Robert D. Reif Fellowship in Legal Ethics and Professional Values
Essay Submission
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The Federal Prosecutor's Subpoena Power as Applied to Another Lawyer

I. Introduction

Prosecutors have played a prominent role in the legal system since the United States' independence and before its inception.[1] As the most powerful player in the adversarial system, the prosecutor carries the duty to seek an outcome rooted in justice over a favorable outcome to the government. In the beginning years of the creation of this role, few laws existed to shape the powerful decisions these government attorneys make. Over time, courts, legislature, and policy-making bodies created governing statutes, regulations, and rules for guidance and when necessary, discipline. Operating under these laws in an increasingly complex world, prosecutors are tasked with upholding justice and the rule of law above all else.

Federal prosecutors are employees of the Department of Justice (DOJ) and work for the United States Attorney Offices (USAO), under the direction of the United States Attorney General (AG), around the country. Every state has one or more appointed United States Attorney depending on the number of federal districts in the state. United States Attorneys are "appointed by, and serve at the discretion of, the President of the United States, with the advice and consent of the United States Senate."[2] The DOJ is part of the executive branch and is thus subject to additional rules governing the president and administration. This can include added Rules of Conduct, Executive Orders, or federal regulations.

In 1940, former Attorney General, Robert H. Jackson, addressed the United States Attorneys at the Second Annual Conference. Jackson's opening statements described the federal prosecutor:

> "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens in investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret

[1] For a full discussion, *see* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973).
[2] U.S. Attorney's Office, *Mission* (Sept. 22, 2016), https://www.justice.gov/usao/mission.

> session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole."[3]

United States Attorneys, along with Assistant United States Attorneys, prosecute all federal crimes and represent the United States in civil proceedings filed in federal court in which the United States is a party. Federal prosecutors work predominantly with federal law enforcement, the Federal Bureau of Investigation (FBI).[4] The typical USAO prosecutes only federal crimes. The District of Columbia Office, however, is different in that it also prosecutes all serious crimes committed by adults that arise under the laws of the District. In this situation, prosecutors work with both federal and local law enforcement.[5] Due to the immense discretion and investigatory power, federal prosecutors' integrity lies with their independence and integrity.

II. Applicable Law

State prosecutors are subject to state law and state ethics rules. Each state adopts its own rules, which may or may not resemble the Model Rules of Professional Conduct. Federal prosecutors have argued that they are not subject to local ethics rules and were immune from state bar disciplinary proceedings with little to no avail.[6] Courts have distinguished whether state ethics rules apply to federal prosecutors based on the context of whether the proceedings directly involve the grand jury and whether there is a federal law in direct conflict with the state rule.[7]

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[3] Robert H. Jackson, The Federal Prosecutor, 31 J. OF CRIM. L. AND CRIMINOLOGY 1, 3 – 6 (1940).

[4] *See* Federal Bureau of Investigation, *A Brief Description of the Federal Criminal Justice Process* (Feb. 12, 2018), https://www.fbi.gov/resources/victim-assistance/a-brief-description-of-the-federal-criminal-justice-process.

[5] *See* United States Attorney's Office, *District of Columbia* (Feb. 13, 2018), https://www.justice.gov/usao-dc.

[6] *See United States v. Colo. Supreme Court*, 189 F.3d 1281 (10th Cir. 1999); *United States v. Helmandollar*, 852 F.2d 498 (9th Cir. 1988); *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986).

[7] *See generally United States v. Supreme Court of New Mexico*, 839 F.3d 888 (10th Cir. 2016) cert. denied, 138 S. Ct. 130 (2017), and cert. denied, 138 S. Ct. 78 (2017) (the challenged

In 1989, Attorney General Dick Thornburgh issued a memorandum to federal prosecutors asserting that state ethics rules were not binding on federal prosecutors; that state ethics rules can apply only if there is not a conflicting federal rule.[8] Despite the Department's dispute over whether state ethics rules apply to federal prosecutors, Congress took on the issue and decided that they do apply. Enacted in 1998, the Citizens Protection Act, also known as the McDade Amendment, mandates that U.S. government attorneys are subject to the ethics rules of the state in which they practice in the same way the state attorneys are subject.[9] An inherently controversial issue, rules that govern prosecutors on the state level are both opposed and supported. Various scholars argue that the applicability of state ethics rules only hinders federal prosecutors as they must operate under conflicting legal schemes, which ultimately prevents effective law enforcement.[10] Even after the passing of this legislation, as some may have hoped, courts declined to construe the rule more strictly.[11]

By nature, federal prosecutors are subject to federal law, including regulations, Executive Orders, and Department of Justice internal policy. Title 28 of the United States Code addresses

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provisions of Rule 16–308(E) are not preempted outside of the grand-jury context, but they are preempted in the grand-jury setting because they conflict with the federal-law principles).

[8] For a full discussion, *see* Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429, 459 (1996). *See also* Angela J. Davis, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 154 (2007).

[9] 28 U.S.C.A. §530B (1998).

[10] *Compare Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2089 – 93 (June 2000) (describing the dangers of the McDade Amendment to include misapplication of correct law, hesitation by federal prosecutors to get involved with undercover investigations risking constitutional rights violations, and a hindrance to effective law enforcement), *and* Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707 (2001) ("The McDade Amendment was supposed to be the answer to the regulation of federal prosecutors, but that task is being pursued at the expense of legitimate law enforcement investigative techniques, practices, and operations by Department attorneys."), *with* Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 56 - 60 (1999) ("To the extent the McDade Act shows a congressional intent to encourage the use of the disciplinary process to police prosecutorial misconduct, it is a positive development."), *and* Nina Marino & Richard Kaplan, *The McDade Amendment: Moving Towards a Meaningful Limitation on Wrongful Prosecutorial Contact with Represented Parties*, 4 RICH. J. L. & PUB. INT. 36, 51 (1999) ("As members of the legal community, our universal support for the McDade Amendment is crucial.").

[11] *See* Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 476 (2017).

ethical standards for government attorneys in Section 530B, which arose from the passing of the McDade Act as mentioned above.[12] Subjecting U.S. Government attorneys to "State laws and rules," this section further directs the Attorney General to alter all DOJ rules to reflect this application.[13] Governing regulations for government attorneys are codified in the Code of Federal Regulations.[14] The Office of Government Ethics outlines Standards of Ethical Conduct for Employees of the Executive Branch in Chapter XVI of Title 5, which governs administrative personnel.[15]

Article II, Section 3, of the United States Constitution gives the president authority to ensure the faithful execution of laws and to commission officers of the United States.[16] Based on separation of powers principles, the president can act only through power of the Constitution or through legislative consent by Congress.[17] As the Department of Justice falls within the Executive Branch, it is subject to executive orders from the President.[18] For example, Executive Order 12731 sets forth the Principles of Ethical Conduct for Government Officials and Employees.[19] This order is from 1990 but is directed to the Office of Government Ethics and is still considered binding on the Department today.[20]

Department attorneys are governed by federal law as well as internal DOJ guidelines and policies. All DOJ attorneys are subject to the Standards of Conduct and Principles of Ethical Conduct for Government Officials and Employees, as set forth in Executive Order 12731.[21] The Justice Department issues the guidance to U.S. Attorneys in the form of the U.S. Attorneys

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[12] 28 U.S.C.A. § 530B.
[13] 28 U.S.C.A. § 530B(b) (1998).
[14] Dep't of Justice, *Departmental Ethics Office* (Sept. 1, 2016), https://www.justice.gov/jmd/departmental-ethics-office.
[15] 5 C.F.R. §§ 2634 - 2641 (2018).
[16] U.S. CONST. art. II, § 3.
[17] U.S. CONST. art. I, § 1. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").
[18] *See* Press Release, Dept. of Justice, *Pursuant to Executive Order on Public Safety, Departments of Justice and Homeland Security Release Data on Incarcerated Aliens* (Tues., Aug. 1, 2017), https://www.justice.gov/opa/pr/pursuant-executive-order-public-safety-departments-justice-and-homeland-security-release-data.
[19] Exec. Order No. 12731, 55 Fed. Reg. 42,547 (Oct. 17, 1990).
[20] Department of Justice, *Departmental Ethics Office* (Sept. 1, 2016), https://www.justice.gov/jmd/departmental-ethics-office.
[21] *Id.*

Manual (USAM). The first Manual was published in 1985 then comprehensively revised in 1997.[22] The governing section for the Criminal Division is Title 9. Section 9-13.410 addresses the AUSA's authority to subpoena other lawyers and acknowledges the effect it can have on the attorney-client privilege. This section was most recently updated in March 2016.[23] The Department requires its attorneys to "strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement."[24] Further, the DOJ attorney must seek the sought-after information through all other means prior to subpoenaing an attorney for client information, unless these attempts would compromise the investigation or risk the ability to subpoena the attorney in the future should the attempt fail.[25] This section also details factors for consideration by the approving DOJ official when deciding whether to approve a request for issuance of a subpoena.[26]

Two internal DOJ offices govern the conduct of Department attorneys: the Departmental Ethics Office and the Department's Office of Professional Responsibility (OPR). The Departmental Ethics Office is part of the larger Justice Management Division and is tasked with administering ethics programs throughout the Department.[27] It provides training on ethics policies in numerous sections and oversees ethics courses in the rest of the divisions. OPR,

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[22] U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR THE UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' MANUAL (1997) [hereinafter USAM].
[23] USAM, *supra* note 28, at 9-13.410.
[24] USAM, *supra* note 28, at 9-13.410(B).
[25] *Id.*
[26] "(1) The information sought shall not be protected by a valid claim of privilege. (2) All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful. (3) In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information. (4) In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation. (5) The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client. (6) The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time."

[27] Dep't of Justice, *Departmental Ethics Office* (Sept. 1, 2016), https://www.justice.gov/jmd/departmental-ethics-office.

however, has enforcement authority and is responsible for investigations into alleged misconduct regarding a DOJ attorney while exercising their investigative authority and throughout litigation and counseling.[28] The Office undertakes an investigation and provides a written report, which is given to the U.S. Attorney and the attorney subject to investigation.[29] In 2010, the DOJ established the Professional Misconduct Review Unit (PMRU), which reviews OPR findings of misconduct involving Assistant United States Attorneys and Criminal Division Attorneys.[30]

III. Legal Question & Background

This paper seeks to examine the proper analysis for a federal prosecutor's power to issue a subpoena through the grand jury: In the context of Rule 3.8(e), what is the correct formula for decision-making regarding the Federal prosecutor's decision to subpoena another attorney about a past or present client in a grand jury proceeding or other criminal proceeding?

A subpoena is a court order compelling the appearance of an individual at one of its proceedings to testify and/or produce evidence on a matter under investigation.[31] In criminal proceedings, subpoenas can be issued by the trial court or by a grand jury. Two common subpoenas are the subpoena duces tecum and a subpoena to testify (ad testificandum).[32] A subpoena duces tecum can order the individual to appear at a certain time and place pursuant to the court and to bring evidence with him or her to court or make them available to the requesting attorneys.[33] A subpoena to testify is only for the compulsion of testimony.[34] A subpoena duces tecum or subpoena to testify can be ordered forthwith to demand immediate evidence production and is often used when there is a significant risk of destruction of evidence.[35]

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[28] Dep't of Justice, Office of Professional Responsibility, *About the Office and OPR Policies and Procedures* (Oct. 19, 2017), https://www.justice.gov/opr/about-office-and-opr-policies-and-procedures.
[29] *Id.*
[30] *Id.*
[31] *See* FED. R. CRIM. P. 17. *See also* Lyn Farrel, THE FEDERAL GRAND JURY 9, n. 47 (2002), *and See also* 2 CHARLES ALAN WRIGHT, ET AL., FED. PRAC. & P. CRIM. § 275 (4th ed. April 2017).
[32] *See* WRIGHT, *supra* note 40, at § 272. *See also* Farrel at 9.
[33] *See* WRIGHT, *supra* note 40, at § 275.
[34] Farrel at 9 n. 47.
[35] *U.S. v. Lartey,* 716 F.2d 955, 962 (2d Cir. 1983) (finding the government's "forthwith" subpoena based out of good faith concern that defendant would tamper with evidence if given the opportunity); *U.S. v. Wilson*, 614 F.2d 1224, 1227 – 28 (9th Cir. 1980) (holding that the

A federal prosecutor often exerts the subpoena through a federal grand jury. The grand jury has its origins in old English common law.[36] The original purpose was to gather a group of citizens to reach a truthful conclusion as to whether a crime had been committed in the community based on information presented to them, serving to prevent the king from indicting innocent people.[37] The Framers of the United States Constitution later drafted the Bill of Rights to include the grand jury in Article V, maintaining its role in the criminal justice system in the newfound United States.[38] In the modern criminal justice system, the grand jury's purpose is to determine whether the prosecutor has presented sufficient or insufficient evidence to establish probable cause that one or more individuals has committed a federal crime in the jurisdiction of the district court.[39] The grand jury's function is said to be two-fold. On one hand, the panel can assist the prosecutor making a probable cause determination and assisting with the gathering of evidence through its power to compel the production of testimony from witnesses, documents, and other materials. On the other, the jury makes the decision as to whether someone is charged with a crime or not, potentially preventing wrongful charges and indictments.[40] According the Rule 6 of the Federal Rules of Criminal Procedure, a court must order for a grand jury to be assembled "when the public interest so requires."[41] The panel must be composed of sixteen to twenty-three grand jurors and the court must order that all of these are legally qualified.[42] A member of the grand jury cannot have been formerly charged or convicted of a felony; must be eighteen years of age or older; a United States citizen; must be able to read, write, and understand English with sufficient proficiency to complete the juror qualification form; must be able to speak English; must be a resident of the judicial district for at least a year; and must be

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government's use of a forthwith subpoena was to collect evidence in anticipation of further criminal conduct). *See* Farrel at 18 n. 84. Forthwith subpoenas should be used only when an immediate response is justified and then only with the prior approval of the United States Attorney. *See* USAM, *supra* note 28, at 9.11-140 (2016).

[36] *See* William H. Merrill, WATERGATE PROSECUTOR 34 (2008).

[37] *Id.*

[38] *Id. See also* David W. Kantaros, *Grand Jury – Professional Conduct Rule 3.8(f): A Necessary Balance between the Attorney-Client Privilege and Grand Jury Subpoena Powers*, 27 SUFFOLK U. L. REV. 545, 546 (1993).

[39] *See Branzburg v. Hayes*, 408 U.S. 665, 686 – 87 (1972). *See* WRIGHT, *supra* note 40, at § 101.

[40] The two-fold functions of the grand-jury are often referenced as the "sword" and "shield" functions. *See* WRIGHT, *supra* note 40, at § 272.

[41] FED. R. CRIM. P. 6(1).

[42] *Id.*

physically and mentally able to serve.[43] Members of a grand jury and all those who may be present during a proceeding are sworn to secrecy and cannot divulge the content of the proceedings nor the subject of investigation.[44]

A grand jury can issue both types of subpoenas but is still bound to respect privileges developed by the Constitution and common law, including the Sixth Amendment right to counsel, the work product doctrine, and attorney-client privilege.[45] Although the Sixth Amendment right to counsel does not attach until after a suspect is formally charged with a crime, the Sixth Amendment could be violated when it is shown that the subpoena was only meant to harass or where compliance would raise a conflict of interest between attorney and client.[46] Common law privileges, such as the work-product doctrine, serve to protect the confidentiality of attorney-client communications and materials prepared in the course of litigation.[47]

When an individual does not want to act accordingly with a subpoena, the remedy is a motion to quash the subpoena.[48] Federal Rule of Criminal Procedure 17(c) allows for a party to request a subpoena to be quashed "when compliance would be unreasonable or oppressive."[49] This remedy is available in response to subpoenas *duces tecum* but is not explicitly an option regarding subpoenas to testify.[50] Regarding compliance with a subpoena to testify, the court will often require the witness to appear then claim any privilege or immunity he wishes to assert.[51]

In a situation where a subpoena is directed at an attorney, the client can move to quash the subpoena in efforts to block the compulsion of the attorney's testimony or evidence. A protection clients assert is the attorney-client privilege.[52] Courts, however, have expressed the

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[43] Farrel at 5.
[44] FED. R. CRIM. P. 6(e).
[45] U.S. CONST. amend. VI. FED. R. EVID. 501, 502. For a full discussion, *see* SARA SUN BEALE, ET. AL, GRAND JURY LAW AND PRACTICE § 6:24 (2d ed. December 2017).
[46] Farrel at 16.
[47] Discussed *infra*.
[48] FED. R. CRIM. P. 17(c)(2).
[49] FED. R. CRIM. P. 17(a).
[50] FED. R. CRIM. P. 17(c)(2). *See* WRIGHT, *supra* note 40, at § 274.
[51] *Id.*
[52] *In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258, 1260 (11th Cir. 1982); *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083, 101 S. Ct. 869 – 70 (1981); *In re Grand Jury Matter No.* 91-01386, 969 F.2d 995, 997 (11th Cir. 1992); *In* re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039, 1042 (11th Cir. 1990).

need for the grand jury's ability to seek the truth without being thwarted.[53] The standard outlined in Rule 17(c)(2) is that the subpoena must be "unreasonable or oppressive." The courts have formulated three criteria to determine whether a subpoena meets that standard: It (1) commands the production of materials clearly irrelevant to the investigation at hand, (2) does not specify what is to be produced with reasonable particularity, or (3) is unreasonable regarding the extent of the effort required to comply.[54]

IV. Background of American Bar Association and Model Rules of Professional Conduct

The American Bar Association (ABA) adopted the original Canons of Professional Ethics on August 27, 1908. It was not until 1964 that the House of Delegates of the ABA created a Special Committee to evaluate any needed revisions to the Canons of Professional Ethics. The Committee then produced the Model Code of Professional Responsibility. In 1969, the ABA House of Delegates adopted the Code and so did the majority of state and federal jurisdictions. The Commission on Evaluation of Professional Standards undertook the re-evaluation of the Code in 1977 and came up with the Model Rules of Professional Conduct after six years of review and drafting. The most recent amendment to the Model Rules was in August 2012 and February 2013.[55]

Rule 3. 8 restricts the subpoena power of a prosecutor to compel another lawyer to present evidence about a past or present client in grand jury and other criminal proceedings.[56] In 1990, when the Rule was promulgated, it included the requirement for a prosecutor to obtain judicial approval prior to issuing a subpoena to another lawyer or an opportunity for a hearing before a prosecutor could subpoena another lawyer about current or past clients. This version of

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[53] *In re* Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 451 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3524 (1984) ("Since the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process.") (citing *In re* Grand Jury Proceedings (Jones), 517 F.2d 666, 671-72, (5th Cir. 1975) ("the purpose of the privilege – to suppress truth- runs counter to the dominant aims of law")). For a full discussion, see Flanagan, *The Grand Jury Subpoena: Is It the Prosecutor's Ultimate Weapon against Defense Attorneys and Their Clients*, 13 PEPP. L. REV. 791, 797 (1986).

[54] Farrel at 19.

[55] *Id.*

[56] *Id* at 423.

the rule included three factors the court was to take into consideration in analyzing whether a subpoena could be issued. In this original version, requirements were included in what was Rule 3.8(f).[57]

Requiring a prosecutor to obtain a court order was an issue then-Attorney General Thornburgh's Justice Department addressed by criticizing the American Bar Association, claiming the rule would "stymie criminal investigations and prosecutions."[58] The ABA then repealed this rule in 1995, noting that it was more relevant within criminal procedure rather than ethics rules.[59] Removal of this requirement came after scrutiny that requiring judicial approval effectively established a procedural requirement, which the rules had never done before. In 2002, Rule 3.8(f) became Rule 3.8(e). Rule 3.8(e) maintained the mandate that a prosecutor consider three factors before subpoenaing an attorney to gain evidence about a current or former client.[60] Currently, Rule 3.8 provides:

> "The prosecutor in a criminal case shall:
> (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
> (1) the information sought is not protected from disclosure by any applicable privilege;
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
> (3) there is no other feasible alternative to obtain the information."

Rule 3.8 has given rise to starkly contrasting positions as it pits the interest of a prosecutor in an effective and thorough investigation against the potential compromise of the attorney-client privilege.[61] In 1985, the DOJ adopted internal guidelines to account for growing concern about the prosecutor's subpoena power.[62] The Department of Justice has consistently challenged Rule 3.8, claiming the Rule impedes the grand jury's investigative function and the

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[57] *See* Frank O. Bowman, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 690-91 (Spring 1996).
[58] See Glaberson, *supra* note 8.
[59] *See* BENNETT, *supra* note 64, at 423.
[60] *See* 2 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 22:3 (2d ed. 2017).
[61] *See* Bowman at 685 – 89.
[62] *Id.* at 690. *See also* USAM, *supra* note 28, at 9-2.161(a).

prosecutor's overall investigation.[63] The American Bar Association, receiving counsel and challenge from the defense bar also, has walked the line between the two counter viewpoints but has left the rule unchanged since 2002.[64]

V. Legal Analysis

The federal prosecutor's ability to issue subpoenas to other lawyers carries significant law enforcement probative value. In the 1980s, federal prosecutors began issuing more subpoenas to accelerate the war on narcotics trafficking and organized crime.[65] The power to subpoena defense lawyers surrounding these crimes involving conspiracy was used to establish whether the client was paying legal fees illegally or legally and potentially shed light on who was involved.[66] Entitled "Special Responsibilities of a Prosecutor," Rule 3.8 of the Model Rules of Professional Conduct addresses the subpoena power of a prosecutor as does federal case law although only nine states have adopted this rule as written.[67]

The first factor for consideration under Rule 3.8(e) requires that the sought-after information is "not protected from disclosure by any applicable privilege."[68] Every lawyer-client relationship is covered by the duty of confidentiality according to governing ethics principles.[69] Under this rule, the lawyer cannot voluntarily disclose information about a client unless the client gives informed consent or if disclosure is impliedly authorized.[70] This ethical duty covers

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[63] *See* Beale, *supra* note 54. *See also State ex rel. Doe v. Troisi*, 194 W. Va. 28, 459 S.E.2d 130 (1995), *and* Zacharias at 459.

[64] *See* BENNETT, *supra* note 64, *and* AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (7th ed. 2011). *See also* Nancy J. Moore, *Introduction, Symposium: Intra-Professional Warfare Between Prosecutors and Defense Attorneys: a Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 530 – 531 (1992).

[65] *See Whitehouse v. U.S. Dist. Court for Dist. of Rhode Island*, 53 F.3d 1349, 1352 (1st Cir. 1995) (holding that federal district court had power to adopt and enforce local rule, as applied to trial subpoenas).

[66] Green at 471.

[67] Bowman at 685. *See United States v. Colorado Supreme Court*, 871 F. Supp. 1328, 1329 (D. Colo. 1994).

[68] MODEL RULES OF PROF'L CONDUCT r. 3.8(e)(1) (AM. BAR ASS'N 2002).

[69] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 1983) ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."). For a full discussion, *see* William H. Simon, *Attorney-Client Confidentiality: A Critical Analysis*, 30 GEO. J. LEGAL ETHICS 447 (2017).

[70] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS'N 1983).

not only confidential communications but also any other information from any source that the attorney acquires throughout the representation of the client.[71] The value of an attorney-client relationship to be protected by confidentiality is priceless. A relationship based on this understanding fosters trust between the attorney and client, prompting a more open dialogue leading to a hopefully more efficient representation. The duty of confidentiality continues even past formal representation of the client.[72] Confidentiality encompasses privileges aimed as specific relationships, such as the attorney-client privilege, but it is not without limitations.[73]

The attorney-client privilege is fundamental to the American legal system and is rooted in common law, dating back hundreds of years ago to English law.[74] This privilege serves as protection of communications between an attorney and his client to encourage honest and open communication without fear of the later use of that information against the client.[75] The attorney-client privilege protects only confidential communications between the attorney and the client (or their respective agents), including both oral and written statements.[76] Lasting indefinitely, the privilege does not stop even when the attorney is fired or the client dies.[77] This

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[71] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6, cmt. 1, 3 (AM. BAR ASS'N 1983).
[72] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 20 (AM. BAR ASS'N 1983).
[73] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1) (1983) (a lawyer may reveal information reasonably necessary to prevent reasonably certain death or substantial bodily harm); MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2) (a lawyer may disclose information to the extent necessary to prevent the client from committing a crime or fraud); MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 15 ("A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure."); MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 12 (a lawyer may reveal information to comply with other law when necessary).
[74] FED. R. EVID. 502. *See Upjohn Co. v. US*, 449 U.S. 383, 388 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."). *See also* Flanagan at 797.
[75] *Id.*
[76] The Third Restatement defines "communication" under the attorney-client privilege as "any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression." Restatement (Third) of The Law Governing Lawyers § 69 (AM. LAW INST. 1998).
[77] *See* Restatement (Third) of The Law Governing Lawyers § 77 ("Unless waived or subject to exception, the attorney-client privilege may be invoked as provided in § 86 at any time during or after termination of the relationship between client or prospective client and lawyer."). *See also Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (On appeal from a motion to quash a grand jury subpoena, the Supreme Court held that the attorney-client privilege survives the death of a client.).

protection serves to prohibit a court or other governmental tribunal from compelling the confidential communications to be disclosed if the requested information regards the professional relationship between the attorney and the client.[78] When there is formal request for information protected by this privilege, it must be invoked. Also, the privilege to claim and waive this right lies with the client as the client or former client must provide informed consent to allow the attorney to disclose any relevant information.[79]

When a governmental entity or another tribunal seeks to compel the attorney to disclose information about his or her client, the general rule is that the attorney should invoke the attorney-client privilege absent informed consent.[80] Absent a court order mandating otherwise, however, an attorney must comply with "other law or court order" pursuant to Rule 1.6(b)(6). The exact definition of the attorney-client privilege that courts apply depends on the jurisdiction. State courts, quite apparently, look to the state rules and statutes guiding ethics for lawyers.[81] Federal courts' definition is determined by common law and the Federal Rules of Evidence, other than when deciding a claim or defense in which case the respective state law should be applied.[82]

Among the most common protections for information is the work-product privilege. This may also apply to information that a prosecutor seeks to obtain by subpoena. The work product doctrine seeks to protect a lawyer's thought processes by privileging "tangible materials and intangible equivalents prepared, collected, or assembled by a lawyer" prepared in anticipation of litigation.[83] Also of concern to this privilege is the client's interests in obtaining thorough assistance from lawyers who do not have to be concerned about potential disclosure of their

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[78] Restatement (Third) of The Law Governing Lawyers §68, cmt. c (discussing rationale supporting the privilege).
[79] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2, MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 13.
[80] *Id.* at para. 15.
[81] *See* Restatement (Third) of The Law Governing Lawyers § 68, cmt. d.
[82] *Id* (citing FED. R. EVID. 501).
[83] *See Hickman v. Taylor*, 329 U.S. 495, 510 - 11 ("Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."). *See also United States v. Nobles*, 422 U.S. 225, 238 (1975) ("At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."). *See* Restatement (Third) of The Law Governing Lawyers §87, cmt. f.

work product.[84] This privilege can be waived by disclosing the information to the court or a third party.[85] Federally, the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and common law guide the interpretation of the work-product doctrine.[86] Most state courts codify this privilege in statutes or rules, while a minority still determines its definition by the common law.[87]

The second factor requires that "the evidence sought is essential to the successful completion of an ongoing investigation or prosecution."[88] While this concept is representative of the Model Rules' version, courts have held to the contrary, seemingly more favorable to the quashing of a subpoena when the information being sought is relevant to a client against whom criminal charges are pending.[89]

The third and final factor mandates that "there is no other feasible alternative to obtain the information."[90] The "no feasible alternative requirement" has been held to be less demanding than local rules to which it has been challenged.[91] The Second Circuit has held consistent with this principle, requiring that the government must show need and unavailability from other sources before issuing an attorney subpoena.[92] This judgment was later vacated as a significant hindrance to the investigation of the grand jury.[93]

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[84] *See* Restatement (Third) § 87, cmt. b ("A lawyer whose work product would be open to the other side might forgo useful preparatory procedures, for example, note-taking.").
[85] *U.S. v. Nobles*, 422 U.S. 225, 239 – 40 (1975); *In re Gibco*, 185 F.R.D. 296, 299 – 301 (D. Co. 1997); *Selby v. O'Dea*, No. 1-15-1572, 2017 WL 6210924, at *5 (App. Ct. Ill. Dec. 7, 2017).
[86] *See* Restatement (Third) §87 cmt. e. *See also* FED. R. CIV. P. 12(b)(3), *and* FED. R. EVID. 502. *See also Hickman v. Taylor*, 329 U.S. 495 (1947) (Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.").
[87] *See* Restatement (Third) §87, cmt. e.
[88] MODEL RULES OF PROF'L CONDUCT r. 3.8(e)(2).
[89] For a full discussion, *see* Beale at §6:24 (citing *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984) (affirming lower court's decision that subpoena to attorneys could be disruptive to client relationship at crucial point in preparation for trial)). *See also In re Grand Jury Subpoena (Legal Services Center)*, 615 F. Supp. 958 (D. Mass. 1985) (following *In re* Grand Jury Matters).
[90] MODEL RULES OF PROF'L CONDUCT r. 3.8(e)(3).
[91] *Stern* at 12.
[92] *See In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968, 973 – 74 (2d Cir. 1985), judgment vacated, 781 F.2d 238 (2d Cir. 1986) (*en banc*) (mandating government to show need for issuance of subpoena would significantly interfere with the investigative function of the grand jury).
[93] *Id.*

When federal prosecutors seek to issue a subpoena for materials or witnesses other than counsel about their clients, they can either go through a federal grand jury or through a trial court.[94] When AUSAs seek to issue a subpoena on another lawyer about his or her client, however, the request must be approved by the Assistant Attorney General of the Criminal Division, who is required to fulfill the requisite criteria to sign off on the request.[95] The AAG's approval is required unless one of two exceptions applies: (1) "Friendly subpoenas" for client-related information where the attorney expressly agrees in writing but requests the issuance of a subpoena and (2) information not protected by a privilege or circumstances that do not impose on the attorney-client relationship.[96] The guidelines stress the importance of attorney-client confidentiality and encourage the DOJ attorney to acquire the sought-after information in any other way before attempting to issue a subpoena to another lawyer.[97]

Under the collective governing laws, a federal prosecutor, or AUSA, when seeking to issue a subpoena to another lawyer about his or her client, is bound by state ethics rules (if not preempted by federal law) and the DOJ guidelines, which require the Assistant Attorney General or the Deputy Assistant Attorney General to approve the subpoena request based on consideration of Model Rule 3.8(e)'s three principles and two others. The DOJ's additional two requirements are (1) that the subpoena is "narrowly drawn" and directed at material information to cover a reasonable, limited period of time and (2) that the "need for the information outweighs any potential adverse effects on the attorney-client relationship."[98]

In the grand jury context, the burden of proof falls on the individual who claims it, specifically, the lawyer as a witness to testify regarding his client.[99] Absent an applicable exception, the information seeking to be protected under confidentiality must be disclosed.[100]

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[94] There is no secrecy provision when obtaining a subpoena through trial whereas grand jury proceedings are confidential. FED. R. CRIM. P. 17(c). *See* Wright at §§ 275, 276.
[95] *See* USAM, *supra* note 28, at 9 -13.410(A).
[96] *Id.* at 9 -13.410(D)(1), (2).
[97] *Id.* at 9 -13.410(B) ("[A]ll reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case.").
[98] In the 1985 version of the USAM, these factors were outlined in Section 9 -2.161(a). The 1997 version, most recently updated in October 2012, outlines the same five factors, but elaborated on two of them and added one more only related to civil litigation. *See* 9 -13.410(C).
[99] *See United States v. Wilson*, 798 F.2d 509, 512 – 13 (1st Cir. 1986). *See also In re Grand Jury Investigation No.* 83-2-35, 723 F.2d 447, 450, 454 (6th Cir. 1983) ("[… I]t is incumbent upon the

At times, violations of federal law are so sensitive or controversial that a prosecutor with added independence is necessary. In these situations, the Justice Department has the option to appoint a special counsel or special prosecutor to ensure the necessary objectivity of the investigation and prosecution, if it comes to that. Special counsel is a term for an independent lawyer conducting investigations with prosecutorial power. Whether to call the lawyer a "special prosecutor" or a "special counsel" is a distinction of terminology.[101]

The position of special prosecutor was legislated as a response to the Watergate investigation in 1978, which allowed the appointment of an "independent counsel" by a three-judge Washington, D.C. Court of Appeals panel upon the request of the attorney general.[102] Congress approved the new role of independent counsel in 1978, and the Supreme Court of the United States followed suit in *Morrison v. Olson* in 1988.[103] This case began with an independent counsel's subpoena of government agency documents and centered around question of whether certain provisions in the Ethics in Government Act of 1978 were constitutional.[104] Analyzing the constitutionality of the independent counsel's appointment by a Special Division judiciary and the removal power by the Attorney General, as a member of the Executive Branch, the Supreme Court held the Act to be constitutional under the Appointments Clause, Article III, and separation of powers principles.[105] Congress' investment of appointment power in the judiciary and removal authority in the Attorney General was within its constitutional authority. The appointment of independent counsels by the judiciary, as was proscribed in the Act, was

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attorney to move for an *in camera ex parte* hearing if one is desired.") (citing, inter alia, *Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981), *United States v. Stern*, 511 F.2d 1364, 1367 (2d Cir. 1975).).

[100] *In re Grand Jury Investigation No.* 83-2-35 at 455.

[101] *Major Garrett, et. al., Special Counsel, Special Prosecutor: What's the Difference?, CBS NEWS (May 17, 2017), https://www.cbsnews.com/news/robert-mueller-fbi-special-counsel-what-you-need-to-know/.*

[102] Phil Helsel, *'Special Counsel' Less Independent Than Under Expired Watergate-Era Law*, NBC NEWS (May 17, 2017), https://www.nbcnews.com/news/us-news/special-counsel-less-independent-under-expired-watergate-era-law-n761311.

[103] 487 U.S. 654, 696 (1988) ("In sum, we conclude today that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch.").

[104] *See id.* at 654.

[105] *See id.* at 670 – 96.

held to be a constitutional inter-branch appointment and sufficient for compliance with separation of powers. This landmark case set the stage for the legality of independent counsels for years to come.

On May 17, 2017, the Justice Department appointed Robert Mueller as Special Counsel to investigate alleged Russian interference in the 2016 presidential election.[106] The appointment of Robert Mueller as special counsel was necessary because the situation called for someone "who exercises a degree of independence from the normal chain of command," as then-Acting Attorney General Rod Rosenstein stated.[107] In the case of Special Counsel Robert Mueller, Deputy Attorney General Rod Rosenstein appointed Mueller because Attorney General Jeff Sessions had recused himself from the investigation.[108] Normally, the Attorney General (AG) appoints the Special Counsel unless the AG has a conflict of interest. In this case, Jeff Sessions had a conflict and eventually stepped down because of his closeness with the activities giving rise to the investigation as Sessions was an adviser to Donald Trump's campaign.[109]
Special Counsel Robert Mueller has a background rich in federal law enforcement. Beginning in 1976, Mueller was an Assistant U.S. Attorney (AUSA) in three different offices.[110] From 1990 to 1993, Mueller was assistant attorney general of the Criminal Division at the DOJ, overseeing hundreds of federal prosecutors and attorneys.[111] Even after he left for private practice, he returned to the Justice Department as a senior AUSA and was eventually named U.S. Attorney

[106] Norman Eisen, *The role of special counsels and the Russia probe*, THE BROOKINGS INSTITUTION (June 27, 2017), https://www.brookings.edu/blog/unpacked/2017/06/27/the-role-of-special-counsels-and-the-russia-probe/.
[107] Devlin Barrett, et al., *Deputy attorney general appoints special counsel to oversee probe of Russian interference in election*, WASH. POST (May 18, 2017), https://www.washingtonpost.com/world/national-security/deputy-attorney-general-appoints-special-counsel-to-oversee-probe-of-russian-interference-in-election/2017/05/17/302c1774-3b49-11e7-8854-21f359183e8c_story.html?utm_term=.c8e818d7c905.
[108] Matt Zapotosky and Josh Dawsey, *At Trump's behest, top White House lawyer urged Jeff Sessions not to step aside from Russia probe*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/world/national-security/at-trumps-behest-top-white-house-lawyer-urged-jeff-sessions-not-to-step-aside-from-russia-probe/2018/01/04/0636878e-f1c3-11e7-b390-a36dc3fa2842_story.html?utm_term=.03976e6fab18.
[109] *Id*.
[110] DEP'T OF JUSTICE, CRIMINAL DIVISION, ROBERT S. MUELLER III (Aug. 10, 2016), https://www.justice.gov/criminal/history/assistant-attorneys-general/robert-s-mueller.
[111] *Id.*

for the Northern District of California.[112] In 2001, he was called to be FBI Director by George W. Bush, where he served until 2013.[113]

Investigative authority given to Special Counsel Robert Mueller is broad. The order that appointed Robert Mueller as Special Counsel gave him authority to investigate "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump."[114] Mueller can also probe other matters that arise from the current investigation, as further detailed in the order. The applicable law to the special counsel is the Code of Federal Regulations Title 28, Section 600.4 through 600.10.[115]

Mueller hit the ground running as he began investigating numerous Trump campaign advisors and insiders. One of Mueller's first moves as Special Counsel was to subpoena a former lawyer of Paul Manafort.[116] Manafort was President Trump's former campaign manager, who recently pleaded not guilty to tax and fraud charges in the Eastern District of Virginia.[117] On February 16, 2018, the DOJ indicted thirteen Russians and three Russian companies for conspiring to infiltrate the 2016 presidential election in efforts to help Trump's campaign.[118] Detailed in the indictment is the conspiracy by these individuals and companies to steal Americans' identities and use those identities to create and deploy social media accounts in an effort to create divide and controversy among Americans.

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[112] Brian Rokus and Gloria Borger, *Robert Mueller and his pursuit of justice*, CNN (Mar. 5, 2018 3:48 PM), https://www.cnn.com/2018/02/23/politics/robert-mueller-profile/index.html.
[113] Biography, *Robert Mueller*, BIOGRAPHY (Mar. 19, 2018), https://www.biography.com/people/robert-mueller-241110.
[114] U.S. DEP'T OF JUST., ORDER NO. 3915-2017, "Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters," (May 7, 2017).
[115] *Id.*
[116] Evan Perez, *Special Counsel Subpoenas Manafort's former attorney and spokesman*, CNN (Aug. 29, 2017), https://www.cnn.com/2017/08/29/politics/mueller-manafort-attorney-spokesman-subpoenas/index.html.
[117] Rachel Weiner, *Paul Manafort pleads not guilty to tax and fraud charges in federal court in Virginia*, WASH. POST (Mar. 8, 2018), https://www.washingtonpost.com/local/public-safety/paul-manafort-set-to-make-first-appearance-in-virginia-court/2018/03/07/237f9ace-1cca-11e8-9de1-147dd2df3829_story.html?utm_term=.b4bb72f39d4a. *See also* Superseding Indictment at 2-34, United States v. Manafort, No. 1:18 Cr. 83 (TSE)(S-1) (E.D. Va. filed Feb. 22, 2018).
[118] Matt Appuzzo and Sharon La Franiere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, NY TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html.

Mueller has authority to investigate and potentially charge matters arising from the investigation into Russian collusion. So, as more evidence is uncovered, we are likely to see new developments and charges brought against other individuals and possibly organizations. Robert Mueller remains just as enthusiastic and steadfast as when he started – there is no sign of his slowing down. As he stated when he stepped into the position of Special Counsel, "I accept this responsibility and will discharge it to the best of my ability."[119]

VI. Conclusion

A federal prosecutor's subpoena power is a vital tool to extract information from others in the legal profession involved in investigations and criminal proceedings. The power to invade the shield of attorney-client privilege must be used with caution and only in times of necessity. When a criminal investigation requires such pervasiveness, the federal prosecutor should be able to acquire knowledge that would otherwise be confidential for the sake of obtaining justice, the prosecutor's ultimate objective.

Even though federal prosecutors are no longer judicially bound by the judiciary's approval in consideration of the three factors of Rule 3.8(e), federal prosecutors should take care to keep these principles in mind when exercising their subpoena power, whether through a grand jury or otherwise. Even when a federal prosecutor is subject to state rules, he or she is still not normally subject to this rule as only a minimal amount of states have adopted it. This means the remaining laws to which the federal prosecutor is subject must be substantial enough to prevent abuse of the subpoena power but not so overpowering as to harm the efficiency and integrity of the investigation.

Above all else, the importance of a federal prosecutor's commitment to public service and justice while also remaining unbiased is a necessary balance if we are to ensure the integrity of the adversarial system. To remain committed to the public service, each case deserves loyalty to the American people. As Attorney General Jackson stated, "the citizen's safety lies in the

[119] Julia Edwards Ainsley and Steve Holland, *Former FBI Chief Mueller appointed to probe Trump-Russia ties*, REUTERS (May 17, 2017, 11:00 AM), https://www.reuters.com/article/us-usa-trump/former-fbi-chief-mueller-appointed-to-probe-trump-russia-ties-idUSKCN18D1XT.

prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."[120]

[120] Attorney General Jackson, Address at The Second Annual Conference of United States Attorneys (April 1, 1940).