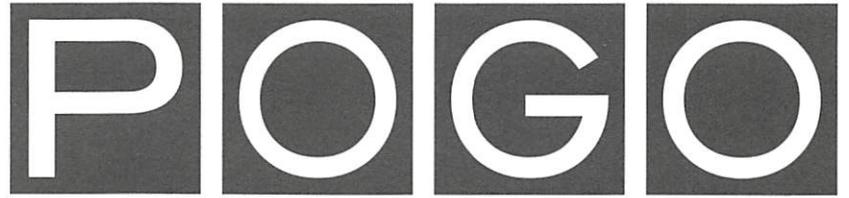


REPORT



PROJECT ON GOVERNMENT OVERSIGHT

**Hundreds of Justice
Department Attorneys
Violated Professional
Rules, Laws, or Ethical
Standards**

*Administration Won't Name
Offending Prosecutors*

March 12, 2014

POGO.org



PROJECT ON
GOVERNMENT OVERSIGHT

Exposing Corruption. Exploring Solutions.

Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards

*Administration Won't Name Offending
Prosecutors*

March 12, 2014

Acknowledgements

Questions regarding this report should be directed to Joe Newman, Director of Communications at jnewman@pogo.org or (202) 347-1122.

Primary Author

Nick Schwellenbach, Former POGO Director of Investigations

Contributors

Neil Gordon, Investigator

Jake Wiens, Former POGO Investigator

Editorial Team

David Hilzenrath, Editor-in-Chief

Danni Downing, Editor

Angela Canterbury, Director of Public Policy

Scott Amey, General Counsel

Danielle Brian, Executive Director

Fact-Checking Team

Mia Steinle, Investigator

Lydia Dennett, Investigator

Web and Communications Team

Pam Rutter, Web Manager

Joe Newman, Director of Communications

Andre Francisco, Online Producer

Overview

An internal affairs office at the Justice Department has found that, over the last decade, hundreds of federal prosecutors and other Justice employees violated rules, laws, or ethical standards governing their work.

The violations include instances in which attorneys who have a duty to uphold justice have, according to the internal affairs office, misled courts, withheld evidence that could have helped defendants, abused prosecutorial and investigative power, and violated constitutional rights.

From fiscal year 2002 through fiscal year 2013, the Justice Department's Office of Professional Responsibility (OPR) documented more than 650 infractions, according to a Project On Government Oversight review of data obtained through the Freedom of Information Act and from OPR reports.

In the majority of the matters—more than 400—OPR categorized the violations as being at the more severe end of the scale: recklessness or intentional misconduct, as distinct from error or poor judgment.

The information the Justice Department has disclosed is only part of the story. No less significant is what as a matter of policy it keeps from the public.

As a general practice, the Justice Department does not make public the names of attorneys who acted improperly or the defendants whose cases were affected. The result: the Department, its lawyers, and the internal watchdog office itself are insulated from meaningful public scrutiny and accountability.

During the Clinton Administration, the Justice Department responded to such criticism by declaring that it would make more of OPR's findings public, including the names of offenders, and it issued a policy statement extolling the importance of disclosure.¹ But the Department's promise of greater openness had major caveats, and its subsequent track record of disclosing the results of investigations does not appear to have lived up to its rhetoric. The policy statement was scrapped during the George W. Bush Administration and has not been revived.

POGO's review of the record since fiscal year 2002 raises questions that are difficult to answer without greater transparency: Are the Justice Department and its internal affairs office taking misconduct seriously enough? Or are they pulling punches? And has Justice Department management watered down the results of the watchdog's probes?

Infraction Severity (from most to least serious)

1. Intentionally violated a clear and unambiguous obligation or standard imposed by law, applicable rule of professional conduct, or DOJ regulation or policy
2. Recklessly disregarded an obligation to comply with that obligation or standard
3. Exercised poor judgment
4. Made a mistake [does not lead to disciplinary action]

The Justice Department does not officially consider the last two to constitute misconduct.

Source: U.S. Department of Justice, Office of Professional Responsibility, "Analytical Framework," July 6, 2005, pp. 2-4.
<http://www.justice.gov/opr/framework.pdf>

Types of Misconduct

An examination of OPR case data for the past 12 fiscal years shows that, among the more severe violations—those that involve recklessness or intentional wrongdoing and are defined by the Department as professional misconduct—OPR substantiated:

- 48 allegations that federal attorneys misled courts, including 20 instances in which OPR determined that the violations were intentional
- 29 allegations that federal prosecutors failed to provide exculpatory information to defendants, including 1 instance OPR concluded was intentional
- 13 allegations that Justice Department personnel violated constitutional or civil rights
- 4 allegations of abuse of investigative or prosecutorial authority or general prosecutorial misconduct, including 3 instances in which OPR determined that the violations were intentional
- 3 allegations that prosecutors abused the grand jury or indictment process
- 1 allegation of “overzealous prosecution”

POGO requested information on OPR investigations through the Freedom of Information Act (FOIA) to augment the limited information available in OPR’s annual reports and data for the years 2004 through 2007 previously obtained through FOIA by governmentattic.org.² OPR annual reports contain statistics on allegations it received and investigations it conducted. They also include summaries of closed investigations. The past two annual reports provide a statistical breakdown of its investigative findings by infraction category.

During the 12-year period that POGO examined, OPR investigated about 2,100 allegations and substantiated about 650.

Examples of Misconduct

Among numerous investigations in which misconduct was found in fiscal year 2012, the most recent year for which OPR has issued an annual report,³ OPR described these examples:

- A DOJ attorney failed to provide information to the defense that could have been used to counter a key witness for the prosecution. The DOJ attorney failed to disclose that, before the trial, another witness had implicated the key witness in the crime and had contradicted the key witness’s testimony. (The Department gave the DOJ attorney a 10-day suspension.)⁴
- A DOJ prosecutor developed a “close personal relationship” with the defendant in a case he was prosecuting, “had numerous personal contacts” with the defendant without the consent of the defendant’s lawyer, and, without telling his supervisors at the Justice Department, negotiated a plea agreement permitting release of the defendant from custody. (When the annual report was written, the Department had not determined what punishment, if any, to impose.)⁵

- A DOJ attorney was assigned a criminal case with 15 months remaining under the statute of limitations, the amount of time the government is given by law to file charges. He allowed the “clear and unambiguous” time limit to expire without filing charges or alerting the Department about the impending deadline so it could decide what to do. (The Department gave the DOJ attorney “a letter of admonishment.”)⁶
- An immigration judge—immigration courts fall within the Justice Department—made disparaging remarks about foreign nationals, showed bias, and violated procedural standards in cases where defendants were “contesting removal proceedings”—in other words, fighting to stay in the United States. (The Department gave the immigration judge a 30-day suspension.)⁷
- A DOJ attorney failed “to timely disclose to the defense a tape recording of the crime despite repeated defense requests for the information,” and falsely told the court that the government had no evidence that a key witness had been diagnosed with a mental illness. (The Department gave the attorney a 14-day suspension.)⁸

Perspective

The Project On Government Oversight posed extensive questions to and invited comment from both OPR and the Justice Department’s public affairs office. They did not respond.

High-level DOJ officials have said in the past that given the context—tens of thousands of its attorneys working on tens of thousands of cases each year—the amount of misconduct is small.⁹

But the potential stakes are high, from whether people facing federal charges get a fair day in court to whether the U.S. government is properly represented in disputes with corporations where taxpayer money is on the line. It’s not only that innocent people could be wrongly convicted and sent to prison; it’s also that, where the legal process has been tainted, convictions of guilty parties can be thrown out.

The watchdog office used its most recent annual report to praise the Department.

“During Fiscal Year 2012, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation’s principal law enforcement agency,” OPR said.¹⁰ “When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct,” OPR added.¹¹

OPR makes it hard for anyone to second-guess such assertions.

For example, in some cases, including some of those highlighted in the bullet points above, OPR has reported that it shared its findings with state bar authorities—the legal profession’s self-regulatory societies—for potential disciplinary action. However, without the names of the government lawyers involved, there is no easy way of checking what discipline if any the bar authorities imposed.

OPR also hinted in some cases that there could be further consequences within the Justice Department, saying it had referred its findings “to the DOJ attorney’s component for consideration in a management context.” What, if anything, happened “in a management context” was not reported.

At least one DOJ official has expressed doubt about the degree of accountability when OPR does find there has been misconduct. Scott N. Schools, then an Associate Deputy Attorney General who had supervisory responsibility over OPR,¹² was described in a federal ruling last year as having testified that the Department had been too soft on offenders. Merit Systems Protection Board Administrative Judge Benjamin Gutman wrote that Schools had indicated “he had long believed that the agency was being too lenient in disciplining attorneys for professional misconduct.”¹³

Despite that testimony, in an email to POGO, Schools said, “I think that the Department presently is doing an effective job of holding prosecutors accountable for alleged misconduct.”¹⁴

Contrary to the views of some critics, Schools argued that OPR might be more prone to finding violations of ethical standards than state bar authorities. “When OPR investigates a Department attorney, it applies a lower standard of proof (preponderance of the evidence) than most state bar associations (clear and convincing evidence),” he wrote. “So in that sense, the Department has decided to hold its attorneys to a higher standard than the professional licensing bodies,” he added.¹⁵

About OPR: The Basics

The Office of Professional Responsibility was created as part of an effort to rehabilitate the Justice Department in the aftermath of the Watergate scandal that toppled President Nixon. It was a response to the ethical lapses and misconduct by Justice Department officials that had come to light.

OPR’s task is to investigate allegations that DOJ’s lawyers are not practicing law in a manner consistent with the laws, rules, and guidelines that govern their professional conduct. The lawyers overseen by OPR include prosecutors who handle criminal cases; attorneys who advise the White House and regulatory agencies on how to interpret laws; immigration judges who sit on special courts administered by the Justice Department; FBI, Drug Enforcement Administration, and Immigration and Customs Enforcement agents when allegations against them are coupled with allegations against Justice Department attorneys; and lawyers who defend the government against lawsuits or pursue lawsuits on the government’s behalf.

Investigations are opened in response to judicial opinions and referrals; tips from lawyers, other private citizens, Justice Department insiders, and other federal agencies; and news reports.

OPR, which was staffed by 16 line attorneys at the end of fiscal year 2012, spends most of its time assessing and investigating allegations of wrongdoing. It also conducts DOJ ethics training, is involved in the development of ethics policies, and analyzes trends to identify potentially systemic ethics problems.

Even when it concludes misconduct has occurred, OPR does not have the final word. Its investigative findings are reviewed by the Office of the Deputy Attorney General and other relevant management officials. In cases involving prosecutors when OPR concludes the actions were intentional or due to reckless disregard of standards, the Professional Misconduct Review Unit (PMRU), which was created in 2011, reviews OPR's findings. DOJ management and the PMRU can soften or reject OPR's conclusions.

One of the examples above shows how OPR can take a milder view of the facts than independent authorities do, and how Justice Department management can soften even those conclusions.¹⁶

In this example, OPR got involved after a court found fault with a federal prosecution. The OPR summary says a DOJ attorney informed OPR of a court decision "in which the court criticized the DOJ attorney for failing to disclose information that a key government witness expected to receive a substantial reward following his testimony at trial."¹⁷ Furthermore, "The court also found that the DOJ attorney failed to disclose information that a witness claimed that the defendant was known to possess a gun of a different caliber than the weapon used in the crime." The defendant was granted a new trial as a result of the judge's findings.

OPR investigated. It disagreed with the court, concluding that "the DOJ attorney did not commit professional misconduct with respect to the two findings that formed the basis for the court's decision to grant the defendant a new trial." OPR did conclude, however, that there was one count of intentional misconduct. Its investigation found that "the DOJ attorney committed intentional professional misconduct in violation of his duty of candor to the court because the DOJ attorney knew, but did not disclose, that the witness had revealed that he previously had been diagnosed with a mental health illness, and that the government possessed evidence indicating that the witness suffered from an ongoing mental health disorder."¹⁸

The Professional Misconduct Review Unit took a look at OPR's finding of intentional misconduct. It downgraded the finding to reckless disregard of the attorney's duty of candor to the court, and that became the DOJ's official finding.

On another matter in the same case, OPR found that the DOJ attorney had exercised poor judgment—which the DOJ does not classify as misconduct.

The public remains in the dark about who the DOJ attorney is and what case the attorney was working on.

In addition to conclusions of what type of misconduct an attorney may have engaged in, OPR can also recommend a range of potential disciplinary actions. But DOJ management—whose public image might be tarnished by such findings—decides what punishment, if any, is actually assigned. Punishment can range from oral reprimands to termination of employment. If an attorney is believed to have committed criminal acts, rather than just violations of professional standards, the matter is referred to DOJ's Public Integrity Section or to a U.S. Attorney's office. When DOJ management agrees it is warranted, OPR informs state bar disciplinary authorities of violations.

In the case above, DOJ imposed a 14-day suspension on the attorney as punishment. The relevant state bar was notified of DOJ's official finding.

Apart from the summaries the OPR publishes, what we know of the kinds of unprofessional conduct that occurs is reflected in the relatively rare high-profile cases that make headlines.

For instance, federal prosecutors kept evidence from attorneys for the late Ted Stevens—then a long-serving Republican Senator from Alaska—that could have assisted his defense as he faced criminal charges that he failed to disclose gifts from an oil and gas services provider. The indictment of Stevens and the subsequent guilty verdict in October 2008—which could have sent him to prison—were set aside by Attorney General Eric Holder in April 2009 after an FBI special agent blew the whistle and allegations of prosecutorial abuse were found to be valid.¹⁹ By the time his conviction was set aside, Stevens, who was Alaska's Senator for four decades, had narrowly lost a bid for reelection.²⁰

In another case, Justice Department attorneys were accused of giving the CIA flawed legal advice green-lighting the use of “enhanced interrogation techniques” on suspected terrorists. These techniques included stripping prisoners nude, putting them in so-called stress positions, depriving them of sleep, and “waterboarding” them to simulate drowning. Critics regard the techniques as torture under international treaties. But Justice Department lawyers wrote memos²¹ defining torture narrowly to give government agencies the green light to engage in aggressive actions in order to compel prisoners to produce information.

Because of the extraordinary interest in these cases, Congress made publicly available OPR's report and other documents, which detailed DOJ management's response to OPR as well as the responses from DOJ officials accused of wrongdoing. (More on that below.)

A Long History of Secrecy

The OPR has a long history of secrecy. As author and journalist David Burnham recounted in a book about the Justice Department, the watchdog unit's first annual report in the 1970s “offered...readers an extremely limited summary description of the sanctions that had been imposed as a result of OPR's investigations....Not only did the report fail to name names, it also failed to describe, even in general terms, the nature of the three situations that had been confirmed [as warranting discipline] and what kind of sanctions were imposed on the malefactors.”²²

In January 1993, *The Washington Post* described secrecy and dysfunction at OPR. “[T]he system they have in place could not be better for sweeping things under the rug,” the leader of a government audit told *The Post*.²³

In December 1993, a federal judge complained that he had been waiting more than three years for the Justice Department to act on a case of prosecutorial misconduct. Reacting to that development, then-Attorney General Janet Reno pledged to reform OPR and make more information about its findings public.²⁴

“I have concluded that more frequent disclosure of the results of OPR’s findings concerning professional misconduct by attorneys will promote public accountability and further the fair administration of justice and the law enforcement process,”²⁵ then-Deputy Attorney General Philip B. Heymann said in a memo explaining the shift.

“[S]erving as an attorney with the Department of Justice carries with it a responsibility to observe high ethical standards,” Heymann wrote. “The public’s interest in knowing whether all of our attorneys are consistently satisfying those standards should be weighed in the balance when making the determination about whether disclosure is appropriate,” he added.

Subsequently, OPR released detailed accounts of investigations naming the offenders in some cases where misconduct was found. Those accounts, which OPR described as summarized reports, were more elaborate than the brief summaries in the annual reports. Even when no misconduct was found, some summarized reports were made available to clear attorneys’ names.²⁶

However, as it turned out, OPR released few of the more elaborate accounts. For several years, OPR’s annual reports said how many summarized reports the office released, and for fiscal years 1994 through 1997, the total came to 16. (Over the same period, OPR reported that it completed more than 900 investigations of alleged misconduct.)

The annual reports for 1998 through 2001 did not say how many of the more detailed accounts were made public. Then, references to the Clinton-era disclosure policy stopped appearing in the annual reports.

During the George W. Bush administration, the Department abandoned the policy Heymann had articulated in 1993.²⁷

In a 2008 story about a “growing shroud of secrecy” at OPR, the *Los Angeles Times* reported that the Justice Department had reversed the Clinton-era policy. It didn’t say when that happened, but it reported that Associate Deputy Attorney General David Margolis said it was his decision to excuse the OPR from preparing summaries of cases that might be released to the public. According to the newspaper, Margolis said the decision reflected a lack of resources and concern about balancing public interests with the privacy rights of individual attorneys facing accusations.

“My goal is to get fair and speedy dispositions of allegations against our attorneys,” Margolis reportedly said, “and, to the extent possible, let the public know what we did and why we did it without unnecessarily or gratuitously...publicly humiliating our line attorneys as individuals.”²⁸

In its two most recent annual reports, those for fiscal years 2011 and 2012, OPR has expanded its disclosure by including statistics on the types of misconduct found in cases OPR closed in those years—the kind of information POGO obtained through FOIA for those years and many others. But despite pledging to provide unprecedented government transparency,²⁹ the Obama administration has not changed course on the issue of identifying the lawyers involved.

This continued secrecy has not gone unnoticed.

The American Bar Association has recommended that the Obama administration make more information available about DOJ attorney misconduct. The ABA passed a resolution in 2010 calling upon the Obama administration to return to the 1993 policy or something similar.³⁰ “The non-public nature of DOJ’s disciplinary determinations deprives the public of information about prosecutors and civil government lawyers who are alleged to have engaged in acts that warrant discipline and about how DOJ responds in such cases,” stated the resolution.

The ABA said it was calling on the DOJ to “‘release as much information regarding completed individual investigations as possible, consistent with privacy interests and law enforcement confidentiality concerns,’ whether by reinstating the practices of DOJ pursuant to its 1993 policy or otherwise.”³¹

As matters now stand, DOJ’s handling of misconduct cases feeds perceptions that the Department does not aggressively police misconduct in its own ranks.

“DOJ’s secrecy undermines public confidence in prosecutorial accountability,” Bruce A. Green, a Fordham University law professor and a contact person listed on the ABA resolution, wrote in *The Yale Law Journal* in March 2009. “When kept secret, OPR’s work fails to effectively deter future prosecutorial misconduct or educate federal prosecutors about where the disciplinary lines are drawn.”

“OPR’s work is even more secretive than ordinary attorney disciplinary processes, which have themselves been criticized as too opaque,” argued Green, “yet there is a far greater public interest in transparency when it comes to wrongdoing by prosecutors than by private attorneys.”³²

In 2007 testimony before Congress, then-Justice Department Inspector General Glenn Fine similarly criticized OPR for its lack of transparency. “While the OIG [Office of Inspector General] operates transparently, OPR does not,” Fine said. “The OIG publicly releases its reports on matters of public interest, with the facts and analysis underlying our conclusions available for review. In contrast, OPR operates in secret. Its reports, even when they examine matters of significant public interest, are not publicly released.”³³

In 2008, a federal judge in Massachusetts expressed more fundamental frustration with OPR.

The Justice Department’s handling of a Massachusetts case “raises serious questions about whether judges should continue to rely upon the department to investigate and sanction misconduct by federal prosecutors,” U.S. District Court Judge Mark Wolf wrote in a letter to the attorney general at the time, Michael Mukasey.³⁴

“As one who took pride in assisting Attorney General Edward Levi in establishing [the Office of Professional Responsibility] more than thirty years ago,” Wolf wrote, “I sadly doubt it is now capable of serving its intended purpose.”³⁵

OPR’s practice of shielding names and case details from public disclosure isn’t the only path taken in the federal government. For instance, the Department of Health and Human Services’ Office of Research Integrity makes public case summaries, including names of researchers, when it finds

research misconduct.³⁶ The Securities and Exchange Commission issues public enforcement actions against accountants for improper professional conduct in audits of publicly traded companies.³⁷ And the Department of Defense Inspector General's Office regularly makes reports of investigations available in response to Freedom of Information requests even when they clear officials of wrongdoing.³⁸

Justice Department Misconduct: Just the Tip of the Iceberg?

The Justice Department argues that misconduct within its ranks is rare.

In 2010, while acknowledging that even “a single instance of prosecutorial misconduct is unacceptable,” then-Acting Deputy Attorney General Gary G. Grindler wrote in a USA Today op-ed that “Overwhelmingly, the cases we bring are handled according to the highest ethical standards. Indeed, an internal review ordered by Attorney General Eric Holder last year found misconduct in just a tiny fraction of the 90,000 or so cases brought annually.”³⁹ POGO has filed a Freedom of Information Act request for this internal review.

“Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants,” the Justice Department said in a March 2012 statement to the Senate Judiciary Committee. “In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility.”⁴⁰

“Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct.” (The term “discovery” refers to the gathering and exchange of evidence before trial; a key requirement is that “exculpatory” information be shared with the defense.⁴¹)

However, misconduct identified by OPR may represent only a fraction of actual misconduct by Justice Department attorneys for a variety of reasons. For instance, it may be harder to detect misconduct occurring during the grand jury investigations that often precede indictments because those are non-public processes and defense lawyers are not present to witness violations or raise concerns. Another reason cases of misconduct may go undetected is that it can be difficult to determine from the outside whether prosecutors or attorneys representing the U.S. government in civil suits are withholding information. Sometimes it takes a whistleblower—as in the Senator Stevens case—to bring the misconduct to light, and it is possible that many who know about misconduct do not come forward to blow the whistle.

Reduced Prison Sentences

The handful of cases publicly known tends to raise questions about OPR and about the systems in place for disciplining misbehaving federal attorneys.

In one case, OPR found intentional misconduct on the part of former Assistant U.S. Attorney G. Paul Howes,⁴² but it took years for OPR to send its findings to state bar authorities who could take disciplinary action against him.

According to OPR, Howes had made improper payments to many witnesses and informants during the 1990s when he was investigating and prosecuting members of a deadly drug gang in Washington, DC. Howes allegedly abused a witness voucher system, which was meant to compensate witnesses for court appearances and the like. Some of his payments went to relatives and girlfriends of witnesses, OPR found.⁴³ The report concluded that Howes “viewed the voucher system as a resource to be used as he saw fit in order to accomplish the goal of convicting some very violent, homicidal drug dealers.”

According to OPR, colleagues described Howes as a talented, effective prosecutor willing to bend the rules to get results.⁴⁴

Eric Holder, who was then heading the U.S. Attorney’s Office in DC, was tipped off by one of Howes’s informants and sent the allegations to OPR in 1996.

OPR finished its report in February 1998, but said it did not seek criminal charges against Howes because of doubts it had about convincing a jury of his guilt.

Howes “undoubtedly would portray himself to a jury, as he has to us, as a beleaguered lone wolf battling a stifling and uncomprehending bureaucracy,” according to the OPR report.

Howes resigned from the Justice Department and moved to San Diego.⁴⁵

A disciplinary authority for members of the DC bar, the Office of Bar Counsel, learned about the allegations against Howes from newspaper articles and requested the 1998 OPR report in March 2002.⁴⁶ OPR didn’t send the report until October 2002, five months after the request, and four years after the report was completed. The report stayed confidential until a federal judge in a case involving Howes forced the report into the public domain in 2003. It took the Bar Counsel four more years to do its own investigation of Howes, which went farther than the OPR report in probing Howes’ actions by looking at more of his cases.⁴⁷ Eventually, in early 2007, the Bar Counsel sought a two-year suspension of Howes,⁴⁸ and an appeals court went further and disbarred him in 2012.⁴⁹

In a 2010 report, the D.C. Board on Professional Responsibility, which hears charges brought by the Bar Counsel, said Howes took exception to some findings but stipulated that he committed several violations, including intentionally failing to disclose exculpatory information to defendants.⁵⁰ In his defense, Howes reportedly said, for example, that he gave vouchers to witnesses who were incarcerated to keep them from turning to crime again and getting killed when they were released from prison.⁵¹

The OPR report on Howes is on OPR’s website, but only because a federal judge did not buy DOJ’s arguments against unsealing it during a lawsuit.⁵² After it was made public, DOJ instituted reforms in 2004 regarding its witness-voucher payments—years after OPR had found abuses under Howes.⁵³

The fact that Howes engaged in misconduct led to substantially reduced prison sentences for several individuals convicted of crimes.⁵⁴

Howes did not respond to POGO's request for comment.

How OPR Can Get Sidelined

Then there's the case of so-called enhanced interrogation techniques.

In 2009, OPR finished a report on the Justice Department's advancement of controversial legal arguments that provided justification for the U.S. government to use brutal interrogation tactics, such as waterboarding, that many view as torture. The report examined the work of two high-level attorneys who worked within DOJ's Office of Legal Counsel: Jay Bybee, who led the office from 2001 through 2003, and John Yoo, the deputy assistant attorney general in that office.⁵⁵

But OPR did not make this report of almost 300 pages available to the public; Congress did.

The report found that "John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice," and that Jay Bybee "committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."⁵⁶

About five months later, after considering rebuttals from Yoo and Bybee, Associate Deputy Attorney General David Margolis in 2010 issued the Justice Department's final ruling on the investigation. Margolis rejected OPR's misconduct findings, writing that a "finding of misconduct depends on application of a known, unambiguous obligation or standard to the attorney's conduct." He argued that he was "unpersuaded that OPR has identified such a standard" and did not authorize OPR to send its findings to the state bar disciplinary authorities.⁵⁷

"While I have declined to adopt OPR's findings of misconduct, I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power," Margolis added.⁵⁸

Neither Yoo nor Bybee responded to a POGO request for comment.

In a 2009 response to OPR, lawyers for Bybee wrote that he "honestly believed the advice he gave" and "did not violate his duties of competence, independence, or candor, as those disciplinary rules have always been understood."⁵⁹

Yoo wrote an op-ed for *The Philadelphia Inquirer* calling Margolis's decision "a victory for the people fighting the war on terror."⁶⁰

Yoo wrote that “OPR’s political bias was legion,” that it “was incompetent,” that its report was “deeply riddled with errors,” that “OPR failed, as Margolis made clear, to even identify and understand the ethical rules that it is charged with enforcing,” and that its investigation took so long it missed the deadline to file any complaints of attorney malpractice.

“OPR selectively tried to persecute only a few officials in the Office of Legal Counsel. OPR failed to interview, and reach conclusions on, the work of then-Attorney General John Ashcroft and other high-ranking officials, even though they received several briefings on our memos and approved them,” Yoo wrote. “OPR also excluded subsequent officials in the Justice Department who continued to approve of enhanced interrogation methods on grounds almost identical to the ones in our memos.”

“OPR lawyers—and the Obama administration—disagreed with the policy choices made by President Bush on the detention and interrogation of terrorists. But instead of arguing against those policies honestly and openly, they decided to fight them under the pretext of a cooked-up ethics investigation,” Yoo argued.⁶¹

Coming from a perspective substantially different from that of Yoo, legal scholars such as David Cole at the Georgetown University Law Center have questioned Margolis’s reasoning, but they were only able to do so because Congress made public the underlying DOJ documents.⁶²

“Where the OPR viewed the errors cumulatively as evidence of an extraordinary and ultimately bad-faith effort to contort the law to a predetermined result, Margolis considered the errors one by one, and concluded that no single error ‘of itself’ warranted a finding of professional misconduct. Margolis, in short, missed the forest for the trees,” Cole wrote.⁶³

More fundamentally, Cole argued, “Remarkably, neither the OPR nor Margolis directly considered the illegality of the conduct that was authorized by the memos.... Why, then, did the OPR and Margolis fail to consider the legality of the brutality itself? Almost certainly because doing so would have implicated not only John Yoo and Jay Bybee, but *all* of the lawyers who approved these methods over the five-year course of their implementation....”⁶⁴

Yoo is currently a professor of law at the University of California, Berkeley, and Bybee is a judge on the U.S. Court of Appeals for the Ninth Circuit.

The Ted Stevens Case

The high-profile case of the late Senator Stevens shows why many are skeptical of DOJ’s ability to robustly investigate and police allegations of misconduct by its own attorneys, particularly supervisors. In a stunning reversal, after prosecuting Senator Ted Stevens, the Justice Department found itself on the defensive. There is no disputing that the prosecution was a debacle, yet the Department has had trouble holding anyone accountable.

Stevens, a Senator from Alaska at the time, was charged in 2008 with failing to report gifts worth hundreds of thousands of dollars, such as renovations to his home, from an oil services company and its chief executive.⁶⁵

On October 27, 2008,⁶⁶ three months after his indictment,⁶⁷ a jury found Stevens guilty. After his conviction, calls came for his resignation from across the political spectrum and from many quarters in the Senate. Those calls became moot because on November 2, 2008, Stevens lost his bid for re-election by a relatively narrow margin.⁶⁸

Asserting that he was innocent, Stevens accused the Justice Department of severe prosecutorial misconduct and vowed to appeal his conviction or have it dismissed.⁶⁹

In February 2009, an FBI special agent blew the whistle. He said the prosecution team had withheld important evidence from Stevens' defense attorneys that could have helped the Senator win a verdict of "not guilty."⁷⁰

Over the next few months, the federal judge in the case held the prosecutors in contempt, the Attorney General voided the convictions and dismissed the indictment, the OPR launched a probe of the prosecutors' conduct, and the judge, citing his concerns with OPR, appointed an independent investigator.⁷¹

Judge Emmet Sullivan said the appointment of an independent investigator was warranted because "the events and allegations in this case are too serious and too numerous to be left to an internal investigation that has no outside accountability."⁷²

In May 2012, the Senate Judiciary Committee, not OPR, publicly released OPR's August 2011 report on misconduct in the Stevens case.⁷³

OPR's report stated that prosecutors Joseph W. Bottini and James A. Goeke "acted in reckless disregard of" their disclosure obligations.⁷⁴ OPR exonerated two other officials, concluding that Public Integrity Section Chief William M. Welch II and Edward Sullivan "did not commit professional misconduct or exercise poor judgment with respect to any of the disclosure violations identified in the report."⁷⁵ Welch's deputy, Brenda K. Morris, the leader of the prosecution team, was found to have exercised poor judgment, which the Justice Department does not classify as misconduct.⁷⁶

In contrast, the independent investigator found more serious violations. The investigative team led by Henry F. Schuelke III found that some of the same acts by Bottini and Goeke rose to the level of intentional misconduct.

Two investigations, two sets of conclusions. The outside investigation had judged the prosecutors more critically than the inside investigation had. But that wasn't all.

Within the Justice Department, OPR answered to higher authorities, and those higher authorities further muddied the waters. The Professional Misconduct Review Unit tasked a member of its staff to review OPR's report. In an 82-page memo, the staff member, Terrence Berg, assigned less responsibility to Bottini and Goeke. He concluded that they had demonstrated poor judgment but

not recklessness. He essentially found that it was unfair for OPR to pin blame on the two prosecutors because supervisors had contributed to the problem. He argued that responsibility rested with the prosecution team rather than with individual members. “[C]onduct by the supervisors was of equal or comparatively greater consequence in causing the disclosure violations and created a unique and extremely difficult set of circumstances under which the line attorneys were required to function,” the staff member wrote.⁷⁷

“I come away with the conviction that the failures that led to the collapse of the *Stevens* prosecution were caused by team lapses rather than individual misdeeds,” Berg wrote.⁷⁸

However, the PMRU chief, Kevin Ohlson, overruled his own staff member with respect to Bottini and Goeke. Ultimately, Bottini was given 40 days of suspension without pay and Goeke was given 15 days of suspension without pay.⁷⁹

Lawyers for the late Senator Stevens decried the punishments as woefully inadequate. “The punishment imposed is laughable. It is pathetic,” three Williams & Connolly LLP lawyers said in a written statement. “The Department of Justice demonstrated conclusively that it is not capable of disciplining its prosecutors.”⁸⁰

But that wasn’t the end of the story, either.

Bottini and Goeke appealed their suspensions to a federal panel that handles personnel disputes involving government employees. In April 2013, the panel reversed the suspensions on the grounds that the Justice Department did not follow its own policy when it essentially rejected the conclusions of the PMRU staff member. The panel judge held that the Department “committed harmful procedural error” by letting the PMRU chief, rather than a subordinate PMRU attorney, propose discipline.⁸¹

While they declined to comment to POGO, in official responses to the government, lawyers for Bottini and Goeke cited the Berg memo in defending the prosecutors. “Goeke cannot be held individually responsible for management decisions he had no authority to make or countermand,” lawyers for Goeke wrote. “The Department of Justice cannot ignore the findings in the Berg Report simply because they are inconvenient or contrary to the stated desire of other powerful and vocal people for retribution and punishment.”⁸²

“Bottini made serious mistakes, but he did so while working in good faith to meet his disclosure obligations; they were mistakes made by a man trying to do the right thing,” lawyers for Bottini wrote. “This good-faith effort, by definition, cannot be prosecutorial misconduct.”⁸³

The Justice Department has appealed the decision of the personnel panel, saying that it properly modified its own policies in allowing PMRU Chief Ohlson to overrule Berg’s opinion.⁸⁴

In 2012 Senator Charles Grassley (R-IA) asked James Cole, who was then deputy attorney general, why DOJ had found less culpability on the part of the two prosecutors than the court-appointed investigator had. Cole wrote that, “in contrast” to Schuelke’s review, OPR analyzed the facts it generated during its investigation against the applicable ethics rules and then “followed its longstanding analytical framework.” The official noted some of the reasons OPR did not believe the

attorneys' actions were intentional: Bottini and Goeke had pressed for disclosure of some exculpatory evidence and there was "an absence of documents or e-mails to support the notion that the withholding of exculpatory material was intentional."⁸⁵

As of April 5, 2013, the date of an administrative ruling discussing the matter, only Goeke had served any of his suspension—one day.⁸⁶

William Welch departed DOJ in April 2012 and is now an associate chief counsel at CIGNA, a health insurance company.⁸⁷

The independent investigator for the trial judge commented favorably on Welch in a letter to Senator Patrick Leahy, chair of the Senate Judiciary Committee. "Whenever controversial disclosure issues were brought to his attention, Mr. Welch directed that disclosures be made," Schuelke wrote. However, Schuelke said Morris "did indeed abdicate her supervisory responsibilities."⁸⁸

Brenda Morris left the Justice Department and is now a deputy general counsel at the consulting firm Booz Allen Hamilton.⁸⁹ She declined to comment to POGO.

Amid the fallout, one of the prosecutors under investigation committed suicide. That attorney was also reportedly upset because he believed that higher-level supervisory attorneys were given a pass.

Ultimately, the Justice Department's Public Integrity Section was left in disarray with many critics arguing that it is more gun-shy now and less likely to pursue public corruption cases.⁹⁰

There is no way to know whether Stevens would have been found guilty if the Justice Department had met its legal obligations to share potentially useful evidence with the defense. As in other cases, prosecutorial misconduct tarnished a case that might have had merit.

Conclusion

Secrecy at the Office of Professional Responsibility has fueled suspicions that the Justice Department does not police attorney misconduct aggressively. The Clinton-era disclosure policy was an attempt to push OPR more in the direction of transparency while still balancing privacy and other concerns. Although it was an important step to proactively disclose OPR findings, there were too many limitations to that disclosure standard. Most problematic was that for those cases involving "an allegation of serious professional misconduct," there needed to be a "demonstrated public interest in the disposition."⁹¹ However, how can the public demonstrate an interest in a case if they know nothing about it? Does the mere fact that DOJ has been able to keep a case quiet justify not making the disciplinary determinations public once the case has concluded?

Stephen Saltzburg, George Washington University Law Professor and co-author of the August 2010 ABA resolution regarding professional misconduct by DOJ attorneys, told POGO he suspects "most of the Senator Stevens-level cases hit the news because a judge files a motion" reprimanding prosecutors. The hundreds of allegations confirmed by OPR as misconduct raises the question of

whether the public really knows about all the significant instances of professional misconduct within DOJ.⁹²

He added that he and others in the legal community want confidence that allegations are treated fairly and consistently. More transparency might help.

Something else that might help is transferring the responsibility for investigating allegations of DOJ attorney misconduct to the DOJ Office of Inspector General.

OPR existed prior to the creation of the DOJ Office of Inspector General in 1988 by the Inspector General Act Amendments. At the time, the amendments specifically carved out DOJ attorneys from the IG's jurisdiction, and kept OPR to investigate allegations against DOJ attorneys.⁹³ As the DOJ IG testified before the House Oversight and Government Committee, "While we have jurisdiction to review alleged misconduct by non-lawyers in the Department, under Section 8E of the Inspector General Act, we do not have the same jurisdiction over alleged misconduct committed by Department attorneys when they act in their capacity as lawyers—namely, when they are litigating, investigating, or providing legal advice."⁹⁴ Given OPR's current exclusive jurisdiction over DOJ attorneys' professional misconduct, the DOJ IG has been prevented from conducting oversight in this area of great sensitivity.

Even the head of OPR for 22 years—the late Michael Shaheen—who originally opposed the creation of the DOJ OIG, told NPR in 2007 that the DOJ OIG is "a quick and efficient office that's empowered to investigate both administrative and criminal matters," and given the "arguable ineffectiveness or limited effectiveness of the current Office of Professional Responsibility" the OIG should take over.⁹⁵

Until the IG does take over, to alleviate concerns that DOJ management isn't aggressively disciplining its own attorneys for misconduct, OPR should have the authority to make referrals to state bars with jurisdiction, and thereby allow state bar authorities to open an investigation and take necessary disciplinary actions.

Recommendations

Report Misconduct to Relevant State Bar Authorities: At the conclusion of OPR’s review, if OPR finds that there was misconduct and that the misconduct was an intentional violation or a result of reckless disregard, OPR must notify relevant state bar authorities of its findings. In addition, if DOJ management or PMRU weigh in on the matter, OPR shall notify relevant state bar authorities within 30 days of its receipt of DOJ management’s or PMRU’s findings.

Increase Transparency: Although the Clinton-era disclosure policy was better than what is currently the standard, it is inadequate. Among other things, any DOJ policy on attorney misconduct needs to ensure that proactive disclosure does not require a demonstrated public interest. When serious allegations of misconduct are found to have merit, details of findings of misconduct and corrective and disciplinary actions should be posted online in a timely fashion, similar to how many state bar authorities deal with ethical violations—including the name of the attorneys who acted improperly and the defendants and cases affected by the misconduct. The public interest in learning about government misconduct can far outweigh any privacy interests for the attorneys whose salaries are paid by taxpayers. If allegations of reckless or intentional misconduct are not upheld by OPR, those unredacted findings should be reported to the House and Senate Judiciary Committees for review. This new congressional oversight would better prevent OPR inappropriately letting offending government attorneys off the hook.

Empower the DOJ Office of Inspector General to Investigate Misconduct: The DOJ OIG should be given the explicit authority to investigate allegations of misconduct throughout the agency like all other OIGs. It’s time to end this wrong-headed exception and to create more independent oversight of and accountability for DOJ attorneys.

An interim step would be to require OPR to send allegations to the DOJ OIG as they come up, giving the OIG the right of first refusal to do investigations. However, eventually OPR should be merged with the DOJ OIG, especially considering OPR’s relatively small size. It could become a specialized unit of the DOJ OIG, similar to how many OIGs have separate audit, criminal investigative, and program evaluation divisions.

Notes

¹ Memorandum from Philip B. Heymann, Deputy Attorney General, to Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility, regarding the “Disclosure of the Results of Investigation of Alleged Professional Misconduct by Department Attorneys,” December 13, 1993. <http://www.justice.gov/oip/docs/attorney-misconduct.pdf> (Downloaded March 6, 2014) (Hereinafter Memo Regarding Disclosure of the Results of Investigation of Alleged Professional Misconduct by Department Attorneys)

² The number of allegations does not necessarily equate to the number of attorneys involved; there can be more than one allegation per attorney, and there can be more than one attorney under scrutiny in any individual allegation of misconduct. A single court case can also give rise to multiple allegations.

³ Department of Justice, Office of Professional Responsibility, *Annual Report*, 2012.

<http://www.justice.gov/opr/annualreport2012.pdf> (Downloaded March 6, 2014) (Hereinafter OPR 2012 Annual Report)

⁴ “OPR referred its finding of professional misconduct to the PMRU. The PMRU affirmed OPR’s finding of professional misconduct and imposed a 10-day suspension. OPR referred its finding of poor judgment to the DOJ attorney’s component for consideration in a management context. OPR has notified the appropriate state bar of DOJ’s professional misconduct findings.” OPR 2012 Annual Report, pp. 24-25.

⁵ OPR found that the prosecutor engaged in both “intentional professional misconduct” and “misconduct in reckless disregard of the DOJ attorney’s professional obligations....OPR referred its findings of professional misconduct to the PMRU, which has this matter under review.” OPR 2012 Annual Report, pp. 26-27.

⁶ “OPR referred its findings of professional misconduct against the DOJ attorney to the PMRU. The PMRU affirmed OPR’s findings of professional misconduct and issued a letter of admonishment. OPR has notified the appropriate state bar of OPR’s findings of professional misconduct. OPR referred its finding of poor judgment against the DOJ supervisory attorney to the DOJ supervisory attorney’s component for consideration in a management context.” OPR 2012 Annual Report, pp. 33-34.

⁷ “OPR referred the matter to the Executive Office for Immigration Review (EOIR) and recommended a range of discipline from a seven-day suspension to termination. EOIR affirmed OPR’s findings and imposed a 30-day suspension.” OPR 2012 Annual Report, p. 32.

⁸ “OPR referred its professional misconduct findings to the PMRU. The PMRU concluded that based on information that the DOJ attorney provided to it, the DOJ attorney did not commit intentional professional misconduct but rather acted in reckless disregard of his obligation of candor to the court. The Department imposed a 14 -day suspension. OPR referred its findings of poor judgment to the DOJ attorney’s component for consideration in a management context. OPR has notified the appropriate state bar of DOJ’s professional misconduct findings.” OPR 2012 Annual Report, pp. 25-26.

⁹ Gary G. Grindler “Opposing view on legal system: Don’t mix mistakes, misconduct,” *USA Today*, October 7, 2010. http://usatoday30.usatoday.com/news/opinion/editorials/2010-10-08-editorial08_ST1_N.htm (Downloaded March 6, 2014) (Hereinafter “Opposing view on legal system: Don’t mix mistakes, misconduct”)

¹⁰ OPR 2012 Annual Report, p. 44.

¹¹ OPR 2012 Annual Report, p. 44.

¹² David Stout, “Scott Schools, a Power in DOJ Bureaucracy, Is Leaving After Two Decades,” *Main Justice*, February 11, 2014. <http://www.mainjustice.com/2013/02/11/scott-schools-a-power-in-doj-bureaucracy-is-leaving-after-two-decades/> (Downloaded March 11, 2014)

¹³ United States of America Merit Systems Protection Board Western Regional Office, *Initial Decision Regarding James A. Goeke and Joseph W. Bottini v. Department of Justice*, April 5, 2013, p. 18.

<http://s3.documentcloud.org/documents/681231/bottini-mspb-initial-decision.pdf> (Downloaded March 7, 2014) (Hereinafter *Initial Decision Regarding James A. Goeke and Joseph W. Bottini v. Department of Justice*)

¹⁴ Email from Scott Schools to Nick Schwellenbach, March 11, 2014.

¹⁵ Email from Scott Schools to Nick Schwellenbach, March 11, 2014.

¹⁶ OPR 2012 Annual Report, pp. 25-26.

¹⁷ OPR 2012 Annual Report, pp. 25.

¹⁸ By describing this as a violation of the lawyer’s “duty of candor to the court,” OPR does not appear to have categorized it for statistical purposes as a case of withholding exculpatory evidence. OPR 2012 Annual Report, pp. 25-26.

¹⁹ Devlin Barrett and Nedra Pickler, "Ted Stevens Conviction To Be Voided," *The Huffington Post*, April 1, 2009. http://www.huffingtonpost.com/2009/04/01/ted-stevens-conviction-to_n_181632.html (Downloaded March 6, 2014)

²⁰ Paul Kane, "Sen. Ted Stevens Loses Reelection Bid," *The Washington Post*, November 19, 2008. <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111803227.html> (Downloaded March 6, 2014)

²¹ *The New York Times*, "A Guide to the Memos on Torture," 2005. <https://www.nytimes.com/ref/international/24MEMO-GUIDE.html> (Downloaded March 7, 2014)

²² David Burnham, *Above the Law: Secret Deals, Political Fixes and Other Misadventures of the U.S. Department of Justice*. New York: Scribner, 1996, p. 333. (Burnham is a member of POGO's board of directors.)

²³ Jim McGee, "Prosecutor Oversight Is Often Hidden From Sight," *The Washington Post*, January 15, 1993, p. A1.

²⁴ Jim McGee, "Justice Dept. Sets Changes On Discipline; Prosecutors' Conduct Had Led to Complaints," *The Washington Post*, December 14, 1993, p. A1; "A Reno Reform," *The Washington Post*, December 20, 1993, p. A24.

²⁵ Memo Regarding Disclosure of the Results of Investigation of Alleged Professional Misconduct by Department Attorneys

²⁶ "Public Disclosure of OPR Findings: During the fiscal year, the Department implemented a policy providing for the public disclosure of the results of OPR investigations in certain cases involving allegations of attorney misconduct. (3) Under the policy, the Department will disclose the results of certain OPR investigations, including those involving a finding of intentional misconduct or involving an allegation of serious professional misconduct in which there has been a demonstration of public interest, where the public interest in disclosure outweighs the privacy interest of the attorney and any law enforcement interests. Disclosure can also be made at the request of the Department attorney who was the subject of the allegations when disclosure would not compromise law enforcement interests. Pursuant to the policy, the Deputy Attorney General issued two public disclosure reports in fiscal year 1994." ("3. The policy was announced in a December 13, 1993 memorandum from then Deputy Attorney General Philip Heymann.") Department of Justice, Office of Professional Responsibility, *Fiscal Year 1994 Annual Report*. <http://www.justice.gov/opr/94annual.htm> (Downloaded March 10, 2014)

²⁷ OPR jointly published reports with the DOJ Office of Inspector General involving managerial attorneys' misconduct in DOJ personnel matters, such as Bush administration political appointee Monica Goodling's improper consideration of job applicants' political affiliation when screening candidates for civil service positions within the DOJ.

²⁸ Richard B. Schmitt, "More scrutiny, secrecy at Justice," *The Los Angeles Times*, July 6, 2008, p. A-14. <http://articles.latimes.com/2008/jul/06/nation/na-opr6/2> (Downloaded March 12, 2014)

²⁹ Memorandum from Barack Obama, President of the United States, to the Heads of Executive Departments and Agencies, regarding "Transparency and Open Government."

http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment (Downloaded March 6, 2014)

³⁰ American Bar Association, House of Delegates, *Recommendation*, August 10, 2010.

<http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100a.authcheckdam.pdf> (Downloaded February 28, 2014) (Hereinafter ABA 2010 Recommendation)

³¹ Through the phrase "consistent with privacy interests," the ABA resolution would leave open the possibility that lawyers found to have engaged in professional misconduct would not be named in every case. That is consistent with DOJ's posture under the 1993 policy. ABA 2010 Recommendation, p. 2.

³² "DOJ encourages corporations to disclose the results of their internal investigations to promote compliance with the law; it ought to apply the same standard of transparency to itself," Green wrote. Bruce A. Green, "Regulating Federal Prosecutors: Let There Be Light," 118 *Yale Law Journal*, Pocket Part 156, 2009. <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/professional-responsibility/regulating-federal-prosecutors:-let-there-be-light/> (Downloaded March 10, 2014).

³³ Statement of Glenn A. Fine, Inspector General, Department of Justice, before the Senate Committee on Homeland Security and Governmental Affairs on "Strengthening the Unique Role of the Nation's Inspectors General," July 11, 2007. <http://www.justice.gov/oig/testimony/0707/> (Downloaded March 6, 2014)

³⁴ United States District Court, District of Massachusetts, *Memorandum and Order Re: United States of America v. Darwin Jones CR. NO 07-10289-MLW*, May 18, 2009, p.28. http://www.gpo.gov/fdsys/pkg/USCOURTS-mad-1_07-cr-10289/pdf/USCOURTS-mad-1_07-cr-10289-2.pdf (Downloaded March 7, 2014) (Hereinafter *Memorandum and Order Re: United States of America v. Darwin Jones*)

³⁵ *Memorandum and Order Re: United States of America v. Darwin Jones*

³⁶ There are limits to the Office of Research Integrity's transparency. According to the website: "The list only includes those who CURRENTLY have an imposed administrative actions [sic] against them. It does NOT include the names of

individuals whose administrative actions periods have expired.” The Office of Research Integrity, “Case Summaries,” (Emphasis in original). https://ori.hhs.gov/case_summary (Downloaded March 6, 2014)

³⁷ Securities and Exchange Commission, “Accounting and Auditing Enforcement Releases,” February 2014. <http://www.sec.gov/divisions/enforce/friactions.shtml> (Downloaded March 6, 2014)

³⁸ Department of Defense Office of Inspector General, “FOIA Reading Room.” <http://www.dodig.mil/foia/readingroom.html> (Downloaded March 6, 2014)

³⁹ “Opposing view on legal system: Don’t mix mistakes, misconduct”

⁴⁰ Statement from the Department of Justice, for the Senate Committee on the Judiciary on “the Special Counsel’s Report on the Prosecution of Senator Ted Stevens,” March 28, 2012, p. 2. <http://www.judiciary.senate.gov/pdf/12-3-28SchuelkeTestimony.pdf> (Downloaded March 6, 2014) (Hereinafter Justice Department Statement for the Senate Committee on the Judiciary)

⁴¹ Justice Department Statement for the Senate Committee on the Judiciary, p. 2.

⁴² United States Department of Justice, *Report of Investigation of Allegation of Misconduct in the Newton Street Crew Prosecution Part 1*, February 9, 1998. <http://www.justice.gov/opr/readingroom/newton1-41.pdf> (Downloaded March 7, 2014); Department of Justice, *Report of Investigation of Allegation of Misconduct in the Newton Street Crew Prosecution Part 2*, February 9, 1998. <http://www.justice.gov/opr/readingroom/newton42-end.pdf> (Downloaded March 7, 2014) (Hereinafter *Report of Investigation of Allegation of Misconduct in the Newton Street Crew Prosecution Part 2*)

⁴³ *Report of Investigation of Allegation of Misconduct in the Newton Street Crew Prosecution Part 2*, p. 65.

⁴⁴ *Report of Investigation of Allegation of Misconduct in the Newton Street Crew Prosecution Part 2*, p. 82.

⁴⁵ Brendan Smith, “Problematic Prosecutions: D.C. Bar Counsel Charges Former Prosecutor G. Paul Howes With Misconduct in Gang Cases,” *LegalTimes*, February 12, 2007. http://www.brendanlsmith.com/pdf/Former_Prosecutor_Becomes_Pariah.pdf (Downloaded March 6, 2014) (Hereinafter Problematic Prosecutions)

⁴⁶ District Court of Appeals, Board on Professional Responsibility, *Report and Recommendation of the Board on Professional Responsibility and Separate Statement of Mr. Bolze as to Sanction*, July 27, 2010, p. 2. http://www.dcbar.org/customcf/download.cfm?filename=bpr_report/GPaulHowes13102&directory=discipline (Downloaded March 7, 2014) (Hereinafter *Report and Recommendation of the Board on Professional Responsibility and Separate Statement of Mr. Bolze as to Sanction*)

⁴⁷ District of Columbia Court of Appeals, Board on Professional Responsibility, Hearing Committee Number One, *Report and Recommendation of Hearing Committee Number One in the Matter of G. Paul Howes*, July 27, 2010, p. 3. http://www.dcbar.org/discipline/hearing_committee/HCGPaulHowes13102.pdf (Downloaded March 10, 2014) (Hereinafter *Report and Recommendation of Hearing Committee Number One in the Matter of G. Paul Howes*)

⁴⁸ *Report and Recommendation of Hearing Committee Number One in the Matter of G. Paul Howes*, p. 64.

⁴⁹ District Court of Appeals, Transcript of Argument No. 10-BG-938, in Re G. Paul Howes, Respondent, March 8, 2012, p. 4. http://www.dcbar.org/discipline/court_action/10-BG-938_MTD.PDF (Downloaded March 10, 2014)

⁵⁰ *Report and Recommendation of Hearing Committee Number One in the Matter of G. Paul Howes*, pp. 48, 32, 74; *Report and Recommendation of the Board on Professional Responsibility and Separate Statement of Mr. Bolze as to Sanction*, pp. 3-4.

⁵¹ *Report and Recommendation of the Board on Professional Responsibility and Separate Statement of Mr. Bolze as to Sanction*, p. 16.

⁵² United States District Court for the District of Columbia, Memorandum Opinion in Re Application of Antoine Rice, *United States of America v. Mark Hoyle, et al.*, November 12, 2003, p. 3 and p. 28. <http://s3.documentcloud.org/documents/15523/united-states-v-hoyle-order-unsealing-documents.pdf> (Downloaded March 7, 2014)

⁵³ Problematic Prosecutions, p. 2; *Report of Investigation of Allegation of Misconduct in the Newton Street Crew Prosecution Part 2*, p. 85.

⁵⁴ *Report and Recommendation of the Board on Professional Responsibility and Separate Statement of Mr. Bolze as to Sanction*, p. 2 fn. 2.

⁵⁵ United States House of Representatives Committee on the Judiciary, “DOJ Report on Bush Administration Interrogation Memos and Related Documents.” (Accessed via Wayback Machine) http://web.archive.org/web/20131224054740/http://judiciary.house.gov/issues/issues_OPRReport.html (Downloaded March 7, 2014)

⁵⁶ Department of Justice, Office of Professional Responsibility, *Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation*

Techniques” on Suspected Terrorists, July 29, 2009, p. 11.

<http://web.archive.org/web/20131112083722/http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> (Downloaded March 7, 2014)

⁵⁷ Memorandum from David Margolis, Associate Deputy Attorney General, to the Attorney General and Deputy Attorney General, regarding “Obligations to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigations into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of ‘Enhanced Interrogation Techniques’ on Suspected Terrorists,” January 5, 2010, p. 2. <https://www.fas.org/irp/agency/doj/opr-margolis.pdf> (Downloaded March 7, 2014) (Hereinafter January 5, 2010, Memorandum from David Margolis)

⁵⁸ January 5, 2010, Memorandum from David Margolis, p. 67.

⁵⁹ Maureen E. Mahoney and Everett C. Johnson, Latham & Watkins LLP, on behalf of Judge Jay S. Bybee, Classified Response to the U.S. Department of Justice Office of Professional Responsibility Classified Report Dated July 29, 2009, October 9, 2009, pp. 1-2. <https://www.fas.org/irp/agency/doj/opr-bybeefinal.pdf> (Downloaded March 7, 2014)

⁶⁰ John Yoo, “Finally, an end to Justice Dept. investigation,” *Taiwan News*, March 3, 2010.

http://www.etaiwannews.com/etn/news_content.php?id=1193345&lang=eng_news&cate_img=140.jpg&cate_rss=news_Opinion (Downloaded March 7, 2014) (Hereinafter “Finally, an end to Justice Dept. investigation”)

⁶¹ “Finally, an end to Justice Dept. investigation”

⁶² David Cole, “The Sacrificial Yoo: Accounting for Torture in the OPR Report,” *Journal of National Security Law & Policy*, Vol. 4, Issue 455, 2010, p. 458.

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1476&context=facpub> (Downloaded March 7, 2014) (Hereinafter “The Sacrificial Yoo: Accounting for Torture in the OPR Report”)

⁶³ “The Sacrificial Yoo: Accounting for Torture in the OPR Report,” p. 458.

⁶⁴ “The Sacrificial Yoo: Accounting for Torture in the OPR Report,” p. 458.

⁶⁵ Department of Justice, Office of Professional Responsibility, *Report: Investigation of allegations of prosecutorial misconduct in United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS)*, August 15, 2011, pp. 1-2. <http://www.leahy.senate.gov/imo/media/doc/052412-081511Report.pdf> (Downloaded March 7, 2014) (Hereinafter Report: Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens*)

⁶⁶ Neil A. Lewis, “Alaska Senator Is Guilty Over His Failures to Disclose Gifts,” *The New York Times*, October 27, 2008. <http://www.nytimes.com/2008/10/28/washington/28stevens.html?pagewanted=all&r=0> (Downloaded March 7, 2014)

⁶⁷ Lara Jakes Jordan, “Ted Stevens Indicted On 7 Criminal Charges,” *The Huffington Post*, July 29, 2008.

http://www.huffingtonpost.com/2008/07/29/ted-stevens-indicted_n_115634.html (Downloaded March 7, 2014) (Hereinafter “Ted Stevens Indicted On 7 Criminal Charges”)

⁶⁸ “Ted Stevens Indicted On 7 Criminal Charges”

⁶⁹ “Sen. Stevens: I’m innocent and not convicted,” CNN.com, October 31, 2008.

<http://www.cnn.com/2008/POLITICS/10/31/stevens.debate/> (Downloaded March 7, 2014)

⁷⁰ Neil A. Lewis, “Agent Claims Evidence on Stevens Was Concealed,” *The New York Times*, February 10, 2009.

<http://www.nytimes.com/2009/02/11/us/politics/11stevens.html> (Downloaded March 7, 2014)

⁷¹ “Sen. Ted Stevens’ conviction set aside,” CNN.com, April 7, 2009.

<http://www.cnn.com/2009/POLITICS/04/07/ted.stevens/> (Downloaded March 7, 2014)

⁷² Emmet G. Sullivan, United States District Judge, in the United States District Court for the District of Columbia, *Order*, Misc. No. 09-0198 (EGS), November 21, 2011, p. 6.

http://legaltimes.typepad.com/files/stevens_investigation_order.pdf (Downloaded March 7, 2014)

⁷³ Report: Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens*.

⁷⁴ Report: Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens*, p. 671.

⁷⁵ Report: Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens*, p. 671.

⁷⁶ Report: Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens*, p. 671.

⁷⁷ Memorandum from Professional Misconduct Review Unit, Department of Justice, to Joseph A. Bottini, Assistant United States Attorney, regarding “OPR Investigation of Joseph A. Bottini (August 15, 2011) Memorandum in Support of Finding of Poor Judgment,” Exhibit 2 of Letter from Bonnie J. Brownell on behalf of AUSA Goeke, to James M. Cole, Deputy Attorney General, regarding “Proposed Suspension of James A. Goeke Received December 9, 2011,” January 23, 2012, p. 10. <http://www.leahy.senate.gov/imo/media/doc/052412-GoekeResponseAppendix.pdf> (Downloaded March 10, 2014) (Hereinafter Memo from Professional Misconduct Review Unit regarding OPR Investigation of Joseph A. Bottini)

⁷⁸ Memo from Professional Misconduct Review Unit regarding OPR Investigation of Joseph A. Bottini, p. 86.

-
- ⁷⁹ Letter from Scott N. Schools, Associate Deputy Attorney General, to Joseph W. Bottini, Assistant United States Attorney, regarding “Disciplinary proposal of Kevin A. Ohlson, Chief, Professional Misconduct Review Unit,” May 23, 2012. <http://www.leahy.senate.gov/imo/media/doc/052412-BottiniDecision.pdf> (Downloaded March 7, 2014); Letter from Scott N. Schools, Associate Deputy Attorney General, to James A. Goeke, Assistant United States Attorney, regarding “Disciplinary proposal of Kevin A. Ohlson, Chief, Professional Misconduct Review Unit,” May 23, 2012. <http://www.leahy.senate.gov/imo/media/doc/052412-GoekeDecision.pdf> (Downloaded March 7, 2014); *Initial Decision Regarding James A. Goeke and Joseph W. Bottini v. Department of Justice*, p. 4.
- ⁸⁰ Statement of William & Connolly LLP, Counsel for Senator Ted Stevens, on the punishment for the prosecutors in Senator Stevens’ case, May 24, 2012. <http://lawprofessors.typepad.com/files/statement-of-williams-connolly-llp.pdf> (Downloaded March 7, 2014)
- ⁸¹ *Initial Decision Regarding James A. Goeke and Joseph W. Bottini v. Department of Justice*, pp.6-7.
- ⁸² Addendum to Letter from Bonnie J. Brownell on behalf of AUSA Goeke, to James M. Cole, Deputy Attorney General, regarding “Proposed Suspension of James A. Goeke Received December 9, 2011,” January 23, 2012, p. 27. <http://leahy.senate.gov/imo/media/doc/052412-GoekeResponse.pdf> (Downloaded March 7, 2014)
- ⁸³ Kenneth L. Wainstein, Jeffrey S. Nestler, and Sara S. Zdeb, O’Melveny & Myers LLP, on behalf of AUSA Joseph W. Bottini, *Response to the United States Department of Justice Office of Professional Responsibility Final Report*, January 25, 2012, p. 1. <http://leahy.senate.gov/imo/media/doc/052412-BottiniResponse.pdf> (Downloaded March 7, 2014)
- ⁸⁴ Joseph W. Bottini v. Department of Justice, *Petition for Review, Docket Number: SF-0752-12-0600-I-1*, June 10, 2013. <http://www.mainjustice.com/files/2013/06/DOJ-Petition-for-Review.pdf> (Downloaded March 7, 2014)
- ⁸⁵ Questions posed by Senator Grassley for the record, for the Senate Committee on the Judiciary on “Ensuring That Federal Prosecutors Meet Discovery Obligations,” June 6, 2012, p. 1. <http://www.judiciary.senate.gov/resources/transcripts/upload/060612QFRs-Cole.pdf> (Downloaded March 7, 2014)
- ⁸⁶ *Initial Decision Regarding James A. Goeke and Joseph W. Bottini v. Department of Justice*, p. 5.
- ⁸⁷ LinkedIn, “William Welch,” <http://www.linkedin.com/pub/william-welch/52/9ab/5b7> (Downloaded March 10, 2014)
- ⁸⁸ Letter from Henry F. Schuelke, III, Janis, Schuelke, and Wechsler, to the Honorable Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary, regarding Welch’s disclosures, March 29, 2012. <http://pogoarchives.org/m/ga/schuelke-letter-20120309.pdf>
- ⁸⁹ LinkedIn, “Brenda Morris” <http://www.linkedin.com/pub/brenda-morris/4a/465/623> (Downloaded March 7, 2014)
- ⁹⁰ Charlie Savage, “Justice Dept. Is Criticized as Corruption Cases Close,” *The New York Times*, December 20, 2010. http://www.nytimes.com/2010/12/21/us/politics/21justice.html?_r=0 (Downloaded March 7, 2014)
- ⁹¹ ABA 2010 Recommendation, p. 2.
- ⁹² Stephen Saltzburg, telephone interview with Nick Schwellenbach, February 10, 2014.
- ⁹³ Letter from Henry R. Wray, Senior Associate General Counsel, Government Accountability Office, to the Honorable Jack Brooks, Chairman of the House Committee on the Judiciary, regarding jurisdictional issues at the Justice Department’s Inspector General (IG) and the Office of Professional Responsibility (OPR), April 15, 1994. <http://www.gao.gov/assets/400/390452.pdf> (Downloaded March 10, 2014)
- ⁹⁴ Statement of Michael E. Horowitz Inspector General, Department of Justice, before the House of Representatives Committee on Oversight and Government Reform on “Strengthening Agency Oversight: Empowering the Inspectors General Community,” January 15, 2014, p. 3. <http://oversight.house.gov/wp-content/uploads/2014/01/Horowitz-DOJ-Testimony-IG-1-15.pdf> (Downloaded March 7, 2014)
- ⁹⁵ Ari Shapiro, “Ex-Chief Calls for Scrapping Justice Dept. Watchdog,” NPR, June 1, 2007. <http://www.npr.org/templates/story/story.php?storyId=10634336> (Downloaded March 7, 2014)