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Article 1

Department of Justice Guidelines: Balancing Discretionary Justice

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DEPARTMENT OF JUSTICE GUIDELINES: BALANCING "DISCRETIONARY JUSTICE"[1]

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INTRODUCTION

Prosecutors are afforded enormous discretion in a multitude of decisions.[3] For example, they decide who will be charged with crimes,[4] what crimes will be charged,[5] what evidence will be submitted to a grand jury,[6] whether discovery materials will be released earlier than mandated by statute,[7] whether an accused will receive benefits for cooperating with the government,[8] and whether cases will be plea bargained, dismissed, or tried.[9] The law sets the external boundaries for many of these functions, but prosecutors may move relatively freely within these boundaries in exercising their executive function.[10] Seldom

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[3] There has been an enormous amount of scholarship on issues related to prosecutorial discretion. *See* DAVIS, *supra* note 1; *see also* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980); Abraham Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 L. & CONT. PROB. 225 (1984) (discussing discretion as it relates to victims); Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669 (1992); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137 (1995); James Vorenberg, *The Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L. J. 207 (2000).

[4] *See* Wayte v. United States, 470 U.S. 598, 608 (1985) (holding that absent an impermissible standard such as race or religion, prosecutors have discretion to decide who will be charged with a crime). *See also* Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997) (discussing prosecutorial discretion in charging); Mark Lemle Amsterdam, *The One-Sided Sword: Selective Prosecution In Federal Courts*, 6 RUTGERS-CAMDEN L.J. 1 (1974) (discussing selective prosecution in federal courts).

[5] *See* United States v. Armstrong, 517 U.S. 456 (1996) (holding that a defendant is not entitled to a discovery claim for a selective prosecution argument).

[6] *See* United States v. Williams, 504 U.S. 36 (1992) (holding that the government is not required to disclose "substantial exculpatory evidence" to a grand jury).

[7] *See, e.g.*, United States v. Green, 151 F.3d 1111, 1115 (8th Cir. 1998) (holding that although the government has no obligation to release discovery material early, it has this option).

[8] The government has the exclusive authority to offer a reduction in sentence premised upon cooperation. *See* U.S. Sentencing Guidelines Manual § 5K1.1 (2001). *See also* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994).

[9] *See* WAYNE R. LAFAVE ET AL., 4 CRIMINAL PROCEDURE § 13.2(a), at 10 (2d ed. 1999) (discussing the range of discretionary decisions afforded to prosecutors); *see also*); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998).

[10] Professor Norman Abrams, in a 1971 article, noted the benefits of this prosecutorial discretion:

> The major advantage of such discretion is that it provides early in the decision-making process a flexibility and sensitivity not available in a system where prosecutorial decisions must be made according to predetermined rules. It permits a prosecutor in dealing with individual cases to consider special facts and circumstances not taken into account by the applicable rules.

do constitutional constraints impede the discretionary power of prosecutors.[11]

Internal "guidelines"[12] of the Department of Justice (DOJ) assist federal prosecutors in making the decisions that fall within their discretionary realm.[13] These internal guidelines, usually found in the United States Attorneys' Manual, provide government prosecutors with guidance in making decisions.[14] Although these guidelines are policy statements and not legislative rules,[15] they offer an element of consistency to the decision-making process, provide education for newcomers to the department, and can serve as a restraint on prosecutorial discretion.[16]

Prosecutors however, do not always adhere to these guidelines.[17] The accused has no judicial recourse when prosecutors fail to abide by these guidelines, as courts routinely find these guidelines strictly internal and unenforceable at law. Thus, when it comes to DOJ guidelines, a failure to follow office procedure is an error that cannot be used by the accused who might suffer as a result of this violation.[18]

This article focuses on criminal cases involving violations of DOJ internal guidelines. It uses as examples three guidelines that have been violated by attorneys in the Justice Department and examines the judicial response to these transgressions. It contrasts this judicial response to court treatment of guideline violations by other administrative agencies.[19] After discussing the guideline violations and court responses to these transgressions, this article focuses on why compliance with the guidelines is important and how it can be improved.

Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971).

11 Reaching a constitutional level requires a showing of a due process violation or a discretionary decision that violated equal protection mandates, such as a charging decision that used an impermissible criteria such as race or religion. *See Wayte*, 470 U.S. at 608 (1985). Guidelines adopted by the Department of Justice, however, do need to stay within the limits of Constitution. *See* United States v. Schmucker, 721 F.2d 1046, 1049 (6th Cir. 1983) (stating that the "government cannot adopt a prosecution policy which, if adopted by Congress as a statute, would be unconstitutional").

12 Guidelines is the accepted term used to describe the policy statements of the Department of Justice. They are not rules, carry no legislative authority, and are issued internally by the Department of Justice. *See infra* Part I.

13 *See infra* Part I.

14 *Id.* (discussing the development of the guidelines and the different forms of guidelines used by the Department of Justice).

15 *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3 (2002) (discussing the differences "between rules and policy statements").

16 *See generally* Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893 (2000) (discussing how DOJ guidelines can serve as a restraint on federalization).

17 *See infra* Part II.

18 *See infra* notes 54–108 and accompanying text.

19 *See infra* notes 149–169 and accompanying text.

This article advocates for a heightened review by the judiciary, legislature, and executive when DOJ guidelines are ignored. This oversight, however, needs to be sensitive to the benefits of continuing the practice of having the DOJ construct meaningful internal guidelines. The article examines remedies that achieve a balance between continuing the practice of having guidelines and yet also having meaningful policies that are adhered to by department employees.

Left for discussion in the next article are problems associated with having one individual or group of individuals within the DOJ formulating policy that will effect non-employees of the DOJ. As stated by Professor Richard J. Pierce, Jr. in discussing discretion in administrative law, "conferring too much discretion on an individual or an institution creates the potential for harm attributable to abuse of discretion."[20] Although the DOJ policy statements can significantly influence the case of an individual accused of a crime, as seen in the policy directive issued by Attorney General John Ashcroft calling for prosecutors "to charge and to pursue the most serious, readily provable offense in all federal prosecutions,"[21] this article does not focus on the content of the guidelines or the policy decisions in formulating these statements. Rather, this Article looks at the guidelines as conceptually beneficial to the Department and seeks ways to assure compliance with them.

I. DEPARTMENT OF JUSTICE GUIDELINES

DOJ guidelines are written internally within the department. They are subject to change at the will of the Attorney General, and, for the most part, they are enforceable only as the department chooses to enforce them. Unlike the Federal Sentencing Guidelines, which are mandatory in nature and subject to judicial imposition and review, the Justice Department's guidelines are internally created and enforced. They are not a part of the Code of Federal Regulations and they carry no legislative authority.[22]

Most of the internal guidelines of the Department of Justice are found in the United States Attorneys' Manual.[23] The Manual describes

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20 *See* PIERCE, *supra* note 15, § 17.1, at 1227.

21 *Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing*, Memo of Attorney General John Ashcroft, *available at* http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrgmem.pdf (last visited Oct. 10, 2003).

22 In some instances the Code of Federal Regulations may overlap with the guidelines. *See* 28 C.F.R. § 50.10 (2003) ("Policy with regard to issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media.").

23 On occasion the Department of Justice will issue policy via a handbook or office directive. *See, e.g*, United States v. Craveiro, 907 F.2d 260 (1st Cir. 1990) (describing Department of Justice Handbook issued after the passage of the Comprehensive Crime Control Act of 1984).

itself as a "looseleaf text" that "contains general policies and some procedures relevant to the work of the United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice."[24]

The U.S. Attorneys' Manual is not a stagnant document, as sections within the Manual are continually being revised. These revisions include "policy" changes that require several layers of departmental review before being added to the Manual[25] and "procedural" changes[26] that are not subject to a similar scrutiny prior to insertion in the Manual. The Manual is "prepared under the general supervision of the Attorney General and under the direction of the Deputy Attorney General, by the United States Attorneys, the Litigating Divisions, the Executive Office for the United States Attorneys, and the Justice Management Division."[27]

Publication of prosecutorial guidelines is relatively new. In a 1971 article, Professor Norman Abrams advocated for a comprehensive prosecutorial policy.[28] Although he offered eight arguments that might discourage publishing internal policy,[29] he stressed the need to move in this direction. He predicted that "making prosecutorial policy public" would "subject it to scrutiny, evaluation, and criticism by outsiders."[30]

His prediction has proved to be accurate. Today federal prosecution policy is easily accessible in both hard text and online.[31] Also apparent

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24 See U.S. DEP'T OF JUST. U.S. ATTORNEYS' MANUAL 1-1.200 (2003), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam (last visited Nov. 9, 2003) [hereinafter U.S. ATTORNEYS' MANUAL].

25 Policy changes are designated "bluesheets" and require a procedure for passage:

> Policy changes are submitted by the Attorney General, Deputy Attorney General, Associate Attorney General, a litigating division or the Executive Office for United States Attorneys (EOUSA). Policy changes submitted by an Assistant Attorney General for a litigating division or the Director EOUSA must be reviewed by the Attorney General's Advisory Committee (AGAC) before being incorporated into the Manual. If the AGAC objects to the proposed policy change, it will meet with the litigating division or EOUSA to resolve. Unresolved issues will be resolved by the Deputy Attorney General or Attorney General. Policy changes issued by the Attorney General, Deputy Attorney General, and Associate Attorney General are effective upon issuance.

Id. at 1-1.600.

26 "Procedural changes to the Manual do not require review by the Advisory Committee and can be incorporated directly into the Manual." *Id.*

27 *Id.* at 1-1.200.

28 Professor Abrams stated: "[I]t is both feasible and desirable to develop comprehensive and detailed policy statements governing the exercise of prosecutorial decision-making and that significant prosecution resources should be allocated to the task of developing such policy."

Abrams, *supra* note 10, at 57.

29 *See id.* at 28–34.

30 *Id.* at 27.

31 The Department of Justice Manual was initially published by Prentice Hall in 1987 and remained a Prentice Hall publication until 1999. In the Editor's Introduction to the multi-

is a growing number of appellate decisions that include as issues claims by defense counsel that the government has violated one of the Department of Justice guidelines. Irrespective of whether publication of the guidelines is correlated to their increased use by defense counsel, there are enormous benefits to the adoption and use of the guidelines.

The federal guidelines used by Department of Justice attorneys today are comprehensive and detailed. The guidelines provide guidance in a wide array of areas such as charging,[32] when it is necessary to seek approval from superiors,[33] procedures regarding international prosecutions[34] and department policy on sentencing.[35]

Some of the DOJ guidelines have been criticized, such as those for law office searches[36] and for grand jury subpoenas to defense counsel.[37] Some of the guidelines authorize conduct that the general public might frown upon. For example, the DOJ guidelines define the term "lures" as "a subterfuge to entice a criminal defendant to leave a foreign country so that he or she can be arrested in the United States . . . or in a third

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volume treatise it stated that this was "not itself an official publication of the Department." *See* DEPARTMENT OF JUSTICE MANUAL xxiii. In 2000, a Manual was published in text form by Aspen Publishers. The official Manual "is published by the Executive Office for United States Attorneys and is distributed to each United States Attorney's Office and Litigating Division of the Department of Justice." U.S. ATTORNEYS' MANUAL 1-1.500 (1997). Today, the guidelines can also be found online in both the Westlaw and Lexis retrieval systems. Additionally, the Department of Justice website, accessible to the general public, contains the entire Manual. *See* http://www.usdoj.gov/usao/eousa/foia _reading_room/usam/ (last visited Aug. 14, 2003).

32 *See* U.S. ATTORNEYS' MANUAL 9-27.230 (2002)) ("Initiating and Declining Charges - Substantial Federal Interest"); *see also* Memorandum from Larry D Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys (January 20, 2003), *at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Nov. 9, 2003).

33 *See* U.S. ATTORNEYS' MANUAL 9-2.400 (2003) (listing a prior approvals chart). One also finds requirements of seeking approvals within specific guidelines. For example, prior to filing a case under the Racketeer Influenced and Corrupt Organization Act (RICO), it is necessary to obtain approval from department supervisors. *See* U.S. ATTORNEYS' MANUAL 9-110.101 (1999).

34 For example, there are specific guidelines regarding extraditions. *See, e.g.*, U.S. ATTORNEYS' MANUAL 9-15.620 (providing the guideline for "extradition for a third country"); U.S. ATTORNEYS'' MANUAL 0-15.240 (providing a guideline on the "documents required in support of request for extradition").

35 *See* Letter of John Ashcroft, Attorney General, *Departmental Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals*, July 28, 2003, *available at* http://216.239.41.104/search?q=cache:qU5x-41LvUIJ:www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/%24FILE/AshcroftCharging%2520Memo.pdf+July+28,+2003+Memorandum+on+%E2%80%9Cdepartment+Policies+and+Procedures+Concerning+Sentencing+Recommendations+and+Sentencing+Appeals,%E2%80%9D&hl=en&ie=utF-8 (last visited Dec. 7, 2003).

36 *See* Steven J. Enwright, Note, *The Department of Justice Guidelines to Law Office Searches: The Need to Replace the "Trogan Horse" Privilege Team with Neutral Judicial Review*, 43 WAYNE ST. L. REV. 1855 (1997) (advocating that the DOJ law office search guidelines are contrary to the attorney-client privilege).

37 *See* Michael F. Orman, Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145 (1986).

country for subsequent extradition, expulsion, or deportation to the United States." The guidelines permit prosecutors to use "lures" and merely require that the prosecuting attorney "consult with the Office of International Affairs before undertaking a lure to the United States or a third country."[38]

In many instances, the guidelines offer the accused benefits that exceed constitutional mandates. For example, although prosecutors have no constitutional obligation to give grand jury witnesses advice warnings informing them when they are a "potential defendant in danger of indictment,"[39] the guidelines mandate attorneys to provide an "advice of rights" form to witnesses who are likely to be indicted by the government.[40] In this, and other instances, the accused receives clear benefits by the enactment of these guidelines.

In some cases, the guidelines offer internal constraints to overly broad statutes.[41] For example, Gerard E. Lynch discusses the Racketeer Influenced and Corrupt Organization Act's[42] breadth and its "draconian penalties," especially in the forfeiture area.[43] The DOJ has created extensive policy to monitor and control how its office files cases.[44] In con-

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38 U.S. ATTORNEYS' MANUAL 9-15.630 (1997). Actual practice shows that the government participates in "luring" activities. *See Russian Hacker Sentencing to 3 Years in Prison*, AP, Oct. 5, 2002, *at* http://www.modbee.com/24hour/technology/story/562860p-4430289c.html (discussing how the United States set up a bogus company and then invited the defendants to the United States to the United States to demonstrate their hacking skills); *see also* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).

39 *See* United States v. Washington, 431 U.S. 181, 182 (1976) (holding that "[t]he constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony"). It should be noted, however, that in the *Washington* case, the "respondent was explicitly advised that he had a right to remain silent and that any statements he did make could be used to convict him of a crime." *Id.* at 188.

40 U.S. ATTORNEYS' MANUAL 9-11.151 (2002). *See infra* notes 86–100 and accompanying text.

41 *Cf.* Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf,"* 50 SYR. L. REV. 1317, 1372 (2000) (discussing how guidelines serve as reinforcement).

42 18 U.S.C. § 1961 et. seq. The RICO Act is also known as Organized Crime Control Act of 1970. *See generally* Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983) (providing a history and general overview of the RICO statute).

43 *See generally* Gerald E. Lynch, *RICO: The Crime of Being Criminal, Parts I & II*, 87 COLUMBIA L. REV. 661 (1987) (noting the attention RICO has received "because of its draconian penalties").

44 The preface to the RICO guidelines reflects the policy rationale of restricting government use of this statute:

> The decision to institute a federal criminal prosecution involves a balancing process, in which the interests of society for effective law enforcement are weighed against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state law rests with the state concerned.

trast, no guidelines exist to control filings by private parties using the civil provisions of RICO. Congress has intervened in the civil context to place a statutory restriction on how private parties may use the statute.[45] Few restraints, however, have been placed on prosecutors who bring criminal RICO cases. Former Assistant Attorney General Edward S.G. Dennis, Jr. noted that "[t]he key to our use of RICO in prosecuting white-collar crime is to confine the statute's use to those cases where the unlawful conduct was both continuous and egregious and where there is the prospect of significant forfeiture of ill-gotten proceeds or of interests in a tainted enterprise."[46]

Guidelines have also been used to stop controversial practices that individual Assistant United States Attorneys, or the offices they work

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> Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. Stated another way, a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be added to an indictment unless it serves some special RICO purpose as enumerated herein.
>
> Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose, rather than to attack the activity which Congress most directly addressed — the infiltration of organized crime into the nation's economy.
>
> These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

U.S. ATTORNEYS' MANUAL § 9-110.200 (1988). There are also guidelines restricting the use of RICO in certain contexts. *See* U.S. ATTORNEYS' MANUAL § 9-110.340 (2000) (providing that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction."). In hearings regarding asset forfeiture, the United States Attorney's Office has touted its guidelines as showing that its forfeiture policy is "administered fairly and effectively, with all appropriate consideration given to the rights of property owners." *See* Stephan D. Cassella, Statement Before the House Committee on the Judiciary Concerning H.R. 1835, The Civil Asset Forfeiture Reform Act, (June 11, 1997) (transcript available at 1997 WL 311709 (F.D.C.H.)) (discussing the "detailed policy guidelines governing the use of the administrative, civil judicial, and criminal forfeiture laws of all agencies of the Department.").

[45] Congress added language to the civil RICO statute, 18 U.S.C. § 1964(c), restricting its use by stating that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c) (2000).

[46] Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 671 (1990). *See also* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035 (1990).

within, might implement.[47] For example, RICO includes mail fraud as a predicate act for a charge.[48] Tax fraud is not on the list of predicates for RICO. Since prosecutors could not directly use tax fraud to obtain the increased RICO penalties, they creatively made the tax fraud charge into mail fraud[49] by claiming that the mailing of a false tax return constituted mail fraud.[50] Consequently, mailing of a false tax return became a predicate for RICO and when the conduct formed a pattern of racketeering it became subject to an increased sentence. This practice was criticized.[51] In 1989, the DOJ added a guideline that stated that "only in exceptional circumstances" would authorization be granted for a RICO charge when a mail fraud predicate was being premised upon the mailing of a false tax return.[52] This guideline, however, has not ended this creative prosecutorial practice of charging mail fraud for the mailing of a false tax return.[53]

II. FAILURE TO ADHERE TO DEPARTMENT OF JUSTICE GUIDELINES

It is impossible to ascertain the full extent of guideline violations that occur in the DOJ. Although one can monitor the violations reported as arguments in appellate decisions, as this paper does, there are likely to be instances of guideline violations that have not been presented for appellate review. This is particularly true in light of clear precedent that rejects these arguments as a basis for relief.[54] Violations of Department of Justice guidelines may also have been an issue at preliminary court hearings that did not result in reported decisions. Similarly, cases that terminated with the entry of a plea agreement would preclude review of a

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47 Guidelines can also be used to stop controversial practices of investigating agencies. For example, new guidelines were implemented to include DOJ attorneys in determining whether individuals may be "accepted as informants." *See* Editorial, *Informants Who Corrupt the Law*, N.Y. TIMES, March 24, 2001, at A26.

48 *See* 18 U.S.C. § 1961 (2000).

49 *See, e.g.*, Busher v. United States, 817 F.2d 1409 (9th Cir. 1987).

50 See 18 U.S.C. § 1341 (2000).

51 *See generally* Ellen S. Podgor, *TaxFraud—Mail Fraud: Synonymous, Cumulative or Diverse?*, 57 U. CINN. L. REV. 903 (1989) (discussing the use of mail fraud when the crime was actually the filing of a fraudulent tax return).

52 The guideline states in part:

> The authorization of the Tax Division is required before charging mail fraud counts either independently or as predicate acts to a RICO charge: (1) when the only mailing charged is a tax return or other internal revenue form or document; or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud (e.g., a tax shelter). Such authorization will be granted only in exceptional circumstances . . .

U.S. ATTORNEYS' MANUAL § 6-4.211(1) (1988) (footnote omitted).

53 *See, e.g.*, Helmsley v. United States, 941 F.2d 71, 94 (2d Cir. 1991) (charging mail fraud for the failing of alleged false state tax returns).

54 *See infra* notes 134–148 and accompanying text.

guideline violation, since plea agreements routinely include waivers of appellate rights. Thus, there can be numerous instances when guideline violations would not surface for public review.

This next section looks at three areas where appellants raise a federal prosecutor's violation of internal DOJ policy as an issue on appeal.[55] The sampling selected for discussion here reflects areas where federal prosecutors repeatedly violated the same department guideline. These areas, however, are by no means exhaustive of all the instances of alleged DOJ guideline violations.[56] There have been numerous DOJ guideline violations by federal prosecutors, including violations of media guidelines,[57] subpoena guidelines,[58] improper charging of cases under the Racketeer Influenced and Corrupt Organization Act,[59] and failure to follow the death penalty protocol of the department.[60] In hearings, Con-

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55 This section is limited to reported decisions in which the appellant raises as an appellate issue a prosecutor's failure to abide by a department guideline. Unreported cases and cases in which the issue was not raised by the appellant may provide a powerful source of possible transgressions, but the numbers and incidents cannot be ascertained to include within this article. In some cases, legislative hearings provided a source on guideline violations. *See, e.g.*, Richard A. Jaffe, *Allegations of FDA Abuses of Authority*, Testimony before the House Committee on Commerce Oversight and Investigations, July 25, 1995, at 4 (1995 WL 441379 (F.D.C.H.)) (discussing abusive subpoena tactics used that were in violation of Department of Justice guidelines); *Hearing on the Independent Counsel Statute*, House Committee on the Judiciary, Subcommittee on Commercial & Administrative Law, June 11, 1999, at 14, 15 (1999 WL 385774 (F.D.C.H.)) (Statements of Rep. Nadler) (discussing violation of DOJ guidelines).

56 There are many alleged guideline violations not covered in this article. *See, e.g.*, United States v. Serrano, 680 F. Supp. 58, 65 (D. P.R. 1988) (discussing failure to follow guidelines related to immunized testimony); United States v. Bagnell, 679 F.2d 826, 832 (11th Cir. 1982) (finding that "[i]t is . . . solely within the province of the Justice Department to determine whether an internal policy against forum shopping in obscenity cases should bar prosecution in a given case"). There are also alleged violations of Department of Justice guidelines involving the civil matters of the department. *See, e.g.*, F.T.C. v. Owens-Illinois, Inc., 681 F. Supp. 27, 34 n.17 (D.D.C. 1988) (holding that guidelines related to mergers are not binding on the courts); F.T.C. v. PPG Indus., Inc., 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986) (holding that merger guidelines are not binding on a court); *see also* Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CAL. L. REV. 575 (1983).

57 *See, e.g.*, Aversa v. United States, 99 F.3d 1200 (5th Cir. 1996) (describing violations of guidelines regarding statements to the media).

58 *See, e.g., In re* Grand Jury Subpoena For Attorney, 724 F. Supp. 458, 461 (S.D. Tex. 1989) (discussing an alleged violation of the guidelines related to obtaining prior approval of the Assistant Attorney General of the Criminal Division prior to subpoenaing an attorney related to his representation of a client); *see* United States v. Wilson, 614 F.2d 1224 (9th Cir. 1980) (concluding that the government failed to abide by the rules on grand jury subpoenas).

59 *See, e.g.*, United States v. Kragness, 830 F.2d 842, 861 n.20 (8th Cir. 1987) (finding that the RICO charging "appear[ed] to run afoul of Justice Department's own guidelines for charging separate predicate acts").

60 *See, e.g.*, United States v. Lee, 274 F.3d 485, 489 (8th Cir. 2001) (discussing the failure of the DOJ to follow the death penalty protocol in § 9-10.000 et seq.).

gress has also noted violations of Department of Justice guidelines, such as the policies and rules for consideration of clemency.[61]

Several themes are prominent among guideline violations. In almost all cases, the defense is unsuccessful in raising as an appellate issue a violation of DOJ guidelines.[62] Courts find that absent an "independent constitutional" basis, there is no basis for judicial enforcement of the guidelines.[63] A different result is seen, however, when the government admits the violation and seeks to correct its mistake. In these limited instances, the authority of the government to remedy a DOJ violation is allowed.[64] Finally, courts will not use their supervisory powers to enforce a DOJ guideline if the sole basis for the argument is that a federal prosecutor violated internal policy.[65]

A. *PETITE* POLICY

Several appellate decisions report violations of the *Petite* Policy of the DOJ. The *Petite* Policy, deriving its name from *Petite v. United States*,[66] "precludes the initiation or continuation of a federal prosecu-

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[61] *See* Senator Orrin G. Hatch, FALN and Role of Justice Department, Statement before the Senate Committee on the Judiciary Oversight, Oct. 20, 1999 (1999 WL 961665 (F.D.C.H.)) (discussing how "policies and rules for the consideration of clemency were apparently ignored").

[62] This result is not unique to the three guidelines presented here. One finds this same result with other guideline violations. For example, after the passage of the Comprehensive Crime Control Act of 1984, the Department of Justice issued a handbook offering guidance to federal prosecutors. In *United States v. Craveiro*, 907 F.2d 260 (1st Cir. 1990), the defendant argued for a remand in that prosecutors had not notified him of a possible sentence enhancement as called for in department policy. The court rejected this non-compliance as being a basis for a court remedy noting that the handbook stated, "[a]s is the situation with regard to other Departmental policies, compliance is expected in all cases but a failure to comply is not intended to confer any rights on a defendant or another party in litigation with the United States." *Id.* at 264 (citing Handbook, p. iii). The court however, noted extenuating circumstances that justified notice not being given in this case.

[63] *See generally* John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 787–88 (1984).

[64] *See* Petite v. United States, 361 U.S. 529 (1960). In *United States v. Fiallo-Jacome*, 784 F.2d 1064 (11th Cir. 1986), the government admitted violating departmental policy, specifically guideline 1-11.320, in having the same judge who heard defendant's immunized testimony, sentence him. The court vacated defendant Brenner's sentence stating that "[a]lthough these guidelines are not binding authority in this court, we accept the government's confession of error in this particular case. . . ." *Id.* at 1067.

[65] Obviously, if the appellant alleges a constitutional violation, there may be a basis for reversal. Thus, the court would not be using the guideline as the focus of the argument.

[66] 361 U.S. 529 (1960). In *Petite*, the Court remanded for dismissal a case in which the government sought dismissal of an indictment. With the consent of the defendant, tne government attempted to dismiss the indictment

> on the ground that it is general policy of the Federal Government "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement."

tion, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)."[67] The policy provides three extenuating circumstances that allow a federal prosecution to go forward despite a prior state or federal prosecution on substantially the same matter.[68]

The policy actually predates the *Petite* decision as it was initiated by Attorney General William Rogers in a 1959 memo to United States Attorneys.[69] Responding to two companion cases, *Bartkus v.*

Id. at 530. The Court remanded noting that it was "empowered" to do so "in the interest of justice." *Id.*

67 *See* U.S. ATTORNEYS' MANUAL 9-2.031 (2003).

68 The "three substantive prerequisites" are that:

> first, the matter must involve a substantial federal interest; second, the prior prosecution must have left the interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.

Id. Additionally "there is a procedural prerequisite," that being, obtaining the approval of "the appropriate Assistant Attorney General." It is not mandatory for a prosecutor to pursue an action if all of these conditions are met. *Id.*

69 "MEMORANDUM TO THE UNITED STATES ATTORNEYS

> "In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling. "In Abbate v. United States and Bartkus v. Illinois [359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684] the Supreme Court held that there is no violation of the double jeopardy prohibition or of the due process clause of our federal Constitution where there are prosecutions of the defendant, both in the state and in the federal court, based upon the same act or acts.
>
> "This ruling reaffirmed the holding in United States v. Lanza, 260 U.S. 377 [43 S.Ct. 141, 67 L.Ed. 314] decided by the Supreme Court in 1922. * * *
>
> "But the mere existence of a power, of course, does not mean that it should necessarily be exercised. * * *
>
> "The Court held then that precedent, experience and reason supported the conclusion of separate federal and state offenses.
>
> "It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it.
>
> "Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently-as the Court clearly indicated-those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.
>
> "Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.

Illinois[70] and *Abbate v. United States*,[71] the Attorney General recognized that while prosecutors might not violate prescriptions against double jeopardy when there is a successive prosecution, the practice was unwise and should be informally controlled.

The rationale for the *Petite* policy is "to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors."[72] Despite these worthy goals, federal prosecutors occasionally proceeded with federal criminal cases based on substantially the same conduct, after a state prosecution.

Although the government has discretion to dismiss cases when its *Petite* policy is violated, defendants are not afforded this same opportunity.[73] Cases in which the defense objects premised upon a *Petite* policy violation are met with appellate decisions that reject its application to defendants.[74] Courts find the *Petite* policy to be "doctrine" of "federal

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> "In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.
>
> "/s/ William P. Rogers Attorney General"

United States v. Mechanic, 454 F.2d 849, 855–56 (8th Cir. 1971) (quoting a Memorandum to the United States Attorneys by Attorney General William P. Rogers); *see also* Haley v. United States, 394 F. Supp. 1022, 1026 (W.D. Missouri 1975).

70 359 U.S. 121 (1959).

71 359 U.S. 187 (1959).

72 United States v. Claiborne, 92 F. Supp. 2d 503, 507 (E.D. Va. 2000).

73 In *Petite* the government sought the dismissal of a case because the prosecutor did not follow the government's internal policy. Petite v. United States, 361 U.S. 529 (1960); *see also* Rinaldi v. United States, 434 U.S. 22, 29–32 (1977) (holding that it was "an abuse of the discretion of the District Court to refuse to grant the Government's motion on the ground that the violation of the *Petite* policy in this case resulted from prosecutorial misconduct rather than inadvertence"). There have been repeated court decisions holding that a defendant is not entitled to dismissal for a *Petite* policy violation. *See, e.g., Claiborne*, 765 F.2d at 794 (9th Cir. 1985) (finding that even if there were a finding of a *Petite* policy violation, a dismissal is not the proper remedy); United States v. Garner, 632 F.2d 758, 761 (9th Cir. 1985) (holding that dismissal is not the proper remedy for a *Petite* policy violation); United States v. Snell, 592 F.2d 1083, 1087 (9th Cir. 1985) (holding that the *Petite* policy does not authorize dismissal of a case in that it is an internal policy). *But see* Delay v. United States, 602 F.2d 173 (8th Cir. 1979) (Heaney, J., concurring) (stating that in certain cases the accused should have the right to enforce the policy).

74 In *United States v. Booth*, 673 F.2d 27, 30 (1st Cir. 1982), the court stated: "The *Petite* policy and cases construing it stand only for the proposition that the government's mo-

prosecutorial policy, not a matter of constitutional law."[75] Courts have repeatedly held that failing to adhere to DOJ's internal guidelines does not warrant court action.[76] As the court stated in *Hayes v. United States*,[77] "we are not prepared to hold that a letter, press release, or similar statement of the Attorney General, which is not promulgated as a regulation of the Justice Department, and published in the Federal Registrar, can serve to invalidate an otherwise valid indictment returned by the Grand Jury."[78] Although courts have reaffirmed a belief in the beneficial aspects of this policy and noted that it "ought to be followed," there has been no corresponding mechanism to assure compliance.[79]

One can only find recognition of these arguments in a dissent or concurring opinion that disputes a court's disregard of a government transgression of the *Petite* policy. For example, in *United States v. Thompson*[80] a three-judge dissent argued that it should not matter whether the government or defendant asks for a remedy resulting from a

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tion to dismiss should be granted when it discovers that it is conducting separate prosecutions for the same offense. The doctrine does not create a corresponding right in the accused."

75 *Id. See also* United States v. Rodriguez, 948 F.2d 914, 915 (5th Cir. 1991) (finding "no error in denial of the motion, because the *Petite* policy is merely an internal rule of the Justice Department"); United States v. Byars, 762 F. Supp. 1235, 1240 n.6 (E.D. Vir. 1991) (finding the *Petite* policy a DOJ internal policy); United States v. Robinson, 774 F.2d 261, 275 (8th Cir. 1985) (stating that "even a genuine failure by the Government to follow the *Petite* policy does not create a right that a defendant can invoke to bar federal prosecution"); United States v. Ng, 699 F.2d 63, 71 (2d. Cir. 1983) (finding that "[i]t is not a statute or regulation; nor is it constitutionally mandated"); United States v, Bouthot, 685 F. Supp. 286 (D. Mass. 1988) (stating that "the *Petite* policy does not create any substantive or due process rights which a criminal defendant may invoke against the government).

76 *See, e.g.*, United States v. Harrison, 918 F.2d 469 (5th Cir. 1990) (holding that a violation of the *Petite* policy, an internal rule, is not a basis for dismissal of an action); United States v. Patterson, 809 F.2d 244 (5th Cir. 1987) (holding that "the *Petite* policy is an internal rule, criminal defendants may not invoke it to bar prosecution by the federal government"); United States v. Schwartz, 787 F.2d 257 (7th Cir. 1986) (holding that the "Department of Justice may give such weight as it chooses to its internal rules"); United States v. Catino, 735 F.2d 718 (2d Cir. N.Y. 1984) (holding that the *Petite* policy does not afford the defendant any substantive rights); United States v. McInnis, 601 F.2d 1319, 1323 (5th Cir. 1979) (stating that "[w]e have repeatedly refused to enforce that policy by dismissing an indictment; the practice of avoiding dual prosecution sets only an internal guideline for the Justice Department"); United States v. Nelligan, 573 F.2d 251, 255 (5th Cir. 1978) (holding "that the *Petite* policy is intended to be no more than self-regulation on the part of the Department of Justice"); United States v. Welch, 572 F.2d 1359 (9th Cir. 1978) (holding that the court will not enforce an "Attorney General's in house rules").

77 589 F.2d 811 (5th Cir. 1979).

78 *Id.* at 818. *See also* United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir. 1978) ("[A] press release expressing a policy statement and not promulgated as a regulation of the Department of Justice and published in the Federal Register is simply a 'housekeeping provision of the Department.'"); United States v. Hutul, 416 F.2d 607, 626 (7th Cir. 1969) ("A letter, press release, or similar statement by the Attorney General, which is not promulgated as a regulation of the Justice Department and published in the Federal Register, cannot serve to invalidate an indictment returned by the Grand Jury.").

79 *See Mechanic*, 454 F.2d at 856.

80 579 F.2d 1184.

violation of the *Petite* policy.[81] This dissent emphasized that "it makes no difference what they are called nor how they are adopted."[82]

Strict adherence to the *Petite* policy is not always advantageous. Flexibility in administering the *Petite* policy allowed for civil rights prosecutions that might not have occurred if the courts required strict compliance with the policy. Attorney General Griffin Bell modified the *Petite* policy during his term in office instituting a stricter review when there was an alleged violation of the policy in a case with civil rights implications. Under the modified policy, cases that a court might normally dismiss because of a state court resolution were subject to a new federal prosecution. An appellate claim that an indictment should be dismissed because of its violation of the *Petite* policy in existence at the time of the alleged conduct was unsuccessful. The Fifth Circuit responded to this argument by stating that "[t]hose individuals caught in the net of increased awareness and sensitivity to particular classes of crimes cannot justify their conduct by noting that at the time of their illegal activity, the community was more tolerant of similar transgressions."[83] The court rejected the use of the *Petite* policy "as a sword to invalidate an otherwise legitimate indictment."[84] Today's *Petite* policy allows the government to proceed with a case involving "a substantial federal interest" that might go "unvindicated" if the federal prosecution did not proceed.[85]

Examining the *Petite* policy and prosecutorial violations of this policy provide several lessons concerning DOJ guidelines. First is that courts treat this policy as strictly internal to the department. Second is that courts will not use their supervisory powers to correct violations of the *Petite* policy. Third is that the formulation of the *Petite* policy and its application requires flexibility to meet changes in DOJ priorities, such as when the federal system needs to proceed in civil rights cases because the states are not adequately pursuing these matters.

B. GRAND JURY ADVISEMENT

A second area where there are cases of prosecutors who sometimes fail to adhere to department policy is in advising grand jury witnesses. Witnesses subpoenaed to testify before a federal grand jury are desig-

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81 *Id.* at 1189–92.

82 *Id.* at 1191. *See also Delay*, 602 F.2d at 179 (Heaney, J., concurring) (stating that "the policy should be enforceable by a defendant in an appropriate case").

83 *Hayes*, 589 F.2d at 818.

84 *Id.*

85 *See* U.S. ATTORNEYS' MANUAL 9-2.031 (2002) (setting forth the three exemptions that permit the federal government to proceed after a state action).

nated by prosecutors as "targets,"[86] "subjects,"[87] or "witnesses." Although the Constitution does not mandate prosecutors to advise grand jury witnesses of their target status,[88] the DOJ guidelines provide that "targets" and "subjects" should receive a letter indicating their status as a "target" or "subject" accompanied by an "advice of rights" form. The guidelines instruct the Assistant United States Attorney to read the Advice of Rights form to a target or subject prior to questioning them before the grand jury.[89]

Although the guidelines offer a clear statement of departmental policy, violations still occur.[90] For example, in *United States v. Myers*[91] the Sixth Circuit recognized a violation of the Department of Justice policy in failing to provide a target letter to the defendant. The court determined that the defendant met the prosecution definitions of being both a target and subject and that an Advice of Rights statement should have been provided to him.[92] Despite this clear violation of DOJ policy, the

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[86] The Manual defines "target" as:

> a person to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization. The same lack of automatic status holds true for organizations which employ, or employed, an officer or employee who is a target.

U.S. ATTORNEYS' MANUAL § 9-11.151 (2002).

[87] Subjects are defined as "a person whose conduct is within the scope of the grand jury's investigation." *Id.*

[88] *See* United States v. Washington, 431 U.S. 181, 190–91 (1977).

[89] The guideline states in part:

> Notwithstanding the lack of a clear constitutional imperative, it is the policy of the Department that an "Advice of Rights" form be appended to all grand jury subpoenas to be served on any "target" or "subject" of an investigation. . . . In addition, these "warnings" should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

U.S. ATTORNEYS' MANUAL § 9-11.151 (2002).

[90] *See, e.g.*, United States v. Long, 977 F.2d 1264 (8th Cir. 1992) (holding that there is no due process violation in failing to provide the accused an Advice of Rights form prior to his grand jury appearance); United States v. Gillespie, 974 F.2d 796 (7th Cir. 1992) (finding that failing to warn a witness of their target status in violation of Department of Justice guidelines did not authorize the use of the court's supervisory powers); United States v. Pacheco-Ortiz, 889 F.2d 301, 307 (1st Cir. 1989) (holding the violation of the Department of Justice guidelines on grand jury witnesses did not warrant exercise of the court's supervisory powers); United States v. Valentine, 820 F.2d 565 (2d Cir. 1987) (finding that a failure to give target warnings does not create a constitutional right); United States v. Martino, 825 F.2d 754 (3rd Cir. 1987) (holding that failing to notify a grand jury witness of their status as a target does not warrant dismissal); *McInnis*, 601 F.2d at 1321 n.4, 1328 (5th Cir. 1979) (describing how the defendants' subpoenas did not include target warnings and advice of rights, but that the court would not enforce internal government guidelines).

[91] 123 F.3d 350 (6th Cir. 1997).

[92] The court stated that the Assistant United States Attorney testified "that part of the reason Myers was placed in front of the grand jury was because he was being investigated."

Sixth Circuit did not accept the defendant's argument, finding that "a violation by the government of its internal operating procedures, on its own, does not create a basis for" defense relief.[93] The court emphasized that it was "troubled by the government's violations of the DOJ Manual."[94]

The poor success rate in presenting these arguments to appellate tribunals has not always deterred defense counsel from raising this issue on appeal. Defendants repeatedly make arguments premised upon the failure of the prosecution to adhere to the DOJ's Advice of Rights Advisement policy.[95] In some cases defendants frame these arguments as due process claims asking the court to use its supervisory powers to rectify the prosecution violations.[96] One instance where this argument proved successful is found in the case of *United States v. Jacobs*,[97] where the Second Circuit used its supervisory powers and suppressed grand jury testimony that had been given without a prior Advice of Rights form and procedure.[98] Other courts have subsequently criticized the *Jacobs* decision, pointing to the fact that newer Supreme Court decisions limit a court's use of its supervisory powers.

Some courts do express their disappointment with prosecutors who fail to follow DOJ guidelines. In *United States v. Babb*,[99] the court was disturbed that the prosecutor who violated the guidelines did not appear in court to argue the case. The court stated, "[w]e find the prosecutor's behavior to be more than 'quite troublesome;' we find it to be unprofessional and worthy of severe condemnation."[100]

The court also noted that state charges were dismissed so that the federal charges could proceed. Finally, the court stressed that the questions addressed to Myers in front of the grand jury related to his conduct. *Id.* at 355.

93 *Id.* at 355–56.

94 *Id.* at 358.

95 *See, e.g.*, United States v. Goodwin, 57 F.3d 815, 816 (9th Cir. 1995) (finding that a failure to provide a witness with an "Advice of Rights" form was not a constitutional violation).

96 *See, e.g.*, United States v. Babb, 807 F.2d 272, 279 (1st Cir. 1986) (holding that failing to adhere to the guidelines on advising a witness of their "target" status does not merit the use of supervisory powers).

97 547 F.2d 772, 777–78 (2d Cir. 1976).

98 Courts have criticized the *Jacobs* case as no longer viable in light of two recent decisions, Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) (limiting the court's use of its supervisory powers) and *Williams*, 504 U.S. 36 (1992) (same). These two cases limited the court's use of its supervisory powers to oversee prosecution activity. *See also Myers*, 123 F.3d at 356 (6th Cir. 1997) (holding that the *Jacobs* decision should be limited by the *Bank of Nova Scotia* and *Williams* decisions). *See also* United States v. Pacheco-Ortiz, 889 F.2d 301, 310 (1st Cir. 1989) (discussing how the *Bank of Nova Scotia* decision limits the use of a court's supervisory powers).

99 807 F.2d 272 (1st Cir. 1986).

100 *Id.* at 279.

Examination of prosecution violations of guidelines regarding grand jury advisement provides three conclusions. First, as with the *Petite* policy, courts view policy of grand jury advisement policy as strictly internal to the department. Second, courts seldom will invoke supervisory powers to correct these policy violations. Third, unlike the *Petite* policy where flexibility may be necessary, there have been no reported cases or statements that offer justifications for allowing violations of advisement policy to occur.

C. PRESENTING EXCULPATORY EVIDENCE TO THE GRAND JURY

A third area of cases demonstrating violations of policy can be seen in decisions concerning the presentation of exculpatory material to a grand jury. As a result of the Supreme Court decision in *United States v. Williams*,[101] federal prosecutors have enormous discretion in the evidence that they present to a grand jury. In *Williams*, the Court held that prosecutors are not required to present "substantial exculpatory evidence" within its possession, to the grand jury.[102] Noting the unique nature of the grand jury and its role as an arm of the prosecutor to investigate matters, the Court reasoned that use of its supervisory powers within this realm was not proper.[103]

Following the *Williams* case, the DOJ instituted an internal guideline, as it did in formulating the *Petite* Policy, to soften the effect of the Court's decision in *Abbate*. This guideline recognizes the power provided to prosecutors by the *Williams* decision but states "that when a prosecutor conducting a grand jury inquiry is personally aware of substantial exculpatory evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."[104] The guideline also emphasizes that non-adherence to the guideline does not offer a basis for the dismissal of an indictment. Unlike other guidelines, it suggests that "appellate courts may refer violations of the policy to the Office of Professional Responsibility for review."[105] Thus, the guideline suggests a disciplinary referral to the specific office within the Department that oversees internal department discipline.

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101 504 U.S. 36 (1992).

102 *Id.* at 52. (stating that "[i]mposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system").

103 *Id.* at 47–48.

104 U.S. ATTORNEYS' MANUAL 9-11.233 (2002).

105 *Id.*

Federal prosecutors sometimes violate the guideline instructing them to present substantial exculpatory material to a grand jury.[106] In *United States v. Gross*,[107] the court recognized a clear violation of the DOJ internal policy, but declined to dismiss the indictment. Interestingly, the court fashioned a remedy that was not provided for in the guideline. Instead of presenting this violation to the Office of Professional Responsibility, as suggested in the guideline, the court decided to send its Order to the supervisors of the United States Attorney's Office for the Central District of California. The court chose this remedy, stating that "this is the first time the Court has been presented with a violation of this provision by" this particular office "and there was some question as to the exculpatory nature of the evidence."[108]

The following conclusions emerge concerning prosecution violations of the guideline requiring them to present substantial exculpatory material to the grand jury. First, as with the *Petite* policy and the grand jury advisement policy, courts view this policy as strictly internal to the department. Second, courts will not use supervisory powers to enforce the guideline since the guideline clearly exceeds constitutional mandates. Third, courts are often troubled when this guideline is violated and believe that they have the ability to motivate internal action to correct future violations.

III. INTERNAL REMEDIES FOR GUIDELINE VIOLATIONS

The U.S. Attorneys' Manual specifies that it is intended only for internal use, and that it "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[109] In Congressional testimony, prosecutors have argued that they should be exempt from state ethics rules[110] because the DOJ has guidelines and a disciplinary process within the department to review allegations of misconduct.[111] Congress, however, has appropriately seen otherwise. Although prosecutors can be disciplined for violations of state ethics rule violations,

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106 *See, e.g.*, United States v. Ransom, 194 F.R.D. 692, 693 (D. Kan. 2000) (finding that there was no requirement for a prosecutor to present exculpatory evidence to a grand jury); United States v. Isgro, 974 F.2d 1091, 1096 (9th Cir. 1992) (finding defendant has no right to "fair" grand jury deliberations).

107 41 F. Supp.2d 1096 (C.D. Cal. 1999).

108 *Id.* at 1100.

109 U.S. ATTORNEYS' MANUAL 1-1.100 (1997).

110 *See* Citizens Protection Act, 28 U.S.C. § 530B (1998).

111 *See, e.g., The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcommittee on Criminal Justice Oversight of the Committee on the Judiciary*, 106 Cong. (1999) (statement of Richard L. Delonis, President of the National Association of Assistant U.S. Attorneys).

these rules do not cover the vast majority of the areas covered by the internal guidelines of the Department.[112]

Although the guidelines are public and accessible, the internal disciplinary process of the Department of Justice is not as available. Internal discipline within the Department of Justice is conducted through its Office of Professional Responsibility. This office, "which reports directly to the Attorney General, is responsible for investigating allegations that Department of Justice attorneys have engaged in misconduct in connection with their duties to investigate, represent the government in litigation, or provide legal advice."[113] In past years, the internal enforcement process of the Office of Professional Responsibility has been criticized for inadequately handling the disciplinary process.[114]

Although the web page of the Office of Professional Responsibility states that it submits annual reports to the Attorney General,[115] current reports are not always available to the public.[116] For example, as of August 2003, the latest report of the Office of Professional Responsibility available on the web is dated fiscal year 2000.[117]

The 2000 report states that thirty-six inquiries were opened that year involving alleged misconduct for "failure to comply with DOJ rules and regulations."[118] Actual investigations, however, opened by the Office of Professional Responsibility for alleged "failure to comply with DOJ rules

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112 The key ethics rules specifically pertaining to prosecutors, cover areas such as not bringing charges if probable cause is lacking, making timely disclosure of exculpatory evidence, and making statements to the media. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002). Federal prosecutors are seldom disciplined in the state ethics system. *See* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement*, 8 ST. THOMAS L. REV. 69, 94 (1995) ("The infrequency with which federal prosecutors are sanctioned personally for unethical conduct may be attributed in part to inadequacies in each of the available disciplinary mechanisms.").

113 U.S. Dep't of Justice, Office of Professional Responsibility, *available at* http://www.usdoj.gov/opr/ (last visited Aug. 24, 2003).

114 *See* Green, *supra* note 112, at 94 ("While the Justice Department's Office of Professional Responsibility does have adequate resources to investigate such allegations, it has an apparent history of inadequate enforcement."); *OPR Only Part of the Problem, Experts Say*, 4 DOJ Alert, Jan. 3-17, 1994, at 3.

115 U.S. Dep't of Justice, Office of Professional Responsibility, *OPR Annual Reports*, *at* http://www.usdoj.gov/opr/reports.htm (last visited Aug. 24, 2003).

116 The Office of Professional Responsibility will make its finding public in two instances: "when misconduct has been found or when the lawyer under investigation, presumably after being exonerated, requests that the findings be released." Green, *supra* note 112, at 86. However, "no public findings will be issued in the overwhelming majority of cases where prosecutors are exonerated, and in part because in the rare case where findings are released, the underlying facts developed in the investigation will still be kept secret." *Id.*

117 *See* U.S. Dep't of Justice, Office of Professional Responsibility, *supra* note 113.

118 *See* U.S. Department of Justice, Office of Professional Responsibility, *Fiscal Year 2000 Annual Report*, *available at* http://www.usdoj.gov/opr/annualreport2000.htm (last visited August 20, 2003).

and regulations" numbered nine.[119] The report does not explain why seventy-five percent of alleged guideline violations were not subject to an inquiry and there is no accounting on the types of violations alleged involved in the twenty-five percent of the cases that were accepted for review. Further the Office of Professional Responsibility does not state how many of the nine cases that were premised upon a "failure to comply with DOJ rules and regulations" had an actual finding of misconduct. The report merely provides "examples" of matters investigated by the Office of Professional Responsibility in the fiscal year 2000.[120] In this report, one example specifically references it being a "failure to comply with DOJ regulations."[121] This example, an allegation of "abuse of subpoena power" was found by the Office of Professional Responsibility, after investigation, to be without merit.[122]

Earlier Office of Professional Responsibility reports provide even less information on Department of Justice guideline violations. The reports for fiscal years 1996 and 1997 do not specifically list a category for Department of Justice violations.[123] Thus, there is no way to determine if the Office of Professional Responsibility investigations during those two years were focused on violations of department guidelines. The reports do, however, list conduct that might be encompassed within guidelines, such as a discovery violation.[124] The 1998 report lists four allegations of "failure to comply with DOJ rules and regulations"[125] and the 1999 report lists six.[126] Again there is no accounting provided to advise readers of the specific guideline involved. One of the examples provided in the 1998 Annual Report involved a violation of the *Petite* policy of the department. The Office of Professional Responsibility determined that a violation had occurred, but did not impose disciplinary measures since the "subordinate's decision . . . was a mistake resulting

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119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *See* U.S. Dep't of Justice, Office of Professional Responsibility, *Fiscal Year 1997 Annual Report, available at* http://www.usdoj.gov/opr/97annual.htm (last visited Nov. 19, 1999); U.S. Dep't of Justice Office of Professional Responsibility, *Fiscal Year 1996 Annual Report, available at* http://www.usdoj.gov/opr/96annual.htm (last visited Nov. 26, 1999).

124 For example, in the 1995-1996 report, alleged misconduct was the subject of complaint in nine cases involving a "failure to disclose exculpatory, impeachment or discovery material." *See* U.S. Dep't of Justice, Office of Professional Responsibility, *Fiscal Year 1996 Annual Report, available at* http://www.usdoj.gov/opr/96annual.htm (last visited Nov. 26, 1999).

125 *See* U.S. Dep't of Justice, Office of Professional Responsibility, *Fiscal Year 1998 Annual Report available at* http://www.usdoj.gov/opr/98annual.htm (last visited August 20, 2003).

126 *See* U.S. Dep't of Justice, Office of Professional Responsibility, *Fiscal Year 1999 Annual Report, available at* http://www.usdoj.gov/opr/99AR-Final.htm (last visited August 20, 2003).

from his inexperience and from the supervisor's concurrence that the policy did not apply." The Office of Professional Responsibility did not impose discipline on the supervisor in this case "because he was no longer employed by the DOJ."[127]

The Department of Justice has made a substantial step in recent years toward compliance with its self-imposed ethical responsibilities. In 1999, for example, the DOJ created a Professional Responsibility Advisory Office "to ensure prompt, consistent advice to Department attorneys and Assistant United States Attorneys with respect to professional responsibility and choice-of-law issues."[128] Oversight of U.S. Attorneys' Offices throughout the country is also mandated by the Code of Federal Regulations.[129] This regulation, however, does not specifically provide for oversight to assess compliance with the internal Department guidelines.

The Office of the Inspector General (OIG) also provides oversight by "investigat[ing] alleged violations of criminal and civil laws, regulations, and ethical standards arising from the conduct of Department employees in their numerous and diverse activities."[130] In some instances the oversight is required by congressional legislation.[131] OIG's critical report issued on June 25, 2003 concerning September 11th detainees demonstrates the OIG's independence in reporting to Congress on conduct within the DOJ.[132]

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127 *See* U.S. Dep't of Justice, Office of Professional Responsibility, *Fiscal Year 1998 Annual Report, available at* http://www.usdoj.gov/opr/98annual.htm (last visited August 20, 2003). A violation of the *Petite* policy was also noted in the 1999 Annual Report, in failure of the DOJ attorney to receive "DOJ approval before prosecuting the defendant for the same acts that had given rise to a prosecution and acquittal in state court." Although this failure was noted in the report, it also stated that "the oversight was cured when the DOJ attorneys obtained a waiver *nunc pro tunc*."*See* U.S. Dep't of Justice, Office of Professional Responsibility, *Fiscal Year 1999 Annual Report, available at* http://www.usdoj.gov/opr/99AR-Final.htm (last visited August 20, 2003).

128 *See* U.S. Dep't of Justice, Professional Responsibility Advisory Office, *available at* http://www.usdoj.gov/prao/ (last visited Aug. 24, 2003).

129 28 C.F.R. § 0.22 (2003) (providing for evaluation of U.S. Attorneys' Offices). This same code provision is cited in the U.S. Attorneys' Manual. U.S. ATTORNEYS' MANUAL 3-3.000.

130 U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, SEMIANNUAL REPORT TO CONGRESS, OIG PROFILE, *available at* http://www.usdoj.gov/oig/semiannual/0503/profile.htm (last visited Nov. 18, 2003).

131 *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (AS REQUIRED BY SECTION 1001(3) OF PUBLIC LAW 107-56), *available at* http://www.usdoj.gov/oig/igwhnew1.htm (last visited Nov. 8, 2003).

132 Glenn A. Fine, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," Testimony Before the Senate Committee on the Judiciary, June 25, 2003, *available at* http://www.usdoj.gov/oig/igwhnew1.htm (last visited Oct.12, 2003).

Finally, the Executive Office of the United States Attorney serves as the institutional mechanism for "policy development." It is this office that "publishes and maintain[s]" the Manual containing the guidelines and it is this office that supervises educational development within the department.[133]

In considering guideline adherence, it is important to note the dual structure of the Department of Justice. On one level there is the Washington, D.C. office, the location of the Office of Professional Responsibility and the Executive Office of the United States Attorney. On a second tier are the 93 offices located throughout the country, supervised by individual United States Attorneys. Although monitoring can occur at both levels, the reporting of guideline violations occurs at the main Justice Department office.

IV. COURTS CONSIDER VIOLATIONS OF INTERNAL GUIDELINES

In the 1979 case of *United States v. Caceres*,[134] the Supreme Court considered what role courts should have in the oversight of administrative guideline violations. Accused of bribery, the respondent moved to suppress tape recordings and testimony that were obtained without the proper authorization required by Internal Revenue Service regulations.[135] Justice Stevens, writing for the majority, rejected the use of a per se exclusionary rule when there was a failure to comply with internal guidelines of an agency. The Court examined whether there were violations of equal protection[136] or due process, and found none.[137] Finding no constitutional violation, the Court deemed the evidence admissible.[138]

Although the effect of the Court's decision in *Caceres* is to permit the admission of evidence despite the violation of internal agency procedures, the Court does not explicitly reject all court monitoring of agency regulations. The Court distinguishes this case from those "when compliance with the regulation is mandated by the Constitution or federal

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133 *See* U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF UNITED STATES ATTORNEY: MISSION AND FUNCTIONS, *at* http://www.usdoj.gov/usao/eousa/mission.html (last visited Oct. 31, 2003).

134 440 U.S. 741 (1979).

135 *Id.* at 743.

136 *Id.* at 752.

137 *Id.* at 752–73 ("Respondent cannot reasonably contend that he relied on the regulation, or that its breach had any effect on his conduct.").

138 *Id.* at 757.

law."[139] *Caceres* differs from instances when the government is required to adopt a regulatory structure.[140]

Caceres provides a clear rationale for not giving agency rules a force of law in its statement, "[i]n the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form."[141] The Court's fear of "fewer and less protective regulations"[142] serves as the guiding force behind its position of allowing the agency transgression.

A forceful dissent by Justices Marshall and Brennan presents a different picture. Premising their position upon a due process violation, these two justices present an exhaustive list of cases that support their view.[143] They argue that the majority erred in "mak[ing] subjective reliance controlling in due process analysis."[144] They state that using "subjective reliance . . . deflects inquiry from the relevant constitutional issue, the legitimacy of government conduct."[145]

Presenting a position contrary to the majority, the dissenters fear that "the majority's analysis invites the very kind of capricious and unfettered decisionmaking that the Due Process Clause in general and these regulations in particular were designed to prevent."[146] They state that "[d]enying an agency the fruits of noncompliance gives credibility to the due process and privacy interests implicated by its conduct."[147] Justices Brennan and Marshall conclude by stating that the Court's holding "necessarily confers upon the Judiciary a 'taint of partnership in official lawlessness.'"[148]

The majority opinion in *Caceres* captures a view that was expressed in many of the lower court cases that preceded the decision. *Caceres*

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139 *Id.* at 749. *See also* United States v. McKee, 192 F.3d 535, 541 (6th Cir. 1999) (holding that the Court in *Caceres* did not foreclose court enforcement of guidelines "when 'compliance with the [provision] is mandated by the Constitution or federal law'"); United States v. Soto-Soto, 598 F.2d 545, 550 (9th Cir. 1979) (distinguishing *Caceres* when FBI action violated federal law).

140 *Id.* at 749–52.

141 *Id.* at 756.

142 *Id.*

143 *See id.* at 757–61.

144 *Id.* at 762.

145 *Id.*

146 *Id.* at 764.

147 *Id.* at 769–70. The dissenters criticize the majority for not "acknowledg[ing] countervailing considerations." They state, "[q]uite apart from specific deterrence, there are significant values served by a rule that excludes evidence secured by lawless enforcement of the law." *Id.* at 769.

148 *Id.* at 770 (citing United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan J., dissenting)).

also served as a source of precedent for decisions rendered since the 1979 holding. As previously demonstrated, most decisions maintain that internal policies of the Department of Justice are unenforceable at law. Many of these cases cite the *Caceres* decision as binding authority.

In reviewing Department of Justice guideline violations, courts seldom reference the case of *United States ex rel. Accardi v. Shaughnessy*.[149] In *Accardi*, an immigration case, the "Court vacated a deportation order of the Board of Immigration Appeals because the procedure leading to the order did not conform to the relevant regulations."[150] In this case, and others that have followed,[151] the Court considered the question of "whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto."[152] The Court in *Accardi* found that an agency's failure to follow its internal rules was grounds for reversal.

Courts hold that violations of Department of Justice internal guidelines differ from the cases that have progressed from the *Accardi* decision.[153] DOJ guideline violations are not codified and they involve internal policy that guides prosecutorial discretion.[154] The DOJ guidelines are designated as mere "housekeeping" rules with no substantive

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149 347 U.S. 260 (1954).

150 Montilla v. Immigration and Naturalization Service, 926 F.2d 162, 167 (2d Cir. 1991).

151 *See, e.g.*, Yellin v. United States, 374 U.S. 109, 123–24 (1963) (overturning contempt conviction when agency rights violated).

152 *Shaughnessy*, 347 U.S. at 265.

153 The cases are distinguished by Professor Peter Raven-Hansen who advocates the use of "equitable balancing" of private and public interests to determine the appropriateness of government estoppel for an agency rule violation. *See* Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own 'Laws'*, 64 TEX. L. REV. 1 (1985). Using his analysis, here, would mean that DOJ policy violations would seldom be a basis for regulatory estoppel. Since there is no legislative interest in DOJ rules, the public interest is questionable. Likewise, it would be difficult to demonstrate a detrimental reliance on the guideline, so the private interest would not be a basis for court intervention. Professor Raven-Hansen states:

> a court weighing the private interest should consider: (1) whether the law that has been violated is mandatory or directory, which determines whether it creates duties that will support any reliance interest at all; and (2) whether the law is material to the public, creating a presumption of reliance ("objective reliance"), or whether it is immaterial, requiring an individualized showing of detrimental reliance ("subjective reliance").

Id. at 70.

154 *See* United States v. Lee, 274 F.3d 485, 492 (8th Cir. 2001) (citing *United States v. Armstong*, 517 U.S. 456, 464 (1996) and holding that "prosecutorial discretion has been treated differently than other types of agency discretion"). The Department of Justice violations are individual acts and they do not represent a deliberate refusal to accept a guideline. This is not a situation of an agency rejecting judicial authority. *See* Joshua I. Schwartz, *Nonacquiescence, Crowell v. Bensen & Administrative Adjudication*, 77 GEO. L.J. 1815, 1903 (1989) (discussing nonacquiescence and its "relationship between administrative, adjudication, and judicial review").

basis that entails review.[155] A lone district court that attempted to use the *Accardi* decision to order a new sentencing phase for DOJ's violation of its death penalty protocol was reversed by the Eighth Circuit. The Eighth Circuit held that the Department of Justice Manual specifically provides that it "does not create substantive or procedural rights enforceable by others."[156]

The failure to follow internal guidelines is not a problem exclusive to the Department of Justice.[157] One finds similar misconduct in other agencies. There are numerous cases that report violations of the Internal Revenue Service guidelines.[158] Courts often use the *Caceres* case as authority for finding that violations of internal guidelines do not present a constitutional violation and do not provide an individual with a remedy from the agency that failed to adhere to its internal guidelines.[159] Courts distinguish, however, where a government agency has officially promulgated its regulations.[160] This is in keeping with classic administrative law principles that provide different treatment for rules and policy statements.

As one might suspect, failure to follow guidelines of the Federal Bureau of Investigations (FBI) is a common basis for argument in appel-

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155 In *Sullivan v. United States*, 348 U.S. 170 (1954) the Court examined the failure to follow a letter issued by the Department of Justice. The Court stated:

> To make the system uniform, Circular Letter No. 2431 was sent to all District Attorneys. It was never promulgated as a regulation of the Department of Justice and published in the Federal Registrar. It was simply a housekeeping provision of the Department and was not intended to curtail or limit the well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction.

Id. at 173.

156 *See* United States v. Lee, 274 F.3d 484, 493 (8th Cir. 2001) (citing U.S. ATTORNEYS' MANUAL § 1-1.100).

157 *See, e.g.*, Jacobo v. United States, 853 F.2d 640, 641 (9th Cir. 1988) (failing to follow a naval manual did not bind the Navy).

158 *See, e.g.*, United States v. Tenzer, 127 F.3d 222, 228 (2d Cir. 1997) (holding that neither the defendant "nor the public may reasonably rely on the IRS's non-solicitation policy"); United States v. Michaud, 860 F.2d 495, 499 (1st Cir. 1988) (holding that it is improper to exclude evidence when there is a breach of an IRS regulation); United States v. Groder, 816 F.2d 139, 142 (4th Cir. 1987) (discussing that bad faith requires more than just showing an agency violation); United States v. Thoma, 726 F.2d 1191, 1199 n.3 (7th Cir. 1984) (holding that violations of internal IRS rules do not grant defendant any rights); United States v. Irvine, 699 F.2d 43, 46 (1st Cir. 1983) (discussing how evidence gathered in violation of an IRS regulation on agency "warning" requirements does not need to be suppressed); United States v. Lehman, 468 F.2d 93, 104 (7th Cir. 1972) (holding that it is improper to exclude evidence although there is a breach of an IRS regulation).

159 *See* Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894 (1980).

160 *See* Shain v. United States, 978 F.2d 850, 853–54 (4th Cir. 1992) (finding that DOJ regulation was "promulgated without notice" and was merely an internal government guideline).

late courts.[161] For example, in *United States v. Andreas*,[162] a case emanating from an alleged Sherman Act violation occurring at Archer Daniels Midland Co. (ADM), the Seventh Circuit examined the failure of FBI agents to adhere to internal policies in their supervision of tape recordings.[163] The court summarily dismissed the complaint citing the *Caceres* holding.

One finds similar results in civil actions brought against the FBI for failure to abide by department policy. In *Kugel v. United States*,[164] the District of Columbia Circuit rejected the use of internal Department of Justice guidelines as a basis for finding a duty in a negligence action. Despite the fact that these guidelines "mandat[e] that agents exercise minimal intrusiveness during an investigation to protect an investigative target from prosecution for improper reasons, from adverse consequences to privacy interests and from avoidable damage to reputation," a failure to abide by these guidelines does not "create a duty in favor of the general public."[165]

This position is in keeping with cases involving alleged violations of internal regulations that occur within other federal agencies. For example, in *Schweiker v. Hansen*, the court determined that a failure to follow a claims manual of the Social Security Administration (SSA) did not create a basis for relief. The Court, in a per curiam decision, stated that the "Claims Manual [was] not a regulation," had "no legal force, and [did] not bind the SSA."[166] The Court noted the ramifications of making a breach of a policy in a "13-volume handbook for internal use by thousands of SSA employees" a basis for legal action.[167]

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161 *See, e.g.*, United States v. Flemmi, 225 F.3d 78, 88 (1st Cir. 2000) (finding that internal FBI guidelines could not be a basis for providing authority to "FBI agents to promise use immunity to informants").

162 216 F.3d 645 (7th Cir. 2000).

163 The court stated:

> Many conversations between Whiteacre and one or more conspirators that should have been recorded were not, and the FBI frequently did not file the necessary reports or provide explanations for these missed conversations. Many of the tapes Whiteacre made were not collected as promptly as they should have been, and the catalogue of tapes given to and collected from Whitacre was not meticulously maintained. The FBI did not seem to follow its own internal guidelines on supervising taping activities, but this does not provide a basis for constitutional challenge.

Id. at 661.

164 947 F.2d 1504 (D.C. Cir. 1991).

165 *Id.* at 1507.

166 Schweiker v. Hansen, 450 U.S. 785 (1981).

167 *Id.* at 1471. This case involved a field representative of the Social Security Administration who incorrectly orally informed a potential recipient of Social Security benefits that she was not eligible. The individual, relying on this information failed to file for the benefits, and was therefore not entitled to sums retroactive to the eligible time. The Court cited to *Caceres* in a footnote expressing the position that "a *per se* rule 'would take away from the Executive

In evaluating an alleged violation of the Department of Justice, a court distinguished these internal guidelines from other departmental policy that is codified finding that because it was "not promulgated as a regulation" it did not carry any force of law.[168] Absent them being published in the Federal Registrar, courts see these internal guidelines as nothing more than "housekeeping provision[s]."[169]

V. ENHANCING GUIDELINE COMPLIANCE

If the guidelines were rules codified into statute or made into a formal regulation in the Code of Federal Regulations, there would be a clear basis for enforcement. Although codification would offer better compliance, there is a strong policy reason for keeping these policy directives as internal guidelines and not elevating them to regulatory or constitutional mandates. In *United States v. Ng*,[170] a case in which the defendant contended that the government had violated the *Petite* policy, the court stated that"[t]o hold the policy legally enforceable would be to invite the Attorney General to scrap it, which would hardly be in the public interest."[171]

On the one hand, guidelines serve important interests of educating new personnel in the office, providing consistency within offices, and also providing a structure for important internal policy decisions. Considering the enormous power wielded by prosecutors,[172] internal guidance can be crucial in ensuring that individual decisions are restricted to the norms of the Department.[173]

Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations.'" *Id.* at 1492 n.5.

168 *Hayes*, 589 F.2d at 818 (discussing an alleged violation of the Department of Justice's *Petite* Policy).

169 *See* Haley v. United States, 394 F. Supp. 1022 (W.D. Mo. 1975) (discussing how noncompliance with the *Petite* policy does not warrant dismissal); *see also* United States v. Hutul, 416 F.2d 607 (7th Cir. 1969) (finding the guidelines to be "'housekeeping provision[s]' of the Justice Department").

170 699 F.2d 63 (2d Cir. 1983). In the *Ng* case, the court noted that there was evidence that the Justice Department had abided by the policy in that they determined that there was justification to depart from the general rule stated in the policy. *Id.* at 71.

171 *Id.* at 71.

172 *See supra* notes 1-10 and accompanying text.

173 In hearings on the Independent Counsel Act, questions were raised concerning the practices of Independent Counsel Kenneth Starr. Some of the questions concerned his alleged failure to follow department policy. Senator Levin, in questioning Independent Counsel Starr, stated:

> Looking at the record of your office, Mr. Starr, in my judgment, despite our best efforts to establish reasonable limits on the power of independent counsels, you and your office have managed to exceed those limits. In the ABC News case, you stated to the court that the relevant Justice Department regulations did quote "not govern an independent counsel" close quote. And that's the way your office seems to have operated generally. In my judgment, you've gone beyond what an average prosecu-

Yet, if the guidelines are nothing more than sheets of paper and have no acceptance and adherence within the organization, then they serve no purpose. Thus, it is necessary to find the appropriate balance between achieving better compliance with the guidelines without derailing the benefits accruing from the existence of having these guidelines.

This next section offers what might be considered "soft" remedies that can be implemented to enhance guideline compliance. They are soft in the sense that they do not suggest that enforcement be administered through strict judicial oversight and correction which may include the dismissal of criminal cases. Rather, the remedies offered here suggest steps that might result in improved enforcement without affecting the beneficial qualities that accrue from having a guideline system.

By offering suggestions for improved compliance with guidelines, this article does not advocate curtailing prosecutorial discretion. There is a clear value in having the executive produce and maintain these guidelines. There is also a clear value in having "individualized justice."[174] But having flexibility that fails to consider the guidelines because of a lack of knowledge, inadvertence, or a particular attorney's desire to "win" is not the product of measured discretion and "individualized justice," but rather the product of individualized action. As such, remedies to correct these guideline failures are warranted.

A. THE JUDICIAL ROLE IN GUIDELINE COMPLIANCE

Precedent clearly holds that use of a court's supervisory powers will not be premised solely on a violation of DOJ policy.[175] Despite the fact that a court may be troubled by the violation,[176] there is seldom judicial

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tor would do in the investigation of a private citizen and you have failed to comply with Justice Department policies as intended under the Independent Counsel law.

The Future of the Independent Counsel Act: Hearings Before the Committee on Governmental Affairs, United States Senate, 106 Cong. (1999 WL 221633 (F.D.C.H.)).

174 DAVIS, *supra* note 1, at 19.

175 *See, e.g.*, United States v. Wilson, 614 F.2d 1224 (9th Cir. 1980) (holding that there is no basis for using supervisory powers for a guideline violation); Application of Shetty, 566 F.2d 81 (9th Cir. 1977) (finding that if DOJ policy was "more than in-house" rules and was published in the Code of Federal Regulations, then the courts might be more better able to regulate the rules).

176 In *United States v. Serrano*, 680 F. Supp. 58 (D. P.R. 1988), the court disapproved of the government's failure to abide by a DOJ guideline. The court stated:

> The guidelines provided by the Department of Justice embody the best practice to properly handle situations involving the prosecution of a defendant who has testified under a grant of immunity. The ignorance of these guidelines by the United States Attorney and his assistants, as well as by the F.B.I., is deplorable. Nevertheless, the failure to follow these guidelines does not mandate dismissal where, as here, defendant's privilege against self-incrimination was not violated.

Id. at 65.

action taken to address the violation.[177] In some cases, the court will find it unnecessary to invoke its supervisory powers because the violation did not affect the conviction, and as such, was harmless error.[178]

Courts routinely dismiss the violation of a DOJ guideline as an internal "housekeeping" matter. Suggested here are alternative considerations that may improve compliance. First, it is suggested that there should be closer review by courts when there is guideline noncompliance. This can be accomplished by allowing defendants to use DOJ violations as evidence to support allegations of prosecutorial misconduct.[179] Second, it is recommended that prosecutors should bear the burden of showing that they did not engage in misconduct, when there has been a violation of a department guideline.[180] Finally, courts should consider reporting violations through the existing internal process, the Office of Professional Responsibility, to enhance overall compliance.

1. *Prosecutorial Misconduct*

Failure to "follow its normal prosecutorial procedures mandates stricter judicial scrutiny of the prosecution."[181] Closer scrutiny could enhance compliance with the guidelines. In structuring judicial scrutiny, however, it is necessary to maintain the important values of continuing a guideline system. As opposed to having guideline violations result in dismissal or reversal, it is suggested here that courts should consider prosecutorial misconduct as evidence relating to the overall propriety of governmental conduct.

Presently, courts summarily deny review of guideline violations claiming a lack of authority because the guidelines are unenforceable under law. Because the guidelines are not rules or law, courts do not have the ability to enforce them. A middle ground exists, however, for hearing this evidence while not raising it to the level of mandatory "rules." Courts could view guideline violations as one piece of evidence in determining whether prosecutorial misconduct has occurred.

Prosecutorial misconduct is often judged from an examination of the entire record of prosecutorial conduct. The cumulative effect of the improprieties may mandate a finding of prosecutorial misconduct. This

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177 *See* United States v. Myers, 123 F.3d 350 (6th Cir. 1997) (noting that the court was "troubled" by the violation but declining to implement its supervisory power).

178 *See* United States v. Babb, 807 F.2d 272 (1st Cir. 1986) (finding it unnecessary to use supervisory powers where the conviction was not a "product" of "prosecutorial misconduct").

179 *See infra* notes 181–189 and accompanying text.

180 *See infra* notes 190–192 and accompanying text.

181 United States v. Haggerty, 528 F. Supp. 1286, 1293 (D. Colorado 1981) (using a stricter review to determine whether there was a selective prosecution).

decision may not be the result of a single incident, but may be the result of repeated instances of prosecutorial misconduct.[182]

One can analogize the use of guidelines in this context as similar to court use of state professional responsibility rules. Like the DOJ guidelines, the ABA Model Rules of Professional Conduct were not designed to be a basis for malpractice or other civil or criminal action against lawyers. The ABA Model Rules of Professional Conduct do "not [themselves] give rise to a cause of action against a lawyer."[183] Some courts, however, permit them to be used as evidence in a trial to demonstrate the community standard for lawyering.[184]

Presently, courts summarily discard guideline DOJ violations as unenforceable at law. They cite the *Caceres* case as authority and then end the discussion.[185] They seldom consider the violation of the guidelines as an aspect of the total picture representing the prosecutor's conduct during trial. Under the approach presented here, the court would examine the violation as one piece of evidence in support of a claim of prosecutorial misconduct. The violation of a guideline would not constitute a per se violation, but, along with other evidence of prosecutorial misconduct, could demonstrate that a prosecutor has violated the community standard expected of prosecutors.

2. *Shifting the Burden*

Some defendants have attempted to use violations of DOJ policy as the basis for claiming prosecutorial misconduct. The level of evidence needed to support this position is particularly problematic, as courts have required that the "prosecutorial conduct" be "so fundamentally unfair as to deny a defendant's constitutional rights."[186] Shifting the burden of proof to the government when a DOJ guideline violation occurs may be

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182 *See, e.g.*, United States v. Conrad, 320 F.3d 851, 855 (8th Cir. 2003) (one of three factors used to constitute prosecutorial misconduct is the "cumulative effect of such misconduct").

183 The Scope to the Rules state in part:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.

ABA MODEL RULES OF PROF'L CONDUCT, Scope (2002).

184 *See, e.g.*, United States v. Murphy, 768 F.2d 1518, 1537–41 (7th Cir. 1985) (using judicial ethical opinions in considering recusal of a judge); Cambron v. Canal Insurance Co., 269 S.E.2d 426 (Ga. 1980) (finding it proper for a jury to consider standards for attorneys); *see also* Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMPLE L. REV. 1323, 1332–35 (1988).

185 *See supra* notes 73–106 and accompanying text.

186 United States v. McInnis, 601 F.2d 1319, 1328 (5th Cir. 1979).

more equitable to the defendant and yet not burden the prosecution when its actions were justified or harmless.[187] This remedy, however, needs to be sensitive to cases involving national security or undercover operations, where the disclosure of information might have a harmful effect.[188]

Thus, closer scrutiny by allowing courts to consider guideline violations as evidence of government misconduct, coupled with shifting the burden onto the prosecution to demonstrate that it did not engage in misconduct, may enhance the value accorded to the guidelines. These proposals should not be overly burdensome to the government because they do not transform the guidelines into law and offer the government relief when misconduct is based on harmless inadvertence.

3. *Forwarding to the Office of Professional Responsibility*

Courts should also consider following the advice provided within some of the guidelines that suggests reporting violations to the Office of Professional Responsibility.[189] When a court merely finds the guideline unenforceable, it fails to assist the government in achieving compliance. Without the knowledge of guideline violations, the government cannot implement corrections. Reporting violations to the agency, however, should not be seen as prejudging the conduct as a DOJ policy violation. Rather, the reporting process should be viewed as indicating that internal review might be warranted.

B. CONGRESSIONAL OVERSIGHT

Congressional oversight can also assist in bringing to light guideline violations and can serve as an impetus for better compliance with these internal rules. This can be accomplished through direct congressional review or alternatively through review of guideline compliance by the Office of the Inspector General.

An example of direct review is seen in the Senate Committee on the Judiciary's 1999 examination of guideline violations in the clemency process. Senator Orrin G. Hatch stated that the Justice Department had "ignored its own rules for handling clemency matters." Specific failure to adhere to DOJ guidelines included the Department's consideration of the

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187 United States v. Mishoe, 241 F.3d 214, 221 (2d Cir. 2001).

188 *See* United States v. Marbelt, 129 F. Supp.2d 49 (D. Mass. 2000) (holding that the defense was not entitled in discovery to internal guidelines of the United States Customs Service that relate to undercover operations).

189 Some courts have threatened to report violations. *See, e.g., Gillespie*, 974 F.2d at 802 (7th Cir. 1992) (stating, "[w]e will, in appropriate circumstances, consider referring internal policy violations to the Department's Office of Professional Responsibility"); *Pacheco-Ortiz*, 889 F.2d at 311 (1st Cir. 1989) (stating that it would consider referring future violations to the Office of Professional Responsibility).

"'possibility' of clemency for the FALN[190] prisoners even though no personal petitions for clemency had been filed."[191]

An example of indirect review is seen in the Office of the Inspector General's (OIG) review of conduct regarding detainees in the aftermath of September 11th. In the detailed report, *A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Inspection of the September 11 Attacks*,[192] the Inspector General for the Department of Justice dissected the conduct of immigration, FBI, and prosecutors toward detainees in the aftermath of September 11th.

Having closer congressional oversight may enhance the level of compliance with the guidelines. Because legislative review will likely be limited to those instances of repeated violations or high profile matters,[193] the burden on the DOJ and Congress should be minimal. Ultimately, Congress could enact legislation removing agency discretion over the internal process when repeated violations occur. Thus, oversight may alert Congress of the need to elevate something from a "housekeeping" status to formal legislation that would be enforceable by the courts.

Congressional oversight would assure that policies adopted by the DOJ are not used merely as a showcase to avoid restrictive legislation. A Report issued on the "DOJ's Implementation of False Claims Act Guidance in National Initiatives Varies," found that what the Department was saying and what was actually happening with respect to guidelines pertaining to the False Claims Act in the Medicare Fraud and Abuse area did not necessarily coincide. Compliance was found to be "superficial" despite claims that "compliance with its False Claims Act guidance" was "an ongoing priority."[194]

The Department of Justice invokes DOJ policy to demonstrate to Congress that there are mechanisms in place to prevent misuse of its

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190 Acronym for Armed Forces of National Liberation.

191 *Examining Certain Implications of the President's Grant of Clemency for Members of the Armed Forces on National Liberation (The FALN): Hearings Before the Senate Committee on the Judiciary*, 106 Cong. 94 (1999) (Testimony of Sen. Orrin Hatch). *See also* U.S. ATTORNEYS' MANUAL § 1-2.111 (1997).

192 Oversight by the Inspector General's Office recently revealed problems regarding the implementation of the USA Patriot Act. *See* STAFF OF THE OFFICE OF THE INSPECTOR GENERAL, UNITED STATES DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (April 2003), *at* http://www.usdoj.gov/oig/special/03-06-index.htm (June 2003) (last visited Oct. 19, 2003).

193 *Id.*

194 STAFF OF THE UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, MEDICARE FRAUD AND ABUSE: DOJ'S IMPLEMENTATION OF FALSE CLAIMS ACT GUIDANCE IN NATIONAL INITIATIVES VARIES, GAO/HEHS-99-170 (August 1999), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?Ipaddress=162.140.64.21&filename=he99170.pdf&directory=/Diskb/wais/data/gao.

discretionary powers. For example, at the 2000 Senate Judiciary Committee hearings on electronic surveillance, a Deputy Assistant Attorney General stated that "the Department of Justice imposes its own guidelines on top of the privacy protections provided by the Constitution, statutes and the courts."[195] Specifically with respect to the Carnivore computer program, he noted that "before Carnivore may be used to intercept the context of communications, the requesting investigative agency must obtain approval from the DOJ asking a court for a Title III order."[196] If prosecutors are permitted to assert DOJ policy as a basis for allowing their continued discretion in implementing legislation to go unchecked, then oversight is necessary when repeated instances of noncompliance with these internal guidelines occur.[197]

C. EXECUTIVE COMPLIANCE MEASURES

Enhanced internal mechanisms could assist in providing better compliance with guidelines. For instance, the Federal Sentencing Guidelines for Organizations offers a detailed structure on how to construct and maintain a compliance program in the organizational setting. These sentencing guidelines serve to reduce a corporation's culpability with respect to criminal punishment. Although the government could not be held criminally liable for failure to comply with this internal structure, instituting a forceful compliance program could assist the government in achieving positive results.

The Federal Sentencing Guidelines for Organizations provide benefits to organizations for maintaining an "effective program."[198] Aimed at "prevent[ing] and detect[ing] violations of law" it requires a program that is "reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct."[199] The essence of achieving an effective program is "due diligence."[200]

Seven attributes are listed as the minimal standards for achieving compliance.[201] Under these guidelines an entity must "tak[e] steps to communicate effectively its standards and procedures to all employees

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195 *The Carnivore Controversy: Electronic Surveillance and Privacy in the Digital Age: Hearing Before the Senate Committee on the Judiciary*, 106 Cong., Sept. 9, 2000 (testimony of Kevin V. DiGregory, Deputy Assistant Attorney General, Criminal Division, Department of Justice) (2000 WL 1268433 (F.D.C.H.)).

196 *Id.*

197 The discipline offered under the Freedom of Information Act (FOIA) might serve as a model for imposing statutory discipline when the internal mechanisms are ineffective. *See* 5 U.S.C. § 552; *see also* Paul M. Winters, Note, *Revitalizing the Sanctions Provision of the Freedom of Information Act Amendments of 1974*, 84 GEO. L.J. 617 (1996).

198 U.S. SENTENCING GUIDELINES MANUAL § 8A1.2, cmt. 3(k) (2001).

199 *Id.*

200 *Id.*

201 *Id.*

and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required."[202] There would be no need to establish "compliance standards and procedures to be followed by employees and agents"[203] because the guidelines exist and the compliance program is intended to achieve full compliance with these standards. "Specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures."[204] These duties should be delegated only to responsible individuals.[205] Organizations need to use appropriate monitoring to detect violations, and when violations are discovered, there needs to be appropriate discipline.[206]

An "effective program" would also require the government agencies to "take[ ] all reasonable steps to respond appropriately to the offense and to prevent further similar offenses–including any necessary modifications to [their] program to prevent and detect violations of law."[207] Implementing a program designed to accomplish this goal, as well as the other seven minimal standards, does require some flexibility depending upon the "size of the organization," "likelihood that certain offenses may occur because of the nature of its business," and "prior history of the organization."[208] The Federal Sentencing Guidelines for Organizations provide guidance on adjusting the minimum standards to meet the constraints of the specific organization.[209]

Many of the standards for compliance have already been instituted by the federal government. For example, there is an Office of Professional Responsibility and there is a Professional Responsibility Advisory Office, all located within the DOJ. There is also the Executive Office of the United States Attorney. There are, however, two levels of compliance needed. On one level there is the main office of the Department of Justice and on another level there are United States Attorneys' offices throughout the United States. Compliance needs to be considered at both of these levels. Due diligence in reporting violations, correcting violations and teaching the guidelines must happen within each of the individual United States Attorneys' Offices.

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202 *Id.* at 3(k)(4). Existing professional programs within the Department may already offer sufficient compliance with this aspect of the program.

203 *Id.* at 3(k)(1).

204 *Id.* at 3(k)(2).

205 *Id.* at 3(k)(3).

206 *Id.* at 3(k)(5)(6).

207 *Id.* at 3(k)(7).

208 *Id.*

209 *Id.*

A policy should be put in place that would hold key executives responsible when they fail to properly monitor the program. United States Attorneys located throughout the country need to be cognizant of the importance of adhering to DOJ guidelines.

If the government can proceed criminally against the CEO of a major company, as it did in *United States v. Park*,[210] for failing to correct sanitation conditions at a plant in Baltimore when the CEO was located in Philadelphia and oversaw "36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses,"[211] then surely it should be able to properly monitor guideline violations occurring in its own offices. As previously noted, the key to compliance is "due diligence."[212]

CONCLUSION

In *United States v. Jacobs*, the court noted that "[w]e have commented *in camera* from time to time on the failure of certain special attorneys to avail themselves of the central repository of legal knowledge and judgment that exists in the regular United States Attorneys' Office."[213] In *Jacobs*, the court chose to use its supervisory powers to dismiss the indictment. But most courts do not, and should not, use such a severe remedy to correct internal government policy violations. If prosecutorial guidelines become legal mandates, there is justified concern that it will have a diminishing return in that fewer guidelines will be enacted. This is especially true when the guidelines offer little benefit to the Department but are tremendously important to the accused, such as is the case with Grand Jury Advisement of Rights policy.[214]

Yet, prosecutorial practice and procedure must be followed more rigorously and consistently. Repeated violations of the same guideline should not be the norm. If transgressions are justified, then federal prosecutors need to consider modifications to the guidelines to include possible unusual circumstances that continually arise. On the other hand, if guidelines represent an important value that prosecutors do not adhere to in practice, action needs to be taken to rectify the situation.

Obviously internal enforcement will best serve the important purposes of the guidelines. But if the internal process cannot achieve compliance, then courts and the legislature need to consider ameliorative action. It is important, however, in taking action to balance the values inherent in maintaining a guideline structure.

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210 421 U.S. 658 (1975).

211 *Id.* at 660.

212 U.S. SENTENCING GUIDELINES MANUAL § 8A1.2, cmt. 3(k) (2001).

213 547 F.2d 772, 778 (2d Cir. 1976).

214 *See supra* notes 86–100 and accompanying text.