McDade-Murtha Amendment: A Sketch of Legislation in the 107th Congress Concerning Ethical Standards for the Justice Department Litigators

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Summary

The McDade-Murtha Amendment, 28 U.S.C. 530B, instructs Department of Justice litigators to adhere to the ethical standards which apply to other attorneys in the places where the litigators perform their duties. While supporters argue the Amendment is the only existing, effective means of preventing and punishing prosecutorial abuse, critics contend that the Amendment impedes effective federal law enforcement. Twice in the last year, the Senate has passed legislation that included sections substantially modifying the amendment, but in each instance the modifications have been stripped out of the host legislation prior to its passage. This is a discussion of those sections and other similar proposals introduced in the 107th Congress. It is an abridged version of *McDade-Murtha Amendment: Legislation in the 107th Congress Concerning Ethical Standards for Justice Department Litigators*, CRS Report RL31221 (Dec. 18, 2001), without its footnotes or appendix. For more detailed background information, *see, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS Report RL30060 (Dec. 18, 2001).

Background

Prior to enactment of the McDade-Murtha Amendment as section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, 112 Stat. 2681-118, Justice Department attorneys had long been required to be licensed to practice law by some state, territory or the District of Columbia and as a consequence were obligated to honor the ethical standards imposed upon members of the bar to which they were admitted. The federal courts when called upon to establish ethical standards for attorneys appearing before them generally adopted the rules of the states in which they were located.

Early in 1980, the Justice Department ruled that nothing in these state and local federal court standards should be construed as an impediment to federal law enforcement efforts. Attorneys General Thornburg and Reno subsequently re-emphasized the point.

In the meantime, however, Congress had begun to express its concern. The House Government Operations Committee conducted hearings and recommended among other things a thorough examination of the ethics rules applicable to Department attorneys while expressing concern over "the problems inherent in any system of self-policing and regulation," H.Rept. 101-986, at 35 (1990). Later, the House Judiciary Committee held hearings on a legislative proposal cast in language much like that of the McDade-Murtha Amendment.

Thereafter, apparently frustrated by the perceived lack of an effective mechanism to curb prosecutorial abuse by federal prosecutors, both Independent Counsel and regular Justice Department attorneys, Congress added the McDade-Murtha Amendment to the 1998 Justice Department appropriations act.

Divisive Issues

Debate over the Amendment and proposals to change it revolve around the same issues that have marked the subject from the beginning. Some are general; others particularized. Who should determine what ethical standards federal litigators must honor? Should federal standards be uniform throughout the United States or compatible with local standards? Should local "no contact," grand jury, or honesty regulations apply to federal litigators even if they impede the performance of federal attorneys? These issues touched upon below in the context of specific legislative proposals are discussed in greater detail in *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS Report RL30060 (Dec. 14, 2001).

Professional Standards for Government Attorneys Act (S. 1437/§501 of S. 1510)

Senator Leahy introduced the Professional Standards for Government Attorneys Act of 2001 (S. 1437) for himself and Senators Hatch and Wyden on September 19, 2001, 147 *Cong.Rec.* S9509. The bill passed the Senate as section 501 of the Senate's terrorism bill (S. 1510), 147 *Cong.Rec.* S10622 (daily ed. Oct. 11, 2001), but was not included in the final USA PATRIOT Act, P.L. 107-56. It repeals the McDade-Murtha Amendment and instead places federal litigators under the exclusive control of the local federal court rules where they conduct their activities, subject to several specific exceptions. It calls for studies and reports designed to remove specific divisive issues from the domain of local federal court rules and place them within the federal rules of criminal and civil procedure.

More specifically, when federal litigators are engaged in conduct "in connection with" or "reasonably intended to lead to" a proceeding in or before a particular court, they are bound by the ethical standards of that tribunal. Otherwise, they are bound by the rules of the local federal court where they ordinarily perform their duties. The sponsor's summary indicates that this last category is for cases of uncertainty as when venue is possible in more than one district or when proceedings are being conducted or anticipated in more than one district: "in other circumstances, where no court has clear supervisory authority over particular conduct, an attorney would be subject to the professional standards established by rules and decisions of the United States District Court for the judicial district in which the attorney principally performs his officials duties," 147 *Cong.Rec.* S9511 (daily ed. Sept. 19, 2001)(*Summary of the "Professional Standards for Government Attorneys Act of 2001"* accompanying the introductory remarks of Sen. Leahy).

The bill codifies the appropriations requirement that federal litigators be licensed to practice law in some American jurisdiction. Like most local federal court rules, it does not require them to be admitted either in the state where they ordinarily represent the United States or in any states where they otherwise perform their duties. Federal litigators are thus returned to where they stood prior to the McDade-Murtha Amendment, *i.e.,* remote from the enforcement mechanisms of state bar counsel whenever they are employed in a state other than the one in which they have chosen to be licensed.

The proposal also addresses potential limitations on the use of undercover investigations. Stings and other forms of undercover investigation are highly valued law enforcement techniques. For any number of reasons including the fact that federal prosecutors are now more likely to direct, supervise, or advise those conducting undercover investigations, conflicts have arisen under two sets of rules – the "no contact" rules and the honesty rules.

The no contact rules, formulated in order to prevent lawyers from taking unfair advantage of unsophisticated laymen, prohibit attorneys from approaching a represented client unbeknownst to the client's lawyer. For any number of reasons law enforcement undercover investigations will ordinarily not be considered a violation of the no contact rule in most jurisdictions, but there are exceptions, *e.g., United States v. Hammad*, 858 F.2d 834, 839-40 (2d Cir. 1988). The bill leaves the no contact rule issue to be resolved by the uniform rules it anticipates will follow from the study it mandates.

The bill deals with the honesty rule issue more directly. The honesty rules ban attorneys from making false statements during the course of their representation of a client or from engaging in dishonest, deceitful, or fraudulent conduct under any circumstances. The Oregon Supreme Court has held that an attorney violates the honesty rules when he misidentifies himself and his purpose in the course of investigating possible fraud committed against a client, *In re Gatti*, 330 Ore. 517, 8 P.3d 966 (2000). In doing so, it refused to recognize a law enforcement exception for either state or federal authorities, 300 Ore. at 530-33, 8 P.3d at 974-76.

It has been suggested that the problems presented by *Gatti* could be overcome if federal prosecutors simply disassociated themselves from undercover investigations until the case was ready for prosecution. The Justice Department replies that early attorney participation helps prevent constitutional violations and is more conducive to successful prosecution.

The bill creates an undercover exception for federal litigators: "Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction, or supervision on conducting covert activities, and participate in such activities, even though such activities may require the use of deceit or misrepresentation," S. 1437, proposed 28 U.S.C. 530B(d).

Although the courts have generally held that a prosecutor's ethical violations do not in and of themselves constitute grounds for the exclusion of evidence, a few have held otherwise. The bill declares that otherwise admissible evidence may not be excluded from evidence in federal criminal proceedings on the basis of a prosecutor's ethical violations.

In addition to the no contact rule study, the bill directs the Judicial Conference to report to the House and Senate Judiciary Committees within two years on (1) the actual and potential conflicts between the performance of federal law enforcement duties and ethical standards dictated by the bill, and (2) the amendments necessary to resolve those conflicts.

S. 1435/§599A of H.R. 2506 (As Passed by the Senate)

Senator Wyden introduced the Federal Investigation Enhancement Act of 2001 for himself and Senator Leahy on September 19, 2001. It was incorporated into the foreign operations appropriations act, H.R. 2506, and passed the Senate as section 599A of that bill on October 24, 2001, 147 *Cong.Rec.* S10961. Unlike the more comprehensive S. 1437, it does not repeal the McDade-Murtha Amendment but imports into it an undercover law enforcement exception similar to that found in S. 1437.

H.R. 3309

The Investigation Enhancement Act of 2001, introduced on November 15, 2001 by Representative Walden for himself and Representatives DeFazio, Wu, Hooley, and Blumenauer, replicates S. 1435 with one exception. It applies the exception both to federal litigators and to Justice Department attorneys who are investigators rather than litigators.

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