any other attorneys for that matter, when they are not in court or

\begin{itemize}
\item \textsuperscript{272} Id.
\item \textsuperscript{273} 28 U.S.C. § 2071(b). Then First Circuit Judge Stephen Breyer found this procedural requirement violated by a local district court rule that merely incorporated a state rule 3.8(f) equivalent. United States v. Klubock, 832 F.2d 664, 674-75 (1st Cir. 1987) (Breyer, J., dissenting).
\item \textsuperscript{274} Amended versions of both these rules became effective on December 1, 1995. The Third Circuit has noted that § 2071 and Rule 83 “probably must be read in pari materia.” Rodgers v. United States Steel Corp., 508 F.2d 152, 163 (3d Cir. 1975), cert. denied 423 U.S. 832 (1975).
\item \textsuperscript{275} See generally Jack B. Weinstein, Reform of Court Rule-making Procedures 55-61 (1977) (discussing the origins of the rule-making power of federal courts).
\item \textsuperscript{276} 28 U.S.C § 2071.
\item \textsuperscript{277} 5 U.S.C. § 301 (1994).
\item \textsuperscript{278} This is to be contrasted with a court’s “inherent” authority to regulate the conduct of “attorneys who appear before it.” Chambers v. NASCO, Inc., 501 U.S. 32, 43-44 (1991). However, Congress may limit this authority “by statute and rule.” Id. at 47.
\item \textsuperscript{279} I have found no authority even of a general nature which attempts to answer this specific inquiry.
\end{itemize}
engaged in complying with a court order, seems questionable.\textsuperscript{280} Thus, one federal court has struck down a local district court rule that targeted a particular "unethical" practice, finding that "[t]here is no general grant of legislative authority [in § 2071 or in Rule 83] to regulate the practice of law."\textsuperscript{281} Bluntly stated, the argument would be that the out-of-court investigative conduct of federal prosecutors and their agents is not a court's "business." The "their business" limitation of § 2071 has received scant attention; but it is difficult to understand how it authorizes any court regulation of activities not directly related to court proceedings or judicial orders.\textsuperscript{282} Congress's grant of authority to the Attorney General is more specific: she may regulate "the conduct of [her] employees."\textsuperscript{283} It is counterintuitive to say that the less specific grant of authority for local court rules limited to "their business" should prevail over the more specific § 301 provision.

Third, § 2071 requires that local court rules "be consistent with Acts of Congress;"\textsuperscript{284} where they conflict, the local rule is invalid.\textsuperscript{285} If the Attorney General possesses sufficient statutory authority to issue ethical rules for federal prosecutors (as it is argued above she does), then her duly promulgated rules have the force and effect of federal law.\textsuperscript{286} My research has revealed no case raising a conflict between an authorized agency rule of national application and a federal district court's local rule.\textsuperscript{287} But a reasonable interpretation of § 2071 is that duly promulgated regulations having the status of federal law should override any conflicting "local" federal court rules. To conclude otherwise

\begin{footnotesize}
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\item \textsuperscript{280} See, e.g., Rodgers v. United States Steel Corp., 508 F.2d 152, 163 (3d Cir. 1975) (holding that "[t]here is no general grant of legislative authority to regulate the practice of law" in § 2071 or Rule 83, and striking down a local rule avowedly intended to prevent "barratry"), cert. denied, 432 U.S. 832 (1975). In \textit{Chambers}, the Supreme Court held in a 5-4 decision, that the court had the "inherent" authority to sanction conduct occurring "beyond the court's confines." \textit{Chambers}, 501 U.S. at 44. But see id. at 60 (Scalia, J., dissenting) (disagreeing with the conclusion that the court's inherent authority reaches beyond the court's confines). The majority's "beyond-court" holding seemed to be limited by reference to "disobedience to the orders of the Judiciary." \textit{Id.} at 44.
\item \textsuperscript{281} Rodgers, 508 F.2d at 163.
\item \textsuperscript{282} For example, wholesale federal court adoption of state ethical rules without limitation theoretically allows federal courts to discipline for advertising, fee, and solicitation violations, even if the matter never comes to federal court. This seems a far-fetched effort under 28 U.S.C § 2071 (1994).
\item \textsuperscript{283} 5 U.S.C. § 301 (1994).
\item \textsuperscript{284} 28 U.S.C. § 2071.
\item \textsuperscript{285} This is the theory by which the Third Circuit struck down a district court's local attorney subpoena rule in Baylson v. Disciplinary Bd., 975 F.2d 102, 112 (3d Cir. 1992) (finding that the judicial approval requirement of the local rule conflicted with the grand jury subpoena provisions of the Federal Rules of Criminal Procedure). \textit{But see} Whitehouse v. United States Dist. Court, 53 F.3d 1349 (1st Cir. 1995) (reaching a contrary result).
\item \textsuperscript{287} Perhaps the murkiness of the issue is another good reason for the Attorney General, as well as federal district courts, to cautiously restrain any rulemaking forays into the area of prosecutorial ethics. \textit{See infra} notes 342-59 and accompanying text.
\end{itemize}
\end{footnotesize}
would be endorsing the ability of federal districts to exempt themselves, by local rulemaking, from all sorts of national regulatory programs. Such a patchwork vision seems inconsistent with a federal regulatory system, as well as with the thrust of § 2071's "consistency" requirement.

Finally, as others have noted, the legislative history of the federal court rulemaking provisions demonstrates that the congressional delegations are limited to "matters of detail." State or ABA ethical codes are broad-ranging documents, purporting to regulate virtually all aspects of attorney conduct, from fee-setting to advertising to discriminatory conduct to publicity. Wholesale adoption of such codes as "local rules" goes far beyond any matter of detail specifically envisioned by Congress. At the very least, the claim to statutory validity for such federal court local ethical rules is weaker than the Attorney General's.

Federal courts have also invoked their "inherent authority" as support for local rules governing attorney conduct, apparently apart from any statutory authorization. Such invocations, however, are generally revealingly devoid of specific citational support. To the extent they are based on a broad construction of pre-"supervisory authority," they are suspect. As the Ninth Circuit subsequently noted, an exercise of supervisory power is appropriate only when "a

288. Consider, for example, "local" rules purporting to exempt court employees from Title VII regulations, labor regulations, OSHA safety regulations, and the like. Surely the nationally promulgated and applicable C.F.R.s would override local court rules attempting such exemption.

289. See Baylson, 975 F.2d at 107, 110-11; see also United States v. Klubock, 832 F.2d 649, 659 (1st Cir. 1987) (Campbell, J., dissenting) (noting that the advisory committee comment to Fed. R. Crim. P. 57 appeared to limit local court rules to "matters of detail"); Sara S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1474 (1984) (arguing that "specialized rather than a general federal common law is essential to the... separation of power required by the Constitution").

290. See, e.g., Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 724 (6th Cir. 1993) (holding that federal courts have inherent authority to discipline attorneys who come before them).

291. E.g., id. (citing an unpublished district court decision, Stone v. City of Philadelphia, 1986 WL 13483 at *4 (D. Pa. Nov. 25, 1986), and a Third Circuit opinion, IBM Corp. v. Levin, 579 F.2d 271, 279 n.2 (3d Cir. 1978), neither of which address inherent authority). It also should at least be noted that the head of the Executive Branch presumably has some "inherent authority." Might this not extend to the "inherent authority" to regulate federal law enforcers, and to protect them from unfair sanction by hostile state authorities?

292. E.g., United States v. Furey, 514 F.2d 1098, 1103 (2d Cir. 1975) (asserting that "federal courts... possess the inherent power" to dismiss a case for delay even in the absence of a constitutional violation). See generally supra notes 32-35 and accompanying text (discussing supervisory authority). Contra United States v. Hastings, 461 U.S. 499, 505 (1982) (holding that a court, in using its supervisory power to discipline prosecutors, may not ignore the harmless-error analysis).
federal constitutional or statutory right" is violated. Most ethical provisions, without more, do not rise to this level.

Most importantly, however, is the line traditionally drawn around a court's inherent supervisory authority: in-court versus out-of-court behavior. This is the line normally drawn for a court's inherent contempt power, absent out-of-court violation of a specific court order. I would contend that this line is also appropriately invoked to circumscribe federal supervisory disciplinary authority, at least where prosecutorial ethics (or lawyer-ethics in general) are at issue. As the Ninth Circuit has stated, federal "[c]ourts do not have the authority to supervise out-of-court executive procedure in the absence of a constitutional or statutory violation." This is, at bottom, a sensible line drawn in light of serious separation of powers concerns. As Judge Kozinski has written:

[T]he supervisory power comprehends authority for the courts to supervise their own affairs, not the affairs of other branches; rarely, if ever, will judicial integrity be threatened by conduct outside the courtroom that does not violate a federal statute, the Constitution or a procedural rule.

It is questionable whether federal courts may properly exert any rulemaking authority on the out-of-court ethics of federal prosecutors. Neither their statutory nor their inherent powers clearly address the issue. But the inquiry need not go that far. Even if federal courts possess some rule-making authority over federal prosecutors' ethics, this power should be overridden by the more specific statutory powers given to the Attorney General to regulate the conduct of federal prosecutors in the investigative conduct.

It thus becomes difficult to separate the "local rules question" from the state preemption question: they both turn, seemingly concurrently, on whether the Attorney General's statutory powers are sufficient to encompass promulgation of exclusive ethical regulations for

293. United States v. Barrera-Moreno, 951 F.2d 1089, 1092 (9th Cir. 1991); United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991).
294. Cf. United States v. Dennis, 843 F.2d 652, 657 (2d Cir. 1988) (stating that "the sanction, absent some serious prejudice to the witness or taint to the trial, should be disciplinary action," not court sanctions).
295. Chambers v. NASCO, Inc., 501 U.S. 32, 43-44 (1991); cf. Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1356 (1st Cir. 1995) (quoting authorities that invoke inherent regulatory power over attorneys who practice before them but without discussing the reach of such power to regulate conduct not before the court).
296. Barrera-Moreno, 951 F.2d at 1092; United States v. Lau Tung Tam, 714 F.2d 209, 210 (2d. Cir.), cert. denied, 464 U.S. 942 (1983) (holding that the Federal judicial supervision of prosecutorial activity outside court is extremely limited, if it exists at all).
297. Simpson, 927 F.2d at 1091 (reversing dismissal of indictment as a sanction for a government undercover investigation founded on prostitution, heroin use, and shoplifting). Judge Kozinski wrote that "sleazy investigatory tactics alone . . . do not provide . . . [an occasion] for the exercise of the supervisory power." Id. at 1090.
federal prosecutors. If so, then as the Attorney General has stated, "the conclusion that the Attorney General has the statutory authority . . . entails the further conclusion that the regulation displaces inconsistent local federal court rules."298

G. Limits on the Attorney General's Regulatory Authority over Federal Prosecutors' Ethics

Even if the Attorney General has sufficient statutory authority to regulate this area, her power (as with all power) cannot be absolute. Certain limitations seem so obvious as to avoid notice; but they are important because they terminate certain extreme objections to the idea.

First, the Attorney General's authority cannot preempt a federal court's inherent authority to regulate the conduct of attorneys appearing before them.299 The conduct of federal prosecutors in court remains subject to governance by federal judges, and the Attorney General has no authority to exempt her prosecutors from judicial discipline for in-court misconduct. The Supreme Court, however, has limited this supervisory authority to in-court behavior,300 or to out of court behavior in violation of a court order.301 Most recently, the Court held that federal judges lack authority to regulate the conduct of federal prosecutors before a grand jury, even though the grand jury is titulary supervised by the court.302

Thus, even if the Attorney General has plenary regulatory authority over the ethics of investigative prosecutorial conduct, her authority regarding in-court conduct remains subject to concurrent court supervision. The line separating investigative from in-court conduct seems relatively clear,303 easy to enforce, and appropriate. Nothing the Attorney General has done to date would undermine this conclusion.304


299. See Chambers, 501 U.S. at 43.

300. See id. at 43 (discussing the scope of the courts power).

301. Id. at 57.

302. United States v. Williams, 504 U.S. 36, 45 (1992) (stating that supervisory power deals "with the court's power to control its own procedures"); id. at 47-48 (noting court's involvement with grand juries).

303. This, of course, is quite different from "perfectly" clear. There undoubtedly will be instances of conduct that can be argued to fall on either side of the line. The concept, however, is useful for the general run of cases. The grayness of the line at certain points counsels restraint on the part of courts as well as the Attorney General in attempting to regulate too aggressively. See supra notes 342-59 and accompanying text.

In addition, it seems obvious that the Attorney General has no authority to preempt various non-substantive, ministerial regulations that a state bar may impose on all of its members. For example, the dues charged by a state bar to maintain an active license may seem excessive and theoretically could even deter some federal prosecutors from maintaining their licenses. It seems extreme, however, to contend that the Attorney General could exempt her prosecutors from paying dues and yet demand that they be allowed to remain members of that state’s bar. Similarly, state bars may enforce filing deadlines, continuing legal education requirements, and other non-burdensome ministerial membership rules.

Some might argue that compliance with the state bar’s chosen ethical rules is simply another membership requirement similar to paying dues. This argument is not without force; I briefly consider below the concept that while the Attorney General may be able to preempt state ethical rules, she may not be able to prevent state license revocation if state ethical rules are not followed. It also is likely that a valid distinction can be made between some bar requirements that are ministerial only and ethics rules that have a substantive effect on the conduct of investigation and litigation. Those substantive rules that can be applied to directly chill effective federal law enforcement fall within the scope of the Attorney General’s preemptive regulatory authority. The ministerial rules remain beyond her preemptive authority.

III. SHOULD THE ATTORNEY GENERAL PROMULGATE A COMPREHENSIVE ETHICAL CODE THAT PREEMPTS LOCAL ETHICAL RULES?

Absent extraordinarily hostile state discipline efforts, the short answer to this question is no. This part addresses the normative considerations that ought to lead the Attorney General to conclude that the current state of affairs does not merit a preemptive, nationalized ethical regulatory structure. Such a structure would incur great costs and risk damage to a multitude of interests. At present, those costs are not outweighed by benefits that a preemptive system might produce, particularly when less costly and less preemptive mechanisms remain to be tried.

A. The Current State of Affairs

Professor Bruce Green has noted that federal prosecutors’ ethics are currently regulated, at least in theory, by at least five different

305. California, for example, charges annual dues of $478, a relatively high figure that has generated substantial controversy within the bar’s membership. See Lawyers Vote to Retain State Bar, L.A. Times, June 26, 1996, at B10.
bodies: (i) state disciplinary authorities; (ii) the Department of Justice's Office of Professional Responsibility ("OPR"), an internal watchdog group that investigates allegations of prosecutorial misconduct and recommends discipline to the Attorney General when appropriate; (iii) federal judges; (iv) federal district court disciplinary committees; and (v) peer criticism from private lawyers (who may be future employers). The current system thus provides a specific example of what Professor Wilkins calls a "multi-door enforcement strategy" for regulating lawyers.

1. Three Types of "Disuniformity": Disparate Rule Writers, Rule Enforcers, and Rule Content

Although Professor Green criticizes the present state of regulatory enforcement as ineffective and inadequate, he does not recommend scrapping the system but rather improving it through communication and coordination among the existing regulatory bodies. This accords with Wilkins's general argument that "[c]reating and operating an efficient and normatively acceptable multi-door enforcement system will require a great deal of cooperation and coordination among [the doorkeepers]."

From the Attorney General's perspective, however, the very multiplicity of doors seems threatening. Because Professor Wilkins wanted to focus on the theoretical ideal system of enforcement of professional

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307. Professor Green asserts that this last regulatory body—private lawyer peer pressure—is "unlikely to affect prosecutors' conduct" and "unlikely to discourage prosecutorial excesses." Green, *supra* note 306, at 70-71 n.13. My empirical experiences as a federal prosecutor lead me to a different general conclusion (of course subject to specific exceptions): prosecutors are often—at times, too often—worried about peer criticism from lawyers both within and without their office. Certainly this is true of federal prosecutors who are actively looking for, or seriously expect to look for, outside employment. The effectiveness of this regulatory mechanism presumably would be enhanced were the Attorney General to actively adopt a non-career prosecutor preference, as is recommended below. See infra notes 357-59 and accompanying text. Like Professor Green (who also was once a federal prosecutor), however, I can offer no support other than experiential assertions as to the general effectiveness of this fifth regulatory mechanism.

308. Wilkins, *supra* note 6, at 873.


310. Id. at 91 n.120, 93-95.

311. Wilkins, *supra* note 6, at 873. Professor Wilkins and Green expressly decline to provide specific suggestions to implement their visions, as beyond the objectives of their present efforts. Thus, after constructing his valuable theoretical model at length, Wilkins expressly notes that "designing such a system [concretely] is beyond the scope of this Article." Id. Similarly, having surveyed the inadequacies of the present federal prosecutor regulatory system, Professor Green concludes his effort by recommending in general terms that existing "authorities should strive to craft a disciplinary process that is . . . more effective than each of the component parts." Green, *supra* note 306, at 95.
norms, he assumed a uniform set of nationally applicable ethical rules setting the norms for all lawyers and enforcers.\textsuperscript{12} Wilkins acknowledged that this assumption is "exaggerated;"\textsuperscript{13} the Attorney General might charitably describe it as hopelessly unreal.\textsuperscript{14} The recent outbreak of ethical rule conflicts has been a major force behind the Attorney General's preemptive rule on contacts.

Yet this theoretical departure from reality is not fatal. While Professor Wilkins did not address the reality of substantive rule diversity, the reality of "multi-door" enforcement is accurately described by Professor Green, who notes that there is not a single reported instance of local ethical discipline actually and finally imposed on a federal prosecutor whom the Attorney General has found undeserving of sanction.\textsuperscript{15} In other words, the Attorney General and state disciplinary authorities have so far apparently agreed as to what constitutes sanctionable prosecutorial conduct in specific cases. Of course, the chilling effect of the potential for discipline cannot be ignored. Yet a potential for discipline will exist under any system of regulation, including one run entirely by the Attorney General. The absence of any actual ethical discipline of an undeserving federal prosecutor, while likely not comforting to the private defense bar,\textsuperscript{16} ought to give the Attorney General pause regarding the perceived need to preempt local disciplinary authority in general.

Nevertheless, the current reality is more nuanced than Professor Wilkins's model. The Attorney General must deal with divergent rule content, as well as enforcement bodies, for prosecutors' ethical rules. Multiple conflicting rules are not the only driving force behind the Attorney General's concern. The substantive content of applicable ethical rules is also a concern. For example, even if all 50 states and 94 district courts agreed on a single no-contacts rule, it seems clear that the Attorney General would seek to preempt it if the rule banned all undercover law enforcement contacts.\textsuperscript{17} Thus, appropriate rule con-

\textsuperscript{12} Wilkins, \textit{supra} note 6, at 810.
\textsuperscript{13} \textit{Id}. at n.36.
\textsuperscript{14} See Gorelick, \textit{supra} note 181, at C7 ("Unfortunately, there are 50 different sets of state ethics rules, subjecting department attorneys to conflicting requirements.").
\textsuperscript{15} See Green, \textit{supra} note 306, at 83 n.78 (stating that "[n]one of the reported [federal disciplinary committee] decisions involve federal prosecutors"); \textit{see also} \textit{Id}. at 88-89 n.111 (noting the dearth of reported disciplinary proceedings brought by state authorities against federal prosecutors, let alone finally resolved against them, and citing only three decisions, none of which involved actual imposition of discipline). Indeed, the single decision that reports a state disciplinary result is one that exonerates the federal prosecutor. \textit{United States v. Kelly}, 550 F. Supp. 901, 903 (D. Mass. 1982).

It is important to focus on local disciplinary actions where the Attorney General believes the prosecutor was undeserving of sanction. For surely the Attorney General ought not complain about ethical discipline of a federal prosecutor whom the Attorney General believes intentionally violated a fair ethical rule.
\textsuperscript{16} See Green, \textit{supra} note 306, at 70, 85 n.88.
\textsuperscript{17} Gorelick & Klineberg, \textit{supra} note 183, at 142.
tent is a separate concern here. Finally, aside from substantive rule content and multiple versions of ethical rules, the multiplicity of enforcement bodies can be seen as “chilling” to federal prosecutors who fear the odd, interpretative error that could severely hurt their personal licenses and careers even beyond the Department of Justice.

There are, therefore, currently three separable concerns driving the Attorney General’s evaluation of the question whether to regulate federal prosecutors’ ethics: multiple rules, the substantive content of the rules, and multiple enforcement authorities. Interestingly, the new federal contacts regulation does not separate these concerns. It preempts local authority on all three fronts: who writes the rule, what the content of the rule will be, and who will enforce the rule. On all these issues the answer is the Attorney General.

2. The Rule Writing and Discipline Functions Can Be Separated

It is important to note that there is no a priori need for such a monolithic answer. The Attorney General might rationally decide to preempt only one, two, or none of these separable issues. For example, she might preempt who writes the rules by forming a blue ribbon commission comprised of outsiders as well as Department personnel, and then agree to abide by whatever content that group finds advisable. Similarly, once a single national rule and its content were promulgated, the Attorney General might still leave enforcement of the rule to state and local federal bodies. It might be assumed (absent evidence to the contrary) that state authorities and federal judges would conscientiously apply the new national rule, once the Attorney General’s authority to promulgate it was settled. While a multiplicity of interpretive bodies will engender an occasionally erroneous interpretation, federal prosecutors already live with that constant possibility with regard to other uniform sets of federal rules (of Civil, Criminal, Appellate Procedure, and Evidence).

The possibility of separating preemptive rule writing from preemptive enforcement is not addressed in the published history of the Attorney General’s contacts regulation. Instead, having decided to write the rule, the Attorney General appears to have immediately concluded that she would enforce it as well. If it considered the option

318. But see Ted Schneyer, Professional Discipline in 2050: A Look Back, 60 Fordham L. Rev. 125, 127 (1991) (speculating that although a Federal code of ethics might initially allow enforcement to “remain[] local,” disciplinary authority ultimately would also become federal “when it became clear both that some states were enforcing the Federal Code much more actively than others and that the state supreme courts often disagreed” in interpretation).

319. Enforcement under the new rule is not entirely preemptive, however. If the Attorney General concludes that a violation of her regulation has been “willful,” the matter is then to be sent to state authorities for discipline (presumably in addition to whatever discipline the Attorney General imposes). Contacts Rule, supra note 10, § 77.12. This is probably because the Attorney General’s discipline of her employees
at all, the thought of leaving enforcement to local authorities did not long occupy the Department, likely because of the heated hostility that produced the regulation itself.

After a period of cooling and conciliation, however, the Attorney General could rationally decide to leave enforcement to local authorities. Once a national, uniform ethical rule of acceptable content is written, at least two-thirds of the Attorney General's concerns will be addressed. Leaving enforcement (concurrent with OPR, of course) to existing local authorities would be far less disruptive of the traditional state role in the field of lawyer-ethics. Moreover, it would demonstrate federal respect for the state supreme courts that enforce lawyer discipline, and it would provide some public confidence that local authorities still control federal prosecutors to some extent, rather than removing the function entirely to Washington. This would go some distance toward reducing external "fox guarding the henhouse" perceptions.

3. The Reality of Monetary Costs

Moreover, it would save the Department of Justice the huge costs of maintaining an exclusive internal investigatory and adjudicative body. The current budget for the Office of Professional Responsibility is roughly $3 million. An adequate budget for an OPR, that was directed to exclusively investigate and enforce a comprehensive, national ethical code—as opposed to one rule and discrete referrals—is difficult to imagine realistically. Surely it would be at least a tenfold amount.

tops out at terminating their employment, and willful violators of any important ethical rule may well be deserving of more serious, licensing, discipline. Of course, the Attorney General has retained the authority to determine whether a violation is "willful," rather than allow state authorities to inquire. Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,927 (1994) (to be codified at 28 C.F.R. § 77). Nevertheless, her sensible decision to leave some discipline to state authorities implicitly acknowledges that the enforcement function need not be entirely preempted, and is separable from the determination of substantive rule content.

320. Conciliation is now at least partially underway; in the Spring and Summer of 1996, Department of Justice officials and members of the State Chief Justices' Conference met and discussed alternatives to the preemptive contacts regulation. Interviews with Jamie Gorelick, Deputy Attorney General, and Michael Zimmerman, Utah Chief Justice (Feb. and June, 1996).

321. See 59 Fed. Reg. at 39,918 (noting at least one critical comment of "the fox maintain[ing] ... guard over the hen-house").


323. According to the 1993 OPR Annual Report, 685 cases were opened by OPR regarding allegations against DOJ employees in 1993. 1993 Ann. Rep. of the Off. of Prof. Resp., pt. III, § A, at 4. Of these, 164 matters involved allegations of misconduct or professional or unethical conduct. Id. at 7. If an overall ethical code were adopted for OPR to enforce, and if state and local federal authorities were ousted from enforcement jurisdiction, one can only speculate on the order of magnitude by which these numbers would increase.
4. Who Is the Prosecutor's Client?

Another relevant current reality for the Attorney General is that federal prosecutors have the most diffuse “client” imaginable: the people of the United States. Representing a corporation provides sufficient “client identity” problems to lead most ethics codes to address organizational clients in separate rules.\textsuperscript{324} Professor Wilkins takes this into account by dividing his theoretical universe into an “Individual/Corporation” client grid.\textsuperscript{325} But the universe of clients does not run only from individuals to corporations.\textsuperscript{326} For prosecutors, it runs immediately and all the way to “the public at large.”\textsuperscript{327}  

Whether Professor Wilkins's omission of any overt reference to the public prosecutor's peculiar client identity problems would lead him to any different modeling results is beyond this article's ken. But imaging an ethical regulatory system for federal prosecutors plainly requires that the absence of express client communication, direction, constraints, and conflicts be kept in mind.\textsuperscript{328} Using Wilkins's terminology, “agency problems” (harms to clients) may be harder to detect or identify, while “externality problems” (harms caused by direct client influence) may be lessened.\textsuperscript{329} Yet because prosecutors often accept the federal investigative agencies, or the victims of crime, as a client-surrogate,\textsuperscript{330} while neglecting considerations of other constituents of the public, a different sort of “externality problem” may arise.\textsuperscript{331} Nevertheless, even after adding prosecutors and their clients to his modeling grid,\textsuperscript{332} Wilkins's generalized cost-benefit statement seems correct. Gains in compliance by federal prosecutors with ethical rules “must be balanced against a likely assessment of the costs associated with . . . a particular method of control.”\textsuperscript{333}

\textsuperscript{324} See Model Rules, supra note 23, Rule 1.13; Cal. R. of Prof. Conduct Rule 3-600 (West 1996).

\textsuperscript{325} Wilkins, supra note 6, at 818.

\textsuperscript{326} Id.

\textsuperscript{327} Id.

\textsuperscript{328} Compare Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 Wm. & Mary L. Rev. 1303, 1357-60 (1995) (noting that ethical codes mandate client-lawyer discussion on various topics).

\textsuperscript{329} See Wilkins, supra note 6, at 819-20.

\textsuperscript{330} That is, they pursue the interests of the investigatory agents with whom they are working (e.g., FBI or DEA), or the interests of the parties injured by the crime at issue.

\textsuperscript{331} For example, departmental ethics instructors often remind prosecutors that even the defendant is a member of “the public,” and thus his or her rights are part of “the client” mix.

\textsuperscript{332} See Wilkins, supra note 6, at 818, 820 (providing matrices that fail to note government lawyers as possible actors and that omit “the public” as a possible client).

\textsuperscript{333} Id. at 820.
B. Costs and Benefits of a Wholly Preemptive Attorney General Ethics Code

While "costs" to state regulators and defense attorneys of an Attorney General promulgated ethics code seem obvious to these groups, there are costs to the Attorney General as well. The Department of Justice's own analysis needs to focus on such costs that are perhaps less obvious.

The benefits of a uniform federal prosecutors' ethics code are clear: uniformity and certainty. The costs are more diffuse, somewhat more speculative, and difficult to quantify. Nevertheless, those costs are undoubtedly large.

1. Benefits

In light of recent ethical rule disuniformity and the unevenness of local rule interpretations, a single, federal code provides one undeniable benefit: uniformity of rule content for a significant group of federal lawyers. Such uniformity necessarily reduces costs of research and investigation into varying local codes and interpretations. It also reduces uncertainty and, to some extent, "chill" from unknown, unpredictable, or hostile enforcement groups.

Moreover, if a comprehensive code were promulgated along the lines of the contacts regulation (that is, preempting enforcement as well as content, and written internally by the Department of Justice itself) other benefits adhere: more, although not perfect, uniformity of interpretation and of discipline; and substantive content favorable to the law enforcement objectives of the Department of Justice. Thus the Attorney General and her employees would reap benefits that flow naturally from enjoying total control over any regulatory system.

Of course, that same aspect of total DOJ control would not unreasonably be viewed as a major drawback by many outsiders, as discussed below. But even the Attorney General ought not overestimate the gains that such a system would provide. Aside from a relatively few issues such as contacts, attorney subpoenas, and possibly ex parte rules, existing local ethical codes are uniformly benign in content and not applied or interpreted adversely to prosecutors. Thus the goals of uniformity are already served, in large reality, by the present

334. See Model Rules, supra note 23, Rule 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."). Some have suggested that this Rule, plainly written for civil practice, might nevertheless be applied to federal prosecutors presenting cases to grand juries, as an "end run" around the rule of United States v. Williams, 504 U.S. 36 (1992), that prosecutors need not introduce exculpatory evidence before the grand jury. See United States v. Colorado Supreme Court, 87 F.3d 1161, 1165-66 (10th Cir. 1996) (reinstating a suit for injunctive relief after finding that federal prosecutor plaintiffs sufficiently alleged "injury in fact" from a proposed application of Rule 3.3(d)).
“multi-door” system. Any gain from a national code would be in only a few discrete areas.

As for enforcement, the reality is that federal prosecutors are rarely investigated by state or local authorities, let alone disciplined.\textsuperscript{335} Preemption of state enforcement authority should necessarily be accompanied by increased Attorney General enforcement, as it was with the contacts regulations.\textsuperscript{336} Thus a fully preemptive Attorney General code would realistically result in more discipline of federal prosecutors rather than less.\textsuperscript{337} This leaves in place at least some, perhaps even a greater, “chilling effect” on close-but-valid conduct by line prosecutors.\textsuperscript{338} Finally, federal judges will still retain their inherent authority to discipline federal prosecutors for in-court and related conduct, regardless of any Attorney General-imposed code,\textsuperscript{339} with all the uncertainty and idiosyncracy of interpretation that inheres in a 1000-judge federal system.\textsuperscript{340}

The benefits, then, of a wholly preemptive Attorney General’s prosecutors’ code are uniform content and interpretation, favorable rule content, and greater control over enforcement. But in light of current uniformity with regard to most state ethical rules and docile state enforcement, these benefits are more psychological for federal prosecutors than they are concrete.

\section*{2. Costs}

Meanwhile, a wholly preemptive, Attorney General-generated ethics code seems quite costly, from the Attorney General’s perspective, as well as from the perspective of a concerned outsider.

First, such a system would simply cost a lot of money.\textsuperscript{341} An internal disciplinary body with sufficient resources to enforce an entire ethical code is hard to envision. Would it require ten times as many

\begin{itemize}
\item \textsuperscript{335} Green, supra note 306, at 83-84, 88-91.
\item \textsuperscript{336} See Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,918 (1994) (to be codified at 28 C.F.R. § 77). This is, of course, not necessarily so, but if OPR did not increase its enforcement activity after state authorities were preempted, it is likely that Congress would step in.
\item \textsuperscript{337} This is particularly so because the traditional state “reluctan[ce] to proceed against federal prosecutors,” Green, supra note 306, at 90, ought to be reduced if it is the Department itself which becomes the enforcer.
\item \textsuperscript{338} This likely systemic increase in discipline of federal prosecutors also ought to give opponents of the Attorney General’s preemption some pause, as a normative matter. If the goal is increased discipline of federal prosecutors, perhaps a stronger federal ethical code and enforcement body is exactly what they should advocate.
\item \textsuperscript{339} See supra notes 299-01 and accompanying text.
\item \textsuperscript{341} Accord, Wilkins, supra note 6, at 829 & n.118 (noting that the bar spent a total of $74.4 million on the disciplinary system in 1988).
\end{itemize}
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lawyers as OPR's current nineteen?\textsuperscript{342} Or more? Receiving congres-
sional authority to add even a single zero to OPR's current $3 million
budget seems unlikely in today's fiscal climate. Yet the new OPR
would likely need greatly increased staff, a large travel budget, many
more fact investigators, and probably (in the finest tradition of Wash-
ington regulators) its own building. Nor would that be the end. The
Attorney General herself would have to add staff to handle the disci-
plinary review process for OPR recommendations (currently handled,
since it is relatively light, by existing staff whose primary responsibili-
ties are on other matters). Indeed, a cadre of internal hearing examin-
ers or administrative law judges would likely become necessary,\textsuperscript{343} as
most state bar disciplinary bodies have discovered.\textsuperscript{344}

Aside from these purely monetary and resource costs, the distrac-
tive costs to the Attorney General cannot be ignored. The job of At-
torney General is already dauntingly overburdened with
responsibilities. Currently, the Attorney General can rely on state
and local federal authorities to detect and discipline federal
prosecutorial misconduct. A nationalized and centralized preemptive
enforcement system would force her to become the final arbiter in
many more cases, or to relegate that important authority to some
lesser figure. For symbolic as well as substantive reasons, it is valuable
to have the Attorney General maintain her role atop the federal
prosecutorial pyramid. Why would she want to add to her burdens in
this regard, when for the most part existing enforcement mechanisms
are not damaging the Department's mission?

Another significant cost, impossible to quantify but certain to occur,
is damage to the wealth of prestige and stature that the United States
Department of Justice has built up over time. As is evidenced by the
hostile and unanimous opposition of the Conference of State Chief
Justices to the single federal regulation on contacts, a preemption of
ethical rule and enforcement power by the Attorney General is
viewed as an arrogant federal incursion on historic state and local au-

\textsuperscript{342} OPR's staff attorneys have almost tripled in four years, from six in 1992 to 18
today. Interview with John T. Ezell III, Deputy Chief of OPR (Sept. 1996). This de-
monstrates a healthy increase in the resources devoted to evaluating allegations of fed-
eral prosecutorial misconduct. Yet a mere 19 lawyers could hardly enforce a
comprehensive federal ethics code that preempted all local authority across the
nation.

\textsuperscript{343} See Schneyer, supra note 318, at 125 (hypothesizing creation of the “National
Disciplinary Commission for Lawyers” sometime in the next 50 years).

\textsuperscript{344} Of course all this cost would be avoided if a decision were made simply to not
enforce the new federal Attorney General code. Such an option seems to be politi-
cally unviable, and the present Attorney General is committed to a responsible en-
39,910, 39,918 (1994) (to be codified at 28 C.F.R. § 77) (containing Attorney General
statement that she takes prosecutorial misconduct “very seriously” and intends to
“fully . . . enforce these rules and to issue . . . strong sanctions for any violation”). The
author declines to presume a normative universe of unenforced prosecutorial ethical
rules; this article presumes a responsible and concerned Attorney General.
The message sent by the Attorney General is one of distrust: we don’t trust state chief justices (who ultimately enforce state bar discipline) to write good rules, or to fairly enforce them, or to understand and seek the benefits of uniformity, or to appreciate legitimate law enforcement concerns.

State authorities are legitimately hostile to these messages. Moreover, they can point to the fact that, while some federal judges may have poorly interpreted their ethics rules and the realities of prosecutorial roles, no federal prosecutor has yet been disciplined by state authorities for the alleged misconduct. Finally, it can be argued, while it may be true that some local ethical rule-writing committees may have fallen prey to anti-prosecutor interests over the last decade, state authorities now are wise to the problem. In fact, recent years have seen little or no strategic ethical rule manipulation in the state bars. In short, state authorities can say, with some powerful justification, “it ain’t broke.” A decision to “fix” it by wholesale preemption would be confrontational and permanently damaging to state-federal relations, which are important to the Attorney General in a multitude of other areas.

This damage would manifest itself immediately in expensive legal challenges likely to succeed at the local level in some jurisdictions, and again hugely distracting from the primary law enforcement mission of the Department of Justice. Individual state disciplinary actions against federal prosecutors claiming preemptive immunity would certainly increase and—unlike the current state of affairs—succeed, again at least in some local arenas. Is it worth it?

Finally, a wholesale assertion of ethical preemption would damage already sensitive relations between the Department of Justice and the private bar. Again, this is something that any sensible Attorney General should be concerned about. In the long run, the legitimacy and authority of federal law enforcement efforts will rest on support from the organized bar, not resistance to it. The Attorney General and her prosecutors cannot live in a vacuum, nor should they. If state

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345. See, e.g., United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993), appeals docketed, No. 95-10366 and No. 95-10394 (filed Aug. 18, 1995 and Sept. 1, 1995); United States v. Hammad, 846 F.2d 854, 857 (2d Cir. 1988) (declining to hold that DR 7-104(A)(1) is “limited in application to civil disputes or that it is coextensive with the sixth amendment”), modified, 858 F.2d 834 (2d Cir. 1988), aff'd, 902 F.2d 1062 (2d Cir.), cert. denied, 498 U.S. 871 (1990); In re Doe, 801 F. Supp. 478, 481 (D.N.M. 1992) (holding that the case was improvidently removed pursuant to 28 U.S.C. § 1442 and, thus, remanded case to the New Mexico Disciplinary Board).

bars and the various national bar associations347 were uniformly to oppose an Attorney General ethics initiative, political opposition would not lag far behind, and the Attorney General cannot win against a hostile Congress.348 Nor should she have any desire to attempt this. A Department of Justice in step with the responsible majority of the people is the only sensible, and normatively desirable, relationship for the nation’s top lawyer.

Thus, to succeed, a wholly preemptive federal ethical code must first be perceived as needed by a substantial number of outside observers and not just by the Attorney General. Responsible and reflective outsiders are not likely, in reality, to undervalue law enforcement interests. Indeed, this likely explains the lack of a serious challenge to the 1994 contacts regulation; responsible outsiders have had to admit—if reluctantly—that in light of Lopez, a preemptive federal regulation on that topic was necessary.349 But the case is strong that we have not reached such a point regarding ethical rules in general, and possibly never will.

All the foregoing costs should give any Attorney General great pause, because they weigh against her own larger interests. But there is also one large cost not yet discussed. It is one that is dramatically vital to any neutral outsider’s calculus, as well as, one hopes, to any reasonable Attorney General. That cost is the likely bias and under-enforcement of desirable ethical norms that an ethical system controlled entirely by the Attorney General could produce. One could go on about this cost at greater length,350 but there seems little need to do so. Any system of rules that is drafted, and then enforced, by the same agency for which the object lawyers work, is likely to be at the very least unconsciously biased in favor of their/its own interests. If even independent regulatory agencies can be “captured,”351 an agency that begins as “captured” is unlikely to strike an entirely neutral balance, in rule content or in enforcement.

If the rule-writing function is maintained within the Department of Justice, full consideration of opposed or competing outside views is impossible; those views are certain to be muted when voiced—if voiced at all—by “insiders,” who generally have little to gain and

347. The ABA, the National Bar Association, and the Federal Bar Association are but a few of the myriad associations that purport to represent national groups of practicing attorneys.

348. Indeed, Congress could immediately end Attorney General preemption in this area simply by unambiguously legislating a contrary intent. See supra notes 5 & 148 and accompanying text.

349. Challenges may also have lagged because the content of the Attorney General’s regulation is reasonably evaluated as normatively inoffensive.


351. See Wilkins, supra note 6, at 846.
much to lose from vocal opposition. Even acting in complete good faith, an Attorney General who claims the entire rule-writing function will likely write at least subtly biased rules.352

As for enforcement, the dangers of under-enforcement when only the Department of Justice disciplines its own are obvious and already well laid out by others.353 As Professor Green notes, “[o]ne might reasonably anticipate . . . that attorneys in the Office of Professional Responsibility lack neutrality and detachment when judging . . . fellow members of the Department of Justice.”354

Moreover, the “fox guarding the henhouse” parable has an experiential basis: even though there may be some perfectly good fox guards, as a class foxes are inclined to eat, rather than protect, chickens. While the current Attorney General appears sincerely committed to effective ethical regulation, recent history has had unfortunate experiences with unethical, even criminal, Attorneys General.355 Cabining the regulation of federal prosecutors entirely within that office can come at an unacceptably high cost. This cost would come in the form of normatively “bad” ethical rules and undesirably low enforcement if the office does not demonstrate the highest motives. Thus, while the Attorney General might not herself perceive total control as a “cost,” outsiders are unlikely to perceive it otherwise.

One final “cost” should be noted here, speculative and perhaps with less consensus. If the Attorney General were to, in effect, direct that her prosecutors could appear and litigate within states and in federal district courts without observing “their” ethical rules, the phenomenon of “career federal prosecutors” is likely to be encouraged.356 Federal prosecutors believed to be in violation of state ethical rules would nevertheless remain licensed to practice, but only in the federal courts. In effect, a de facto and ultimately perhaps, de jure “Federal bar” of prosecutors would be created, licensed, and disciplined by the Attorney General. Even if such federal prosecutors could not be overtly disciplined by their state bars for ignoring state ethical rules—

352. Historically, Attorneys General have not always acted in good faith. Thus, while this author’s model would presume a good-faith Attorney General, see supra note 344, a legitimate danger of an exclusive Department of Justice system is the possibility that a bad faith actor might one day occupy the office. See infra note 355.


354. Green, supra note 306, at 85. This is not a criticism of the OPR attorneys, who in the author’s experience are dedicated, hard-working, and dispassionate. It is simply a human characteristic of any internal institutional regulatory group.


and this seems less than clear—they are likely to be held in low regard by their stateside peers. Even if this does not “chill” effective federal prosecutorial conduct, it is likely to make it harder for federal prosecutors to find stateside private employment.

But encouraging more career federal prosecutors is a “cost” of which the Attorney General should be wary. A large cadre of lifelong federal prosecutors is a bad idea. The Department of Justice is a “public prosecutor’s” office. This should mean that the bulk of the federal prosecution force does not stay for life, but rather turns over frequently enough that the public perspective remains fresh and the “public interest” is not forgotten. Of course, a few unusually talented and energetic “old-timers” must stay to provide continuity, training, and experienced judgment. But overall, careerism is incompatible with the American concept of the public prosecutor’s office. While some European countries have a different model, a uniquely American aspect of criminal prosecution has been that the identity of the prosecutor changes with some frequency. The ideals thus remain with the institution, while personnel and perspective are constantly renewed. A system that lends itself to lifelong federal prosecutor licensing is at war with this concept. Departmental lawyers need to be in sync with their communities, not at war with them. Thus the endpoint of the preemptive conception is a bad one for the Department of Justice, as well as its clients, the people of the United States.

IV. So Who Should Regulate Federal Prosecutors, and How?

Detailed construction of a Wilkinsian system for federal prosecutors will have to await another forum; indeed, perhaps only the “reality crucible” of the Department of Justice itself can produce the strongest and most nuanced mold. But a few brief points can be sketched here.

357. A quick summary of the argument would be: Since Neagle it has been clear that states may not penalize federal agents for their authorized, official conduct. It is, however, unclear whether revocation of a state license based on a failure to fulfill state licensing requirements would be a prohibited “penalty,” so long as the attorney’s practice remains unaffected. Surely, for example, a state may remove from its rolls a federal prosecutor who refuses to pay state bar dues, or even just pays them late (if that same sanction is visited on all attorneys who pay late). So long as federal prosecutors are permitted to continue practicing in their courts, removal from the state rolls of actively licensed attorneys might be within the state’s discretion as “licensor” where a federal prosecutor refuses to follow the state bar’s rules.

358. For example, the Department of Justice presently relies on two such talented lawyers: Jack Keeny, the Acting Assistant Attorney General for the Criminal Division, who has been with the Department 45 years, since 1951, and David Margolis, Associate Deputy Attorney General, who is a youthful 56 and has been with the Department “only” since 1965.

359. This article is already too long to permit consideration of Professor Zacharias’ provocative assertion that Congress might actually be “the most suitable [ethics] deci-
A. The Attorney General Should Not Preempt the Field

Because most state regimes are uniform and substantively accepting of most ethical rules, there is no need for the Attorney General to preempt the entirety of state ethical codes. Because the costs, both actual and possible, of preemption are high, it should not be attempted unless a strong need can be shown.

This Article does posit that it is appropriate for the Attorney General to preempt when a discrete ethical rule is being misused in local venues against valid federal law enforcement efforts. Rule 4.2 and the *Lopez*, *Hammad*, and *Doe* cases provide the paradigm. Yet even preemption here need not be permanent. If the states were uniformly to adopt a substantively acceptable version of the contacts rule, the need for Attorney General preemption would be lessened substantially. There is no reason that ethical regulation cannot be ceded back to the states, once a discrete “crisis” has been suitably resolved. Thus discrete, rule-specific Attorney General preemption occasionally may be necessary and appropriate; but it should be limited in scope and presumptively non-permanent.

B. The Attorney General Should Separate the Three Aspects of Ethical Rule Preemption, and Consider Less Than Wholesale Preemption

It may on occasion be necessary for the Attorney General to issue a nationwide, preemptive, ethical rule. The contacts regulation was such an instance. Yet the Attorney General should consider separating (1) the promulgation of a preemptive national rule from (2) its drafting and (3) its enforcement.

A specially designated drafting commission, composed of prominent lawyers—and even non-lawyers—with diverse perspectives and independent of the Department of Justice, as well as Department of Justice attorneys, could yield at least two benefits. First, the rule drafted by such a group is likely to be the best-tested and most fully considered, and thereby—one hopes—the normatively most desirable rule. The Attorney General could always reserve the right to reject a substantively unacceptable proposal. But there is little reason to be-

—Zacharias, *Who Can Best Regulate*, supra note 153, at 431. My initial reaction is that the present situation is far from being so bad as to require a “fix” involving such a dramatic institutional shift; and that numerous factors give one pause regarding Congress’ institutional capacity to be reflective and nuanced regarding lawyers’ ethical rules.

360. This is not an entirely unrealistic vision, *c.f.* Fred C. Zacharias, *A Nouveau Realist’s View of Interjurisdictional Practice Rules*, 36 S. Tex. L. Rev. 1037 (1995) (suggesting that a uniform interjurisdictional rule would not undermine any one jurisdiction’s ability to regulate lawyers and insure that lawyers conduct themselves accordingly). The Department of Justice attorneys and representatives of the Conference of State Chief Justices are presently meeting to determine whether the present situation can be resolved by a mutually acceptable rule.
lieve that a Commission more diverse and independent than simply the Attorney General’s internal staff will yield a “bad” rule.361

Second, an independent drafting commission is likely to produce broader public acceptance for proposed preemptive rules. Certainly a proposal issued by a committee that includes legislators, academics and defense attorneys will have more credibility than a wholly Attorney-General-generated rule. The danger, of course, is that an independent committee will be unable to agree, as diverse members act to protect their perceived constituencies and “turf.” If that were to happen, the Attorney General of course could simply abandon the idea. Yet the careful selection of experienced and truly independent members, who are not beholden to particular constituencies and are mindful of the need for responsible rule-drafting, might go far towards producing consensus proposals. It is worth a try.

As for enforcement, there seems little reason not to at least initially send a message of trust to state authorities, rather than one of intrusive preemption. It bears repeating that there is no record of unfair state discipline of federal prosecutors. Perhaps the existence of fifty separate enforcement authorities will “chill” some conduct, but this has been the reality of enforcement up to now, and remains so even after the Attorney General’s contacts regulation for all the ethical rules but that one. Yet federal criminal law is, overall, still being effectively enforced.

Moreover, substantive uniformity of content goes a long way toward eliminating chill. The “chill” factor thus appears to be negligible, and one that the Attorney General is so far willing to bear in general. State enforcement thus should remain the norm.362 Indeed, once a national content can be agreed upon, even the contacts regulation could be amended to permit state enforcement of its substantive provisions.

Professor Schneyer may be right: national ethical rules may inevitably lead, sooner or later, to national enforcement.363 But respect for state authorities and their historical role, as well as wariness of incurring costs where no need for enforcement preemption has yet been shown, counsels that a less preemptive course initially be pursued.

361. In fact, the contact regulation is arguably the product of just such diverse views. First promulgated under one Administration, it was refined and revised by “outsiders” brought in to staff the new Administration’s Attorney General office. It also benefited from substantial comment periods spanning three Federal Register publications over two years. See supra notes 99-101 and accompanying text. Such independent and repeated redrafting is unlikely to be the norm. It should, instead, be affirmatively institutionalized.

362. There is no constitutional objection to such state enforcement, since it would not be mandatory but rather simply permitted, for those states interested in maintaining that function. See New York v. United States, 505 U.S. 144, 161, 168-69 (1992).

363. See Schneyer, supra note 318, at 127.
C. The Attorney General Should Seek To Influence Local Ethical Regulators

The Department of Justice is able to exert substantial influence over the current state and local regulatory structures, through lobbying and, more significantly, through direct participation by its prosecutors in local bar activities. In addition, the Attorney General's potential preemptive power gives her a "Big Stick." Thus the ABA was recently persuaded to revoke the judicial approval provision of Rule 3.8(f).

Local bar committees often generate the initial drafts of local ethical rules, as well as influential comment on proposals. The Attorney General has a high-profile potential representative—the U.S. Attorney and Assistants—in every state and major city in the country. Federal prosecutors should be encouraged to participate energetically in the bar's ethical rule development process. Rather than incur the unknown yet large costs of a preemptive system, the Attorney General would do better to focus her considerable energies and clout on this avenue of developing ethical rules. Her recent expression of support to her attorneys for their personal bar involvement is a very positive step in the right direction.

The largest problem confronting the Attorney General in the ethics area has been rule content and local interpretive disuniformity. But if federal prosecutors are helping to draft rules and write interpretive opinions, as well as generally providing a realistic prosecutorial perspective to local bar groups and authorities, hostile disuniformity problems can be muted if not entirely avoided.

D. State and Local Authorities Must Take Seriously Their Role to Ensure Fair Ethical Regulation of Prosecutors

The Attorney General cannot remain sanguine regarding the currently un-preempted "multi-door" system if states permit their ethical rules to become "Trojan Horses" for strategic attacks on fair law enforcement. State authorities also must play a responsible self-policing role. State ethics committees, disciplinary personnel, and judges who serve as final arbiters of rule content and enforcement must critically review ethical rules and disciplinary charges and be satisfied that they are fair and regardful of traditional practice as well as of valid law enforcement concerns. Only a vigilant and fair promulgation and ap-

364. See Attorney General Encourages Bar Involvement, 9 Criminal Justice, Summer 1994, at 47.

365. See, e.g., Cal. R. Prof. Conduct Rule 2-100 cmt. (West 1996) ("applicable law" for the "authorized by law" exception "includes the authority of government prosecutors and investigators to conduct criminal investigations"). The author speaks from some experience, having served pro bono as an officer of the Bar Association of San Francisco's Ethics Committee while employed as an Assistant United States Attorney for the Northern District of California from 1989-1994.
application of state ethical rules will persuade federal prosecutors that they can live with state regulation.

So it's a group effort: the Attorney General and federal personnel should work with state authorities rather than move to preempt them; and judicial and state officials must endeavor to ensure that their rules are fair and evenly applied, not used as tactical weapons. In this final conclusion, this article is in accord with both Professors Wilkins and Green.\footnote{See Wilkins, supra note 6, at 873; Green, supra note 306, at 95.}

CONCLUSION

The brief answer to the normative question posed by this Article's title is that absent extreme hostility to federal prosecutors, state authorities should remain the chief regulators of federal prosecutors' ethics. The "multi-door" regulatory system,\footnote{Wilkins, supra note 6, at 851, 873.} that is currently in place for federal prosecutors has advantages that ought not be abandoned solely for the sake of uniformity.

Nevertheless, to paraphrase Justice Sutherland, federal prosecutors must be able to strike hard blows, so long as they are not foul ones.\footnote{Berger v. United States, 295 U.S. 78, 88 (1935).} Multiple and conflicting sets of ethical rules cannot be applied to federal prosecutors if the effect is to chill or obstruct the effective yet fair enforcement of federal criminal laws. Absent further word from Congress, the Attorney General is legally empowered to step in and address such a situation by preemptive rule-making if necessary.

Finally, however, the Attorney General ought to strive not to assert her full preemptive powers in this field, because such preemption carries with it grave costs: to the Department of Justice, to the fabric of federal-state and bench-bar relations, and ultimately to the pursuit of justice in the federal system. A cautious course in this uncharted sea seems prudent. The various local regulatory authorities do not, as a whole, appear so hostile to federal prosecutors that these costs should be assumed. At the very least, the Attorney General should proceed preemptively only in discrete areas and only where lesser methods—primarily, entreaties to state Chief Justices and rule writers—have been tried without success.

Meanwhile, all relevant actors, state and federal judges, Department of Justice personnel, and private lawyer bar participants, should work to prevent misdesign and misuse of their ethical rules. Cases like \textit{Lopez} must be prevented from developing, so that the Attorney General will feel no further need to protect her prosecutors from uneven and unfair ethical regulation. It is in the interests of all to acknowledge that the Attorney General's power, while capacious in this area, is better off unexercised.