

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 8-9, 2010

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association urges the President and the Attorney General
2 to assure that lawyers in the Department of Justice do not make decisions concerning
3 investigations or proceedings based upon partisan political interests and do not perceive that they
4 will be rewarded for, or punished for not, making a decision based upon partisan political
5 interests; and
6
7 FURTHER RESOLVED, That the American Bar Association urges the leaders of state, local and
8 territorial legal offices to assure that lawyers in their offices do not make decisions concerning
9 investigations or proceedings based upon partisan political interests and do not perceive that they
10 will be rewarded for, or punished for not, making a decision based upon partisan political
11 interests.

REPORT

The government possesses virtual monopoly power with respect to the power to investigate various forms of conduct and with respect to initiating prosecutions and other enforcement actions against individuals and entities. It is vital to promote and preserve public confidence in the fairness of government action that investigations and enforcement actions be neither initiated nor avoided as a result of partisan political activity.

Even in criminal cases where there is a presumption of innocence, the initiation of an investigation may result in stigma whether or not the individual actually is prosecuted. Civil investigations also may damage the reputation of a person or entity even if no wrongdoing is ever proven. If the public were to believe that investigations or proceedings are not brought in a good faith effort to even-handedly enforce the law but are brought to secure partisan advantage, the damage to the system could be enormous. Juries might be unwilling to find for the government because of a fear that they would aid and abet a corrupt system, and the desirable stigma that arises when a party is appropriately sanctioned for violating the law would be undermined.

If investigations or proceedings are not initiated because of partisan political considerations, the damage to the rule of law is also substantial. If the public were to believe that individuals or entities are given a free pass to violate the law with impunity, the basic concept of equal justice under law would be undermined.

In Garcetti v. Ceballos, 547 U.S. 410, 425 (2006), the Supreme Court recognized the importance of even-handed law enforcement when it cited with approval Rule 5-110 of the California Rules of Professional Conduct (2009), which provides as follows

Rule 5-110 Performing the Duty of Member in Government Service

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

Lawyers in government service have a special obligation to promote the rule of law and to see that government deals fairly with the body politic. Judge Simon E. Sobeloff made this point when he spoke as Solicitor General before the Judicial Conference of the Fourth Circuit on June 29, 1954:

The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.

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What Judge Sobeloff said about the office of Solicitor General should be true of all government lawyers. The goal is to seek justice, and that goal cannot be met if partisan political considerations drive decisions as to initiation of investigations and proceedings.

The most recent episode that raised questions about whether government lawyers were being rewarded or punished because of their willingness or unwillingness to let partisan politics guide their decisions arose in connection with allegations that the Bush Administration took adverse action with respect to United States Attorneys who failed to initiate investigations or proceedings against political opponents. The Department of Justice's Inspector General and its Office of Professional Responsibility issued a 392-page joint report (*An Investigation Into the Removal of Nine U.S. Attorneys in 2006*, September 2008) that "found significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. attorneys." The Report concluded that the most serious allegation that it was unable to fully investigate related to David Iglesias, the United States attorney for New Mexico, and whether he was removed as United States Attorney "to influence voter fraud and public corruption prosecutions." *Id.* at 357-358. Former Attorney General Michael Mukasey named Nora Dannehy, the acting United States Attorney in Connecticut, to examine whether criminal laws were broken. Whether or not crimes were committed, the credibility of the Department was damaged. As the Report concluded: "The Department's removal of the U.S. Attorneys and the controversy it created severely damaged the credibility of the Department and raised doubts about the integrity of Department prosecutive decisions." *Id.* at 358.

Lawyers, like other employees, want to succeed, to be promoted, and to be valued by their employers and their supervisors. They look to their leaders to set the standards by which they will be judged. Nothing in this resolution is intended to suggest that the lawyer who heads an office cannot consider whether his or her lawyers are carrying out the priorities of the office and are acting in the best interests of the office.¹ Nothing in this resolution is intended to suggest that when a lawyer is elected to be a county or city prosecutor or legal officer, he or she cannot fill "political" positions with individuals from the victorious political party. Nothing in this resolution is intended to suggest that when the country elects a new President, he or she may not request the resignation of all political appointees and consider political affiliation in making new political appointments.

¹ In *Ceballos*, the Court recognized that "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." 547 U.S. at 422-23.

This resolution is simply intended to urge the leaders of governmental law departments to assure that government lawyers make decisions concerning investigations and proceedings without regard to partisan politics. The Attorney General of the United States, the elected district attorney in Brooklyn, the appointed Attorney General in New Jersey, and heads of public legal departments throughout the country may be Democrats, Republicans, Independents, or have some other political affiliation. Whatever that affiliation may be, it should not affect the decision whether or not an investigation or proceeding should be brought, and it should not result in their permitting lawyers in their offices to determine whether or not an investigation or proceeding should be brought or how it should be conducted based on partisan politics.

Respectfully submitted,

Charles Joseph Hynes
Chair, Criminal Justice Section
February 2010

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GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Joseph Charles Hynes, Chair

1. Summary of Recommendation(s).
This Recommendation urges the President and the Attorney General to assure that decisions to appoint, promote, assign and terminate United States Attorneys and other lawyers in the Department of Justice are neither rewards nor punishments for making decisions concerning investigations or proceedings based upon partisan political interests.
2. Approval by Submitting Entity.
The recommendation was approved by the Criminal Justice Section Council on November 7, 2009.
3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?
NO.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
None that we are aware of at this time.
5. What urgency exists which requires action at this meeting of the House?
This resolution is simply intended to urge the leaders of governmental law departments to assure that government lawyers make decisions concerning investigations and proceedings without regard to partisan politics. If investigations or proceedings are not initiated because of partisan political considerations, the damage to the rule of law is also substantial. If the public were to believe that individuals or entities are given a free pass to violate the law with impunity, the basic concept of equal justice under law would be undermined.
6. Status of Legislation. (If applicable.)
Not applicable
7. Cost to the Association. (Both direct and indirect costs.)
None
8. Disclosure of Interest. (If applicable.)
No known conflict of interest.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)
Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the February 2010 House of Delegates agenda it is being circulated to the following:
Standing Committee on Legal Aid and Indigent Defendants
Judicial Division
Litigation Section
Individual Rights and Responsibilities Section
Coalition for Justice
Council on Ethnic and Racial Justice
Young Lawyers Division
Government and Public Sector Lawyers Division
Standing Committee on Ethics and Responsibility
Standing Committee on Lawyers' Professional Responsibility
State and Local Government Law
Administrative Law

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House)

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EXECUTIVE SUMMARY

A. Summary of Recommendation.

This Recommendation urges the President and the Attorney General to assure that decisions to appoint, promote, assign and terminate United States Attorneys and other lawyers in the Department of Justice are neither rewards nor punishments for making decisions concerning investigations or proceedings based upon partisan political interests.

B. Issue Recommendation Addresses.

That the leaders of state, local and territorial legal offices assure that decisions to appoint, promote, assign and terminate lawyers in their offices are neither rewards nor punishments for making decisions concerning investigations or proceedings based upon partisan political interests.

C. How Proposed Policy Will Address the Issue.

This resolution is simply intended to urge the leaders of governmental law departments to assure that government lawyers make decisions concerning investigations and proceedings without regard to partisan politics. If investigations or proceedings are not initiated because of partisan political considerations, the damage to the rule of law is also substantial. If the public were to believe that individuals or entities are given a free pass to violate the law with impunity, the basic concept of equal justice under law would be undermined.

D. Minority Views or Opposition.

None.