



April 6, 2026

To: Department of Justice, Office of the Attorney General
Re: Review of State Bar Complaints and Allegations Against Department of Justice Attorneys

28 CFR Part 77

[Docket No. OAG199, AG Order No. 6653-2026-A]

RIN 1105-AB82

My name is Michael Fox, and I serve as a Legal Fellow with the Cato Institute’s Project on Criminal Justice. I write alongside my colleague, Matthew Cavedon, the Director of our Project. We are both former state-level public defenders and our current work addresses the lack of accountability for government officials—including federal prosecutors. We are concerned that the proposed rule seeks to impair the one remaining mechanism by which the actions of federal prosecutors can meaningfully be scrutinized.

The Most Powerful and Least Accountable

Federal prosecutors are “one of the most powerful peace-time forces known to our country”—and one of its least accountable.¹ Though they hold the authority to strip citizens of their lives, liberty, property, and reputations, they enjoy nearly impenetrable legal protections.

A recently proposed Department of Justice rule—granting the Attorney General a right of first review over ethics complaints against DOJ attorneys—radically departs from federalism and further erodes our constitutional system of checks and balances. For decades, an informal agreement has existed where state bars typically wait for the DOJ’s Office of Professional Responsibility (OPR) to conclude its internal inquiries before launching their own. However, by formalizing this practice through official rulemaking, DOJ is attempting to compel state bars to suspend independent investigations. It seeks to ensure that federal prosecutors are held to a lower ethical standard than every other licensed attorney in the country.

This proposal aims to further insulate federal prosecutors from oversight. Further, OPR’s persistent failure to publish identifiable findings or ensure meaningful accountability only underscores the need for independent state bar investigations.

Professional Liability and the Statutory Command

Federal prosecutors operate shielded by absolute immunity from civil suits. This leaves their professional licenses as the main tethers to accountability. But the federal prosecutor is often insulated by a culture of secrecy within the Department of Justice.

By attempting to circumvent the state-bar process, DOJ is seeking to remove the final external check. This directly contradicts the McDade-Murtha Amendment, 28 U.S.C. § 530B(a)—one of

¹ Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940).

the federal laws federal attorneys are sworn to uphold—which requires that such attorneys be subject to state laws and rules to the same extent and in the same manner as others. A federal prosecutor granted a right of internal first review is not subject to state oversight in the “same manner” as any other attorney. Such an attorney is shepherded into a system with a long history of abject failures at upholding professional standards.

The Ted Stevens Case: A History of Internal Failure

The 2008 prosecution of U.S. Senator Ted Stevens (R-AK) exemplifies the failure of internal DOJ oversight. Federal prosecutors secured his conviction just eight days before a critical election.² They alleged that Sen. Stevens corruptly received \$250,000 in cabin renovations from his friend Bill Allen.³ It later came to light that prosecutors concealed crucial facts: while prosecutors told the jury Sen. Stevens paid just \$160,000 for work worth \$250,000, Allen had in fact told the FBI and prosecutors that the work was actually worth just \$80,000.⁴ Sen. Stevens had paid more than market value.⁵ Even more shockingly, prosecutors concealed records showing that Allen had sex with a child prostitute, then suborned her to perjure herself by denying this.⁶

U.S. District Judge Emmet Sullivan vacated the jury’s verdict and dismissed the indictment. *United States v. Stevens*, No. 08-CR-231, 2009 WL 6525926 (D.D.C. 2009). He admonished DOJ and asked, “How does the court have confidence that the public integrity section has public integrity?”⁷ Yet the consequences for the prosecutors were minimal.⁸ Absolute immunity protected them from civil lawsuits, and the absence of a direct violation of court order prevented a criminal contempt finding. Although OPR recommended brief suspensions without pay for two prosecutors, the Merit Systems Protection Board overturned these findings because DOJ failed to follow its own procedures.⁹

Two attorney supervisors in the Public Integrity Section were reassigned within DOJ after an internal inquiry made no misconduct findings as to them.¹⁰ A junior member of the Sen. Stevens trial team was even allowed to continue prosecuting public corruption cases because the investigation determined that he had simply “deferred to the judgment of his superiors and made no independent decisions.”¹¹

The Judicial Construction of the Absolute Shield

² TIME Staff, *Prosecutors Gone Bad: Misconduct in the Ted Stevens Corruption Trial*, TIME (March 16, 2012), <https://tinyurl.com/5esshz7b>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Calabresi, *supra*.

⁷ Neil A. Lewis, *Judge Berates Prosecutors in Trial of Senator*, THE N.Y. TIMES (Oct. 2, 2008), <https://tinyurl.com/kmnd95f>.

⁸ See Carrie Johnson, *Report: Prosecutors Hid Evidence in Ted Stevens Case*, NPR (March 15, 2012), <https://tinyurl.com/5cyjkhsh>.

⁹ Charlie Savage, *Judge Reverses Suspensions of Prosecutors in Stevens Case*, THE N.Y. TIMES (April 7, 2013), <https://tinyurl.com/3x5cxvjb>.

¹⁰ Johnson, *supra*.

¹¹ *Id.*

Such prosecutorial unquestionability results from a century of judicial decisions. In 1927, the Supreme Court affirmed a circuit court decision holding that federal prosecutors are absolutely immune from suits for malicious prosecution. *Yaselli v. Goff*, 275 U.S. 503 (1927) (per curium). Half a century later, *Imbler v. Pachtman*, 424 U.S. 409, 410, 427–28 (1976), confirmed absolute immunity for prosecutors for tasks intimately associated with their courtroom advocacy role. *Id.* Two years later, the Court extended this protection to government attorneys trying cases within administrative tribunals. *Butz v. Economou*, 438 U.S. 478, 517 (1978). Over the course of the twentieth century, the Court immunized misbehaving prosecutors from civil liability.

For all this, no legal precedent suggests that federal prosecutors should enjoy insulation from state bar oversight. Rather, the Court envisioned that “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.” *Imbler*, 424 U.S. at 429. Congress has explicitly ratified this assessment through the McDade-Murtha Amendment, as detailed above. OPR is no substitute for the state bar oversight foreseen by the judicial and legislative branches.

OPR: An Institutional Fortress and the Delay-and-Decay Strategy

OPR was established to enforce ethical standards following the Watergate scandal, yet it lacks independence and routinely buries complaints of prosecutorial misconduct.¹² Its investigations are conducted in self-imposed secrecy and its findings rarely lead to meaningful discipline.¹³ The proposed rule would use OPR’s lengthy reviews as a delay-and-decay strategy to hobble state bar inquiries. During these delays, witness memories would fade, evidence would be lost, and the attorneys involved would often move to new positions, effectively foreclosing justice.

These dangers are illustrated by the high-profile prosecution of the Bundy family relating to its dispute with the Bureau of Land Management.¹⁴ The case collapsed when U.S. District Judge Gloria Navarro dismissed the indictment with prejudice. *United States v. Bundy*, 406 F. Supp. 3d 932, 934 (D. Nev. 2018). The prosecution, under the leadership of then-Acting U.S. Attorney for the District of Nevada Steven Myhre, had engaged in “flagrant misconduct” that violated “a universal sense of justice.” *Id.* at 935, 940. For years, the government’s narrative was built on the claim that the defendants had lied about snipers surrounding their property in order to incite a standoff. *United States v. Bundy*, 968 F.3d 1019, 1024–25, 1031–32 (9th Cir. 2020). However, prosecutors deliberately concealed evidence that snipers had in fact deployed around the Bundy Ranch. *Id.* at 1035, 1042.

For Myhre, concealing evidence was a familiar tactic. Years earlier, in *United States v. Chapman*, the Ninth Circuit affirmed another dismissal when federal prosecutors working under him failed to turn over more than 650 pages of mandated discovery. *United States v. Chapman*, 524 F.3d 1073, 1090 (9th Cir. 2008).

¹² Mike Fox, *How DOJ Helps Federal Prosecutors Escape Accountability & Evade Public Scrutiny*, CATO AT LIBERTY (Jan. 29, 2025), <https://tinyurl.com/4ybtwd4x>.

¹³ *Id.*

¹⁴ *Id.*

DOJ insulated Myhre rather than disciplining him. When his tenure finally ended, it did so quietly and without explanation.¹⁵ Myhre—who had previously been ordered by the Equal Employment Opportunity Commission to undergo anti-sex discrimination training and submit to a compliance report—was transitioned into the role of “senior litigation counsel,” tasked with mentoring and training new federal prosecutors.¹⁶ Internal DOJ safeguards against prosecutorial misconduct failed to serve the public—but served Myhre perfectly.

His case is no outlier. A 2010 investigation uncovered 201 cases over thirteen years in which federal prosecutors were found by courts to have violated legal or ethical rules. Just six prosecutors were disciplined, and all retained their licenses.¹⁷

By formally requesting that state bars defer to a system characterized by opacity and indulgence, the proposed rule seeks to immunize DOJ attorneys from the ethical standards that govern every other member of the bar. When an offenders’ own agency controls the timing and scope of a misconduct inquiry, they are even likelier to be exonerated—and the public left at their mercy.

The Move Toward Impunity

Our constitutional system of checks and balances reflects the principle that no single entity can be trusted to police itself. If judicial doctrines foreclose civil relief for those wronged by prosecutorial misconduct and agency rules sideline state bars, federal prosecutors will operate without meaningful oversight. This will undermine public trust in DOJ.

We urge DOJ to withdraw this rule, honor the expectations of courts and Congress alike, and respect state bars’ role in providing much-needed professional oversight. Effective accountability is most necessary for the attorney who holds “more control over life, liberty, and reputation than any other person in America”—the federal prosecutor.¹⁸

Sincerely,

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¹⁵ Jeff German, Embattled Federal Prosecutor Steven Myhre in Nevada Takes a Step Down, LAS VEGAS REVIEW-J. (April 12, 2018), <https://tinyurl.com/35uere3w>.

¹⁶ *Id.*

¹⁷ Christopher Zoukis, *Prosecutorial Misconduct: Justice Denied as the System Turns a Blind Eye*, CRIM. LEGAL NEWS (Feb. 18, 2020), <https://tinyurl.com/afsfwf67>.

¹⁸ Jackson, *supra*, at 18.