ADNAN AWAD: THE FORGOTTEN INFORMANT

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Cite as 7 CAL. CRIM. L. REV. 2

Pincite using paragraph numbers, e.g. 7 CAL. CRIM. L. REV. 2, ¶11

Introduction

¶1The United States and its citizenry rely on prosecutors to adhere to ethical standards and to behave professionally when dealing with matters the requisite standards do not address.[2] Because courts and disciplinary agencies are generally unfamiliar with most prosecutorial activity, society inevitably must rely on their self-regulation and enforcement.[3] Although U.S. citizens do have confidence in prosecutors' general motivations,[4] terrorist defectors and informants (hereinafter "terrorism informants") may not.[5] Over the last few decades the U.S. Government has been repeatedly accused of problematic dealings with many important terrorism informants.[6] According to former CIA case officer Reuel Marc Gerecht, "[e]ven in very high-profile cases, the handling of these individuals has been downright atrocious."[7] Strikingly, under current federal jurisprudence, terrorism informants have very limited access to judicial review of prosecutorial action.[8] Thus, if government officials do not follow through with their promises, terrorism informants often have no recourse.

¶2Though the United States spends large sums of money investigating international terrorism,[9] intelligence on terrorist groups is difficult to obtain.[10] The FBI has the primary responsibility for investigating international terrorism on behalf of federal prosecutors, but many federal agencies participate in terrorist investigations.[11] Because the CIA has been monitoring international terrorism for decades, it is uniquely positioned to assist law enforcement.[12] Unfortunately, in recent years the CIA has had difficulty performing its crucial monitoring function, since it "now possesses a 'deteriorated human-intelligence capability that makes it almost impossible to penetrate key targets such as terrorist organizations and cripples U.S. efforts to detect and prevent terrorist attacks.'"[13] Because the CIA no longer cultivates its own human intelligence networks, it is forced to rely on information from terrorism informants.[14]

¶3This Article will focus on the unfortunate plight of one such terrorism informant—Mr. Adnan Awad. It will follow his path to the United States and examine how government officials allegedly mistreated him. Had this alleged mistreatment gone unnoticed by the international press, it is doubtful that Mr. Awad's story would deter current terrorists from defecting or others from becoming informants. However, Mr. Awad's story—and many similar stories—*have* reached the international public,[15] hindering the government's recruitment of terrorism informants. In 2002, *U.S. News & World Report* ran an article outlining four instances where terrorism informants accused the government of breaching promises.[16] The article stated that, because of these past

instances, "U.S. Intelligence agencies will have a hard time winning the trust of new defectors—from terrorist groups such as al Queda, Hamas, and Hezbollah—whose help they desperately need in the war against terrorism."[17] This Article poses a solution to this problem.

¶4Specifically, this Article argues that the United States' ethical rules and its sovereign immunity doctrine do not adequately protect terrorism informants. To remedy the situation, Congress must adopt ethical standards that address the treatment of these informants and waive the government's immunity from suit so terrorism informants can have access to judicial review of prosecutorial action. As Mr. Awad's attorney stated, "The problem with Awad was the whole process . . . no one person [was] trying to jerk him around. There was just a complete bureaucratic breakdown."[18]

¶5Part I of this Article will give an in-depth examination of Mr. Awad's history and his allegations against the U.S. Government. Part II will examine Mr. Awad's difficulties in finding a forum to adjudicate his civil claims. In Part III, this Article will address whether Mr. Awad could bring ethical charges against his assigned government officials for professional misconduct. After Part II and Part III illustrate how prosecutors can mislead terrorism informants without substantial fear of professional or civil repercussions, Part IV will argue that this policy must be changed and will give three possible solutions.

I. ADNAN AWAD'S HISTORY AND HIS DEALINGS WITH THE U.S. GOVERNMENT

¶6Sometime in 1979, a terrorist organization known as the "15 May Faction" or the "Abu-Ibrahim Faction" (hereinafter "May 15 Organization") began operating in Iraq with Iraqi government funding and support.[19] An offshoot of Wadi' Haddad's terror group,[20] the May 15 Organization specialized in the use of suitcase bombs and plastic explosives.[21] The organization had a global reach; it was accused of bombing ships, airliners, crowded hotels, and restaurants in London, Rome, Vienna, Antwerp, and Nairobi. [22]

¶7On August 30, 1982, a well-dressed Palestinian named Adnan Awad walked into the U.S. Embassy in Bern, Switzerland, and announced that he had just left a highly sophisticated suitcase bomb in a Geneva hotel room.[23] Mr. Awad told the authorities that the May 15 Organization had blackmailed his Baghdad-based business and had coerced him into blowing up the Jewish-owned hotel.[24] Once he arrived, though, he immediately decided to abort the mission and asked the United States for help.[25]

¶8The United States promptly notified the Swiss authorities that a bomb, disguised as a suitcase, was hidden under Mr. Awad's bed in his hotel room.[26] With the help of Mr. Awad, the authorities disarmed the bomb.[27] As Mr. Awad began to tell his story to American and Swiss officials, the officials realized that he could be useful to their governments.[28] Just a few weeks earlier, a bomb had exploded on a Pan Am flight bound from Tokyo, Japan to Honolulu, Hawaii—and Mr. Awad held crucial information concerning the alleged attacker, Mohammed Rashid.[29] In fact, Mr. Awad

knew Mr. Rashid personally and could easily describe his *modus operandi*.[30] Furthermore, the construction of the Pan Am bomb was strikingly similar to Mr. Awad's plastic suitcase bomb.[31] With Mr. Awad's help and eventual testimony, the Swiss and U.S. authorities thought they could bring Mr. Rashid and his associates to justice for their alleged involvement in the Pan Am bombing.[32]

¶9Because he could no longer safely return to his home, Mr. Awad was allowed to remain in Switzerland and was issued personal identity documents under the alias Mahmoud Alti Toufaic.[33] These documents allowed Mr. Awad to travel freely outside of Switzerland.[34] In addition to the personal identity documents, the grateful Swiss authorities provided Mr. Awad with a BMW automobile and a $1750 monthly salary.[35]

¶10In August 1984, representatives from the United States approached Mr. Awad and asked for his assistance in the capture and prosecution of various members of the May 15 Organization.[36] Among the representatives was the United States Attorney for the District of Hawaii, Tim Mahon, a Department of Justice ("DOJ") attorney, Zach Brown, and Stan Velto, an FBI agent.[37] The officials sought Mr. Awad's help in apprehending Mr. Rashid, the leader of the May 15 Organization, and his associates.[38]

¶11After Mr. Mahon and Mr. Brown allegedly promised that he would receive a United States passport and citizenship, Mr. Awad came to the United States and enrolled in the United States Marshals Service's Witness Security Program ("witness protection") in December of 1984.[39] Mr. Awad alleges that Mr. Mahon and Mr. Brown also promised him "that his life in the United States would be at least equal to what he enjoyed in Switzerland and, if he became dissatisfied, he could return to Switzerland."[40] As a term of enrollment in witness protection, Mr. Awad signed a Memorandum of Understanding,[41] which outlined the placement of all his identification documents, including his previous passports, with the United States Marshals Service ("USMS") for safekeeping.[42]

¶12In witness protection, Mr. Awad was barely trained in English, and although he was a skilled construction worker, the officials placed him in mechanic's school.[43] Even worse, according to Mr. Awad, was that the government assigned him a female marshal—an "insult[] to Arabic people."[44] Having become dissatisfied with witness protection, he threatened suicide[45] and voluntarily left the program in May of 1986.[46] Shortly thereafter, he testified in front of the grand jury in Washington, D.C. about Mr. Rashid and the May 15 Organization's terrorist activities.[47] On July 14, 1987, the grand jury indicted Mr. Rashid and others for their part in the 1982 Pan Am airliner bombing.[48]

¶13Greek authorities arrested Mr. Rashid in Athens, Greece, in May of 1988.[49] Rather than allowing the United States to extradite him to face charges associated with the bombing of the Pan Am flight, the Greek authorities decided to prosecute him in Greece under the terms of the Montreal Convention.[50] United States government officials then asked Mr. Awad to testify at Mr. Rashid's trial in Greece.[51] Because of financial difficulties, and after U.S. Government persuasion, he agreed to reenter witness

protection and provide the requisite testimony against Mr. Rashid.[52] Upon reentry into witness protection, Mr. Awad received various types of financial assistance from the U.S. Government, including money for the payment of a house mortgage.[53]

¶14Approximately two years after reentering witness protection, Greek officials deposed Mr. Awad in Washington, D.C. concerning Mr. Rashid's trial.[54] A few months later, in February of 1991, Mr. Awad again voluntarily left witness protection due to his dissatisfaction with the program.[55] After leaving, Mr. Awad provided "vital" testimony in Mr. Rashid's trial in June and November of 1991, leading to Mr. Rashid's conviction and a sentence of eighteen years in prison.[56] In the mandatory *de novo* retrial by a Greek appellate court two years later, Mr. Awad again furnished crucial testimony that led to another conviction and a sentence of fifteen years imprisonment.[57] In December of 1996, Greek authorities released Mr. Rashid from prison, and in June of 1998 the FBI arrested him for the same offense.[58] After being arrested, Mr. Rashid moved to dismiss six of the nine charges against him by claiming that his prior prosecution in Greece violated the Double Jeopardy Clause.[59] Both the District Court and the United States Court of Appeals for the District of Columbia rejected Mr. Rashid's motion.[60] Mr. Rashid is currently in U.S. federal custody awaiting trial.[61]

¶15Despite Mr. Awad's assistance in jailing Mr. Rashid, the U.S. Government still had not fulfilled its alleged promises. In December 1993, Mr. Awad's patience finally ran out. He brought an action against the United States in the United States District Court for the Northern District of Mississippi, seeking damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402(b), 2401 (b), and 2671-2680, for false imprisonment, conspiracy, intentional infliction of emotional distress, bad faith breach of contract, invasion of privacy, negligence, trespass to chattels and conversion.[62] Mr. Awad based these claims on allegations that the U.S. Government did not return his documents or provide him with a passport and citizenship, did not give him the same treatment as he received in Switzerland, and did not give him his total promised reward. The District Court held a bench trial from February 26, 2001 through March 7, 2001.[63] At the conclusion of the trial, the District Court found that all of Mr. Awad's claims arose out of one or both of the two alleged contracts with the United States.[64] Because it held that exclusive jurisdiction over Mr. Awad's claims lay in the Court of Federal Claims (hereinafter "CFC"),[65] it transferred the case pursuant to 28 U.S.C. § 1631.[66]

¶16Worried that the CFC would dismiss his case for lack of jurisdiction, Mr. Awad appealed the order of transfer, but the United States Court of Appeals for the Federal Circuit affirmed.[67] In its decision, the Court of Appeals relied on the well-established principle that "where a tort claim stems from a breach of contract, the cause of action is ultimately one arising in contract, and thus is properly within the exclusive jurisdiction of the Court of Federal Claims to the extent that damages exceed $10,000."[68] The Court of Appeals agreed with the District Court that all of Mr. Awad's claims arose in contract.[69]

¶17On September 4, 2003, Mr. Awad filed an amended complaint in the CFC pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) seeking $5,000,000.00 in compensatory damages, plus all costs, attorney fees and prejudgment interest.[70] Specifically, Mr. Awad's Amended Complaint asserts that the government breached two alleged contracts: (1) an oral contract in which the government allegedly promised Mr. Awad a United States passport, citizenship, and a "life in the United States [that] would be at least equal to what he enjoyed in Switzerland," and (2) a written Witness Certification Statement ("WCS") that promised the return of his documents if Mr. Awad decided to revert to his true identity.[71]

¶18In his complaint to the CFC, Mr. Awad stated:

> While in [witness protection, I] was not assimilated into the American culture, [I] was provided cursory instruction in the English language, and was unable to find suitable employment as a result. While the USMS provided financial assistance to [me], this assistance was at a subsistence level and did not compare with what the Swiss authorities had provided . . . [I] also had basic freedoms taken away from [me] such as the freedom to associate with whomever [I] chose and the right to travel freely, and [I] was often under surveillance by the USMS. [I] was also forced to move at the whim of the USMS.[72]

Mr. Awad further asserts that various government officials repeatedly lied to him about receiving a passport and citizenship, the return of his personal identity documents, and the receipt of a four million dollar reward.[73] Mr. Awad's most troubling allegation is that he was trapped in the United States for sixteen years without a passport, and thus he was unable to visit his fatally ill father before he died.[74] After repeated attempts to obtain citizenship, Mr. Awad was finally sworn in as an American citizen on June 8, 2000, and shortly thereafter received a passport.[75] "I came to America because I love this country," he told a *Time Magazine* reporter in 1994. "They [U.S. Government officials] took my freedom and put my life in danger. Everything put in front of me was like a mirage."[76]

¶19Even assuming the veracity of Mr. Awad's allegations, under our current jurisprudence Mr. Awad has no authority to challenge the government's action. Mr. Awad tried to bring a civil action, but it was dismissed for lack of jurisdiction and transferred to the CFC.[77] Although the CFC has yet to rule, Mr. Awad's case will also probably be dismissed from the CFC for lack of jurisdiction—leaving Mr. Awad without a forum that can adjudicate his claims.[78]

II. A LACK OF CIVIL REMEDIES: MR. AWAD'S CFC CLAIMS

¶20Mr. Awad's last hurrah is his action against the United States in the CFC. Because prosecutors cannot be sued for monetary relief in their personal capacities, Mr. Awad could only bring his claims against the United States as an entity.[79] Further, since the District Court found that Mr. Awad's claims against the United States were

based solely on contracts, the CFC is the last and only forum that could possibly adjudicate his claims.[80] Mr. Awad's claims were filed in the CFC under the Tucker Act, which grants the CFC sole jurisdiction over all express or implied contract claims against the United States.[81]

¶21Unfortunately for Mr. Awad, the CFC is a court of limited jurisdiction.[82] As with all federal courts, the CFC's jurisdiction to adjudicate a claim depends upon, and is delineated by, the extent to which the United States has waived its sovereign immunity.[83] The United States' waiver of sovereign immunity must be unequivocally expressed, and cannot be implied.[84] Thus, any grant of jurisdiction to the CFC must be strictly construed.[85] As the CFC has stated, "[a]mbiguities regarding the existence of subject matter jurisdiction must be resolved against the assumption of jurisdiction.'"[86] Moreover, "a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists."[87]

¶22Although the Tucker Act is an affirmative waiver of sovereign immunity, it is solely jurisdictional in nature and does not create any substantive right of enforcement against the United States for money damages.[88] Pursuant to section 1491 of the Tucker Act, the CFC has jurisdiction to "render judgment upon any claim against the United States founded . . . upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States."[89]

¶23Section 1491 is not a limitless waiver of immunity for breach of contract claims. Indeed, it is well-settled that the waiver of sovereign immunity for claims sounding in contract is limited to contracts executed by the United States in its proprietary capacity. In other words, the Tucker Act does not waive U.S. sovereign immunity for claims based on contracts that private parties could not make. As the CFC has repeatedly opined:

> The contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of the minds. The Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves.[90]

The only exception to the general rule that the CFC's jurisdiction in the contract area is limited to those cases in which the government acts in its proprietary capacity—is that it *may* still possess jurisdiction if it finds "specific authority . . . to make the agreement obligating the United States to pay money, *and* [that the agreement] spell[s] out how in such a case the liability of the United States is to be determined."[91]

A. *The Nature of Mr. Awad's Contract Claims*

¶24In accepting as true all factual allegations made in a similar complaint, both the United States Court of Appeals for the Federal Circuit and the United States District Court for the Northern District of Mississippi found that all of Mr. Awad's claims arose from one or both of the alleged contracts with the government.[92] Assuming, *arguendo*, that the parties actually entered into the alleged contracts, an examination of the nature of the contracts makes it obvious that the contracts were not of a proprietary nature. The government's purpose in contracting with Mr. Awad was clear: to arrest, detain, and imprison Mr. Rashid, a notorious terrorist.[93] The procedures surrounding the arrest and confinement of a dangerous terrorist are purely governmental functions with no private analogue.[94] Consequently, if the government did contract with Mr. Awad, the government was acting in its sovereign capacity, as it would if it contracted with any terrorism informants.[95]

¶25The leading contract case defining the jurisdictional scope of the Tucker Act is *Kania v. United States*, 650 F.2d 264 (1981). In that oft-cited case,[96] the plaintiff, Eugene Kania, sought damages for various costs and expenses associated with his successful motion to dismiss an indictment against him.[97] The focus of the dispute was an oral contract between Mr. Kania and an Assistant United States Attorney ("AUSA") to provide testimony in exchange for immunity.[98] After he had provided the testimony, the government indicted Mr. Kania; however, the United States District Court for the Southern District of New York dismissed the indictment.[99] The District Court found that: (1) the terms of the agreement included a promise that Mr. Kania would not be prosecuted if he testified truthfully; and (2) there was no evidence that Mr. Kania had violated this agreement.[100] Mr. Kania then brought an action in the United States Court of Claims under the Tucker Act seeking damages.[101] The Court of Claims found that it lacked jurisdiction over Mr. Kania's claims, because the claims were not within the confines of the Tucker Act's jurisdictional grant of power.[102] Specifically, the Court found that the oral contract between the AUSA and Mr. Kania had no private analogue, and that accordingly, the contract was entered into by the United States in its sovereign, as opposed to its proprietary, capacity.[103]

¶26The holding in *Kania* applies directly to Mr. Awad's case. In his case, the government was not contracting to "purchase . . . goods, lands, and services . . . such as private parties, individuals or corporations also engage in among themselves."[104] Instead, the government was offering protection and documentation to a former terrorist in exchange for testimony. Even the critical consideration offered by the government—a United States passport and citizenship—was of a sovereign nature and not available from a private party.

¶27In trying to distinguish the holding in Kania from his own case, Mr. Awad could argue that he was in a better position to contract with the government because he was not an inmate, suspect, or defendant in a criminal investigation or proceeding. Unfortunately for Mr. Awad, this argument will fail because, while the purpose of the government's action is highly relevant, Mr. Awad's criminal status has no bearing on the

CFC's jurisdiction according to the CFC's decisions in *Commonwealth of Kentucky* and *Grundy*.[105]

¶28In *Grundy*, the plaintiffs had agreed with a deputy U.S. Marshal to allow the U.S. DOJ to use their property to house and conceal prospective witnesses from organized crime figures.[106] The plaintiffs were not under investigation for any criminal activity.[107] The oral agreement provided that:

> (1) [the government] . . . would not place in "the safehouse" any witnesses who were residents of Rhode Island; and (2) that plaintiffs would come to no harm by reason of their cooperation with the government, the two named marshals and the Attorney General would protect the plaintiffs should they be exposed to any danger, and that the government would indemnify them from any losses they might sustain because of their cooperation.[108]

The plaintiffs alleged a breach of this agreement under the Tucker Act and sought monetary damages.[109] The court dismissed the complaint because the government entered into the contracts in its sovereign capacity.[110]

¶29In *Commonwealth of Kentucky*, the state sued the United States for breach of a Memorandum of Understanding ("MOU") agreement pursuant to which the Army Corps of Engineers was to perform maintenance and repairs of certain locks and dams pending divestiture.[111] The court dismissed the complaint because the government undertook the MOU in its sovereign capacity.[112] The court stated: "Even though the government is in privity of contract with a claimant, no liability arises for government acts taken for the benefit of the general public."[113]

¶30Both *Grundy* and *Commonwealth of Kentucky* illustrate two important points: the government's purpose is highly relevant, and Mr. Awad's criminal status when he entered into the alleged contracts is irrelevant. In Mr. Awad's case, the government's sole purpose was to benefit the general public by helping to remove notorious terrorists from society.[114] To achieve this goal the government allegedly contracted with Mr. Awad for testimony, a contract that simply would not occur between private parties. Therefore, the CFC will likely find that it lacks jurisdiction to consider Mr. Awad's claims based upon the alleged contracts.[115]

B. *The Specificity Exceptions*

¶31As has been shown, the United States probably entered into both of the alleged contracts upon which Mr. Awad's claims are premised in its sovereign capacity, as would be the case if the government contracted with any other terrorism informants. Despite this fact, the CFC *may* still possess jurisdiction if it finds "specific authority . . . to make the agreement obligating the United States to pay money, *and* [that the agreement] spell[s] out how in such a case the liability of the United States is to be determined."[116] It is axiomatic that Tucker Act jurisdiction does not extend to actions

for recovery of damages based upon unauthorized acts of government officials.[117] For contracts among private parties, "apparent authority" is sufficient, but when contracting with the government there must be specific authority, which places a significant burden on the party negotiating an agreement with a government representative.[118] In Mr. Awad's case the alleged agreements were contracted for by individuals without specific authority and neither of the alleged agreements "spell[ed] out how . . . the liability of the United States" was to be determined. Thus, Mr. Awad's claims probably do not meet this exception. The next two subsections will examine each of the two alleged contracts individually and show specifically why they do not meet the exception.

1. The Oral Contract

¶32First, it is apparent that the government officials who allegedly promised Mr. Awad that he would become a U.S. citizen lacked the authority to make such a promise, because only the Attorney General has authority "to naturalize persons as citizens of the United States."[119] In any case, Mr. Awad has not alleged that the Attorney General delegated this authority to Mr. Mahon or Mr. Brown. Further, Mr. Awad did not meet the residency requirements of 8 U.S.C.A. § 1427(a), and therefore the Attorney General himself did not have the power to grant him citizenship in 1984.[120] To meet the residency requirements, Mr. Awad would have had to live in the United States continuously for the previous five years (1979-1984) and be a person of good moral character.[121]

¶33Second, even if Mr. Awad could have the residency requirements waived, and the Attorney General had delegated his authority to Mr. Mahon and Mr. Brown, thereby providing them specific authority to enter into the agreement, the oral contract did not offer specifics on the determination of liability. Mr. Awad's Amended Complaint does not allege that the terms of monetary liability in case of breach were ever discussed among the parties.[122] In fact, Mr. Mahon and Mr. Brown allegedly told Mr. Awad that if he became dissatisfied, he could return to Switzerland, not that he would receive pecuniary damages.[123] For these reasons, the alleged oral contract does not fit the *Kania* exception.[124]

2. The Witness Certification Statement ("WCS")

¶34Under the circumstances of the agreement, the inspector who signed the WCS probably did not have the specific authority to obligate the government to pay money to Mr. Awad.[125] Although the inspector did have the authority to sign the WCS and retain Mr. Awad's documents, the inspector did not have the authority to pay Mr. Awad for these documents or to set monetary liability in case of breach without permission of the Director or the U.S. Marshal Service.[126] Importantly, Mr. Awad did not allege in his Amended Complaint that the Director of the U.S. Marshal Service delegated this authority to the inspector.

¶35Even assuming specific authority, the WCS does not in any way obligate the United States to pay money, and it does not discuss how liability for breach is to be

determined.[127] The agreement only includes provisions regarding the retention of Mr. Awad's documents. Thus, the WCS probably does not satisfy the *Kania* specificity exception. Accordingly, because both contracts do not meet the *Kania* exception, the CFC probably lacks jurisdiction over Mr. Awad's claims.

III. POSSIBLE PROFESSIONAL SANCTIONS: CURRENT ETHICAL RULES ON PROSECUTORIAL CONDUCT

¶36Over the past 150 years, ethical rules governing the practice of law have changed dramatically.[128] Once nonbinding "aspirational goals for the legal profession," many ethical rules now have the same authority as statutory law.[129] "Whereas violations of early ethical canons at most led to 'informal sanctions and peer pressure,' breaching modern ethical rules can result in formal sanctions, exclusion of evidence, or, if the perpetrator is a prosecutor, dismissal of criminal charges."[130]

¶37Hidden within the 920-page Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999[131] was a small provision known as the McDade Amendment[132] that transformed the ethical regulation of federal prosecutors.[133] Prior to the Amendment, federal prosecutors were required to adhere only to the ethical rules of the jurisdiction in which they were licensed.[134] However, the McDade Amendment, titled "Ethical Standards for Attorneys for the Government," states that "an attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[135] Thus, this broadly worded statute seemingly mandates that DOJ attorneys must follow the ethical rules established in any and all of the States in which they practice.[136]

A. *Applicable Professional Rules*

¶38Even if read broadly, the penumbra of state ethical rules that now applies to DOJ attorneys does not directly supervise a prosecutor's discretionary decisions.[137] For the most part, a prosecutor's discretionary decisions are unmonitored[138] "The only real voice in the federal system that limits prosecutorial discretion can be found in the guidelines of the Department of Justice, internal mechanisms which are legally unenforceable by defense counsel."[139]

¶39A review of the Model Rules of Professional Conduct ("Model Rules") and the American Bar Association's ("ABA") Model Code of Professional Responsibility ("Model Code") reveals that, if Mr. Awad's allegations are true, it appears that Mr. Mahon and Mr. Brown could have violated Rules 4.1(a) and 8.4(c) of the Model Rules and DR 1-102(4) of the Model Code.[140]

1. Model Rule 4.1(a)

¶40Model Rule 4.1(a) states that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."[141] Recently, the United States Court of Appeals for the Third Circuit issued an opinion on Pennsylvania Rule 4.1(a), which is identical to Model Rule 4.1(a).[142]

¶41In *United States v. Whittaker*, the Third Circuit overturned the United States District Court for the Eastern District of Pennsylvania's decision that found that an Assistant United States Attorney ("AUSA") had violated Pennsylvania Rule 4.1(a).[143] The alleged unethical conduct involved a signed letter from the DOJ to car theft victims where some of the victims were also being investigated for their involvement in the thefts.[144]

> [A prosecutor] signed a letter addressed to approximately 300 people who owned cars that were dismantled in [] chop shops [that were under investigation] to advise them of the progress of the investigation and to invite them to file victim impact statements or to make inquiry with respect to the case with certain specified Government personnel. [The prosecutor] prepared the letter, but he did not send it personally. Rather, he provided a paralegal in his office with a list of persons whose vehicles had been dismantled. This list included persons the Government suspected had participated in insurance give-ups. [The prosecutor], however, instructed the paralegal not to send the letter to these suspects. Unfortunately, the paralegal erroneously sent the letter to everyone on the list, including Whittaker.[145]

After being indicted, Whittaker alleged, among other claims, that the letter was prejudicial and that it was a misrepresentation.[146] After finding a violation, the district court sanctioned the AUSA by disqualifying him from prosecution of the case.[147]

¶42In its decision overturning the district court, the Court of Appeals stated: "Of course the letter should not have been sent, but this case involved a mistake, not a lie, and the district court certainly should have treated it that way. In this regard, we point out that it is not unusual for parties in a judicial proceeding to correct mistakes."[148] Thus, the Court of Appeals found it "perfectly clear" that the district court should not have disqualified the AUSA.[149]

¶43Applying this decision to Mr. Awad's case illustrates just how difficult it can be for an informant to get a government attorney sanctioned for professional misconduct. Although the language in the Third Circuit's opinion seems to intimate that if a government attorney lies to a third person the attorney can be sanctioned, the penalty given (disqualification from prosecution) would not deter prosecutors from lying to terrorism informants.

2. Model Rule 8.4/Model Code DR 1-102(A)

¶44Even more textually persuasive than Model Rule 4.1(a), Model Rule 8.4(c) states, "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[150] Similarly, Model Code DR 1-102(A) states that "[a] lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[151] Because the language of these two provisions is so similar, this Article will assume that they are interchangeable.

¶45A prima-facie violation of Rule 8.4(c) can be made out where a "misrepresentation is knowingly made, or where it is made with reckless ignorance of the truth or falsity thereof . . . [N]o actual knowledge or intent to deceive . . . is necessary."[152] Additionally, half-truths or silence as to material facts has been found to violate Rule 8.4(c),[153] as has the failure to correct a misrepresentation.[154]

¶46Recently, the Legal Ethics Committee of the District of Columbia Bar issued Opinion 323 finding that attorneys who are employed by a national intelligence agency do not violate Rule 8.4(c) if they engage in fraud, deceit, or misrepresentation in the course of their non-representational official duties.[155] The Committee stated, "Such employees may, on occasion, be required to act deceitfully in the conduct of their official duties on behalf of the United States, as authorized by law."[156] According to the Committee, the Opinion is limited only to situations where the attorney's deceit is authorized.[157]

¶47Although there are a handful of cases involving government or state attorneys misrepresenting the facts, or outright lying, all of the cases deal with abuses of court procedures.[158] There do not seem to be any cases that deal directly with a federal prosecutor who has misled a terrorism informant. However, even without specific case law on point, it seems that if Mr. Awad's allegations are true, Mr. Mahon and Mr. Brown could be subject to court sanction only if their acts were unauthorized. Since Mr. Mahon and Mr. Brown are licensed attorneys, they should have known that they did not have the authority to grant Mr. Awad citizenship and a passport; thus, this was a "misrepresentation . . . knowingly made."[159] Yet, if they had the authority to make this misrepresentation from a superior, Opinion 323 seems to allow their conduct. On the other hand, if they acted without authority, Mr. Mahon and Mr. Brown do seem to have facially violated Model Rule 8.4(c), but it is too difficult to surmise the extent of any possible sanctions that they could receive.[160]

B. *Enforcement*

¶48The Office of Professional Responsibility ("OPR") within the DOJ is slated as the internal monitor of ethical violations committed by federal prosecutors,[161] but in recent years it has been criticized for failing to hold prosecutors "publicly accountable for misdeeds."[162] The OPR typically investigates allegations of "abuse of prosecutorial or investigative authority," "[m]isrepresentation to the court or opposing counsel," "[u]nauthorized release of information (including grand jury information)," "[i]mproper oral or written remarks to the court or grand jury," and "[c]onflicts of interest."[163] Rarely, if ever, does the OPR investigate a claim of deceit or misrepresentation, and

therefore they are unlikely to investigate Mr. Mahon, Mr. Brown, or any others engaged in similar activity.[164]

¶49At the same time, professional rules that could be broadly interpreted, such as Rules 4.1(a) and 8.4(c) and DR 1-102(4), generally do not play as much of a role in regulating federal prosecutors.[165] This is the case for at least three reasons: (1) the ethical rules regulate prosecutors with a "fairly light touch";[166] (2) disciplinary authorities are not eager to bring actions against prosecutors except where the conduct is unambiguously wrong;[167] and (3) courts are often liberal when interpreting professional rules with regard to prosecutors.[168] Accordingly, even if Mr. Mahon and Mr. Brown did violate an ethical rule in Mr. Awad's case, they are unlikely to ever face professional sanctions. Further, any professional sanctions they could receive (even disbarment) would not repay Mr. Awad for his alleged suffering, or lead to enforcement of his alleged contracts. Enforceable professional sanctions would, however, help to curb prosecutorial misconduct in the future and thereby minimize the number of unfulfilled promises to informants.

IV. HELPING TO PROTECT TERRORISM INFORMANTS: THREE POSSIBLE SOLUTIONS

¶50It is highly unlikely that the CFC will deviate from the settled legal authority and grant Mr. Awad jurisdiction. Even if it did, its decision will not be binding on other CFC cases and thus will not help protect future informants from governmental misconduct.[169] Moreover, if the CFC granted Mr. Awad jurisdiction and the case were appealed, the Court of Appeals for the Federal Circuit would be in a tough situation. If the Federal Circuit were to find that the CFC had jurisdiction, it could open the door to litigation over other actions that are rightly protected by sovereign immunity, such as plea bargains and other government contracts undertaken for the benefit of the general public. Or, if the Federal Circuit were to deny jurisdiction, it would be sending the message to terrorism informants that contracts made with government officials are not always enforceable. Fortunately, there are better non-judicial solutions.

¶51This Article poses three possible solutions to this problem. First, the DOJ could amend its internal guidelines so as to explicitly prohibit this type of conduct. Second, individual states could pass ethical rules prohibiting this type of conduct. Finally, Congress could pass a bill or amendment permitting terrorism informants like Mr. Awad to bring civil suits under the Tucker Act and pass legislation that clearly states that it is prosecutorial misconduct for government attorneys or their agents to make false or misleading statements to terrorism informants. An analysis of all three possibilities reveals that this is a problem Congress must explicitly solve.

A. *An Amendment to the DOJ Attorney's Manual*

¶52The United States Attorney's Manual ("Manual") is prepared under the Attorney General's supervision[170] and periodically revised by the Executive Office for United States Attorneys.[171] It is a loose-leaf text designed as a quick reference for DOJ attorneys.[172] The Manual does not create any rights enforceable at law in a civil

or criminal proceeding.[173] Under federal regulation, the Manual is public information[174] and is available at all depository libraries, law school libraries, the Library of Congress, and on the DOJ's website.[175]

¶53The Manual is divided into nine titles: General,[176] Appeals,[177] Executive Office for United States Attorneys,[178] Civil,[179] Environment and Natural Resources,[180] Tax,[181] Antitrust,[182] Civil Rights,[183] and Criminal.[184] Of these nine titles, the Criminal title contains regulations applicable to federal attorneys who deal with terrorism informants.[185] For example, subsection 9-13.500 of the Manual mandates that the Criminal Division's Office of International Affairs be consulted before contact is made with any foreign or State Department official in matters regarding the obtaining of evidence in a criminal investigation or prosecution.[186] Further, subsection 9-21.310 states that investigative agents (e.g. FBI agents) and DOJ trial attorneys are "not authorized to make representations to witnesses regarding funding, protection, or other Witness Security Program services, including admission into the Program."[187] However, this provision would allow some DOJ attorneys, like Mr. Mahon (a United States Attorney), to make representations about witness protection to terrorism informants.[188] No other sections of the Manual are relevant to the veracity of DOJ attorneys' representations to terrorism informants.[189]

¶54Although the Manual can help curb prosecutorial conduct, it is not enforceable law.[190] Thus, to create formidable repercussions for prosecutorial misconduct in this area, the states or Congress must regulate by statute. Even so, amending the Manual's language to explicitly disallow misrepresentations to terrorism informants could help protect these important allies. This Article recommends amending sub-section 9-21.310, already titled "Representations and Promises," to read (added language is bracketed and bolded):

> Investigative agents and government trial attorneys are not authorized to make representations to witnesses regarding funding, protection, or other Witness Security Programs services, including admission into the Program. Representations or agreements, including those contained in plea agreements, concerning the Program are not authorized and will not be honored without specific authorization from OEO[191]. **[No government attorney may knowingly or recklessly make false or misleading promises or representations to witnesses or informants involved in the prosecution or investigation of international terrorist activities.]**[192]

While this simple provision may not legally ensure the protection of terrorism informants' rights, it could help prosecutors better understand their role when dealing with informants and curtail prosecutorial misconduct.

B. *State Action*

¶55Although it may seem counter-intuitive for states to regulate federal prosecutorial activity abroad, the McDade Amendment now grants them this power.[193] The obvious problem with state regulation is that one state cannot regulate all the activities of all DOJ attorneys.[194] Moreover, many representations made to terrorism informants happen abroad, where the government attorney would be subject only to his bar membership state's ethical rules.[195] Even with these shortcomings, though, if a majority of states had a rule outlawing misrepresentations to terrorism informants, the informants would be much more likely to trust governmental representations. Nonetheless, there is superior way to alleviate this problem—Congressional action.

C. *Congressional Action*

¶56The best approach, and the one advocated by this Article, is for Congress to: (1) narrowly waive sovereign immunity by amending the Tucker Act; and (2) attach a rider to a bill explicitly outlawing misrepresentations to terrorism informants. It is important for the waiver of sovereign immunity to be narrow, waiving sovereign immunity only in cases involving government contracts with, or promises to, informants used in the prosecution or investigation of terrorist activities. Although individually neither of these two proposed Congressional actions would guarantee the elimination of misconduct, together these actions will. By amending the Tucker Act to allow for suits against the government where there is an alleged contract between a government attorney (or agent) and a terrorism informant, the informant will be judicially protected. However, since government attorneys are not generally liable individually under the Tucker Act,[196] amending it in this way will not necessarily curb prosecutorial misconduct. To adequately protect terrorism informants and defectors, Congress must also outlaw this type of prosecutorial misconduct by criminalizing it or mandating strict professional sanctions.

¶57Amending the Tucker Act would not be difficult. Congress could simply insert the following language into 28 U.S.C. § 1491 (added language is bracketed and bolded):

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, [(1)] an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States**[; and (2) an express or implied contract with the United States includes any contract made between a United States government attorney or their authorized agent and a witness or informant involved in the prosecution or investigation of international terrorist activity]**. [197]

Congress could then define the scope of the terms "United States government attorney" and "witness or informant" in a later section of the Act. This clear and explicit language would allow only informants like Mr. Awad access to civil remedies, while not adversely affecting the other appropriate sovereign acts of the government. Congress would make a bold statement by passing these provisions—that future terrorism informants could trust government officials. At the same time, the impact of this legislation would neither heavily burden government officials nor expose the government to heavy litigation because the proposed amendments would only be applicable to a very small number of people.

CONCLUSION

¶58This article poses an important inquiry. If government officials can mislead terrorism informants without ramification, then informants will not trust the U.S. Government and the United States could lose its most important weapon in the war on terrorism. "Only one thing," according to Jim Pravitt, the head of the CIA's Directorate of Operations, "would have given us sufficient foreknowledge to have prevented the [September 11th attacks]—a well-placed insider providing critical intelligence on specific targets and times of attack."[198] Without the help of terrorism informants, the United States is powerless to investigate and thwart terrorist attacks.

¶59The U.S. must promote a policy that protects informants like Adnan Awad. Without these protections, would-be informants will not take the grave risks associated with abandoning their allies and homeland. To win the War on Terrorism, the United States must ardently protect its greatest weapon—terrorism informants.

[1] J.D., Vermont Law School, 2004 (*Cum Laude*); B.S. (Economics/Mathematics), Centre College, 2001; Note Editor, *Vermont Law Review*, 2003-04; Member, *Moot Court Advisory Board*, 2003-04. I wrote this article after serving as a full-time unpaid intern at the Department of Justice. All facts contained in this article are public information and were obtained from sources outside of the Department of Justice. I would like to clarify that the thoughts, opinions, and legal conclusions expressed herein are entirely my own and are not to be imputed to the Department of Justice or any member thereof.

[2] Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 449 (2002). The drafters of the Model Code suggest that prosecutors and their agents must "serve justice." See also Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 633-34 (1999); *see also* Berger v. United States, 295 U.S. 78, 88 (1935). When the drafters make this suggestion, "they express an intuitive sense that prosecutors are more likely than financially motivated lawyers to take the directive to heart." Green & Zacharias, at 449.

[3] Green & Zacharias, *supra* note 2, at 450.

[4] *See id.* at 449 (arguing that this notion comes from two sources: "First, as government officials, we hope and expect that prosecutors will serve the government's interests, which in the law enforcement context include 'justice.' Second, we know that lawyers who choose careers in law enforcement rather than the more lucrative private sector often make that choice because of a desire to serve the public."); *see also* Bennet L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 310 (2001) (arguing that prosecutors have a sense of obligation to discover truth).

[5] Douglas Pasternak, *Squeezing Them, Leaving Them; Some Defectors Say Washington Isn't Always Good About Keeping Its Word*, U.S. NEWS & WORLD REPORT, July 8, 2002, at 1.

[6] *Id*. at 1-2.

[7] *Id*. at 1.

[8] *See infra* Part II.

[9] In the five years prior to the September 11th attacks, the U.S. government spent more than fifty billion dollars to protect and prevent terrorism. Mark D. Villaverde, *Structuring The Prosecutor's Duty To Search The Intelligence Community For Brady Material*, 88 CORNELL L. REV. 1471, 1527 (2003); *see also* Robert Dreyfuss, *Dim Intelligence: What Did We Get For All That Money?*, AM. PROSPECT, Oct. 22, 2001, at 10 ("[T]he United States spent more than 1.3 billion seeking to prevent and prepare for terrorist use of nuclear, biological, or chemical weapons" in 2001.).

[10] Villaverde, *supra* note 9, at 1527.

[11] The Attorney General, who may appoint officials "to detect and prosecute crimes against the United States," has delegated this authority primarily to the FBI. 28 U.S.C. § 533 (2000); 28 C.F.R. §0.85(1) (2003).

[12] Villaverde, *supra* note 9, at 1519.

[13] *Id*. at 1527-28.

[14] *See* Pasternak, *supra* note 5, at 1 (quoting a senior CIA official saying that some of the information informants and defectors provide "is pure gold").

[15] *See*, *e.g*., *Unreliable Sources? Promises of Rewards Sometimes Fail to Materialize*, 4 BOABAB PRESS 10 (1994) *available at* http://www.africa2000.com/BNDX/BAO410.htm (last visited April 27, 2004) ("[Awad] is now living . . . in the United States—with . . . his . . . promises unfulfilled"). The *Boabab Press* is an international news service that was started in 1991 by a group of professional journalists based in Washington, D.C. The news service encompasses parts

of Africa, Latin America, and the Middle East. *See also* Pasternak, *supra* note 5, at 2 ("Adnan Awad, the key witness against a Palestinian terrorist awaiting trial for the 1982 bombing of a Pan Am flight from Tokyo to Honolulu, says he is so disgusted with his treatment that he has seriously considered not testifying against the suspect, Mohammed Rashid."); Jill Smolowe, *A Hero's Unwelcome*, TIME, May 9, 1994 at 1 ("While [Awad] had been hailed by a Senate panel as 'a hero for the American people,' Washington had taken seven years to issue him a green card—and still would not honor his request for citizenship and a passport.")

[16] Pasternak, *supra* note 5, at 1-5.

[17] *Id*. at 1.

[18] Pasternak, *supra* note 5, at 4.

[19] Yoram Schweitzer, *The Arrest of Mohammed Rashid – Another Point For The Americans*, *available at* http://www.ict.org.il/articles/Rashid3.htm (last visited April 27, 2004).

[20] Wadi' Haddad was one of the leaders of the Popular Front for the Liberation of Palestine, but split from this organization in 1976 to form a terrorist group that became the foremost Palestinian terrorist organization. He died from cancer in 1978. *Id*.

[21] *Id*.

[22] Jay Peterzell, *The Life and Crimes of a Middle East Terrorist*, TIME, Jan. 14, 1991, at 2.

[23] Plaintiff's Amended Complaint ¶¶ 4, 5, Awad v. United States, No. 03-1538C (Fed. Cir. filed September 4, 2003) [hereinafter "Pl.'s Compl."]; Adnan Awad v. U.S., No. 1:93CV376-D-D, 2001 WL 741638, at *1 (N.D. Miss. April 27, 2001); Peterzell, *supra* note 22, at 2-3.

[24] Smolowe, *supra* note 15, at 2.

[25] *Id*.

[26] Pl.'s Compl. ¶ 5; *Awad*, 2001 WL 741638, at *1; Peterzell, *supra* note 22, at 3.

[27] *Awad*, 2001 WL 741638, at *1.

[28] Peterzell, *supra* note 22, at 3.

[29] *Id*. at 4.

[30] Smolowe, *supra* note 15, at 2.

[31] *Id*. at 2; Smolowe, *supra* note 15, at 2.

[32] Peterzell, *supra* note 22, at 2. Both bombs had easily passed through security checks designed to detect metal weapons and stop hijackers rather than bombings. Id.

[33] *Awad*, 2001 WL 741638, at *1; Pl's Compl. ¶ 6.

[34] *Id*.; Pl.'s Compl. ¶ 6.

[35] Pl.'s Compl. ¶ 6; *Unreliable Sources? Promises of Rewards Sometimes Fail to Materialize*, 4 BAOBAB PRESS 10 (1994) *available at* http://www.africa2000.com/BNDX/BAO410.htm (last visited Dec. 13, 2003).

[36] Pl. Compl. ¶ 7; *Awad*, 2001 WL 741638, at *1.

[37] Pl. Compl. ¶ 7; *Awad*, 2001 WL 741638, at *1. "Tim Mahon," "Zach Brown," and "Stan Velto" are not the true names of the government officials. Although their names are public information, their true names are not included in this article in order to protect their identities

[38] *Awad*, 2001 WL 741638, at *1.

[39] Pl.'s Compl. ¶ 7, 8; *Awad*, 2001 WL 741638, at *1.

[40] Pl.'s Compl. ¶ 7.

[41] The terms of the Memorandum of Understanding are, in relevant part:

> The witness acknowledges that it is necessary to place in safekeeping with the Marshals Service all identification documents (driver's license, credit cards, etc.) that reveal his/her true identity for reasons of security. The Marshals Service agrees to retain these documents indefinitely, and will return the documents to the witness should he/she desire to revert to his/her true identity.

Pl. Compl. ¶ 10.

[42] *Id*. ¶¶ 9, 10; *Awad*, 2001 WL 741638, at *1.

[43] Pasternak, *supra* note 5, at 4.

[44] *Id*.

[45] *Unreliable Sources?*, *supra* note 15, at 1.

[46] Pl. Compl. ¶ 14; *Awad*, 2001 WL 741638, at *1.

[47] Pl. Compl. ¶ 18; *Awad*, 2001 WL 741638, at *1.

[48] Pl. Compl. ¶18.

[49] *Id*. ¶ 22.

[50] Greece "rejected U.S. demands for Rashed's extradition, yet w[ere] subject to the requirement of Article 7 of the Montreal Convention to prosecute Rashed itself" for failing to extradite him. United States v. Rashed, A/K/A Rashid Mohammed, 234 F.3d 1280, 1281 (D.C. Cir. 2000). The Montreal Convention of 1971 declares hijacking to be an international offense and mandates the state where a plane is hijacked to either extradite or assert jurisdiction over the hijacker and thereafter prosecute him. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177, reprinted in 10 I.L.M. 1151.

[51] *Awad*, 2001 WL 741638, at *2.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*. "Due in no small part to Awad's testimony, which this court finds was of vital importance to this nation, Rashid was convicted by the Greek court." Id.

[57] *Id*.

[58] *Id*.

[59] United States v. Rashed, 234 F.3d 1280, 1280-81 (D.C. Cir. 2000).

[60] *Id*. at 1281; United States v. Rashed, 83 F. Supp. 2d 96 (D.D.C. 1999). Mr. Rashid's only possible claim under Double Jeopardy was an exception that applies if one sovereign's prosecution is a "sham." *Rashed*, 234 F.3d at 1281. According to the Court, "In no reasonable sense of the word was Greece's prosecution of Rashed a sham." *Id*.

[61] *Awad*, 2001 WL 741638, at *2.

[62] *Id*. at *1.

[63] *Id*.

[64] *Id*. at *8.

[65] For an explanation of the types of cases heard before the CFC and a brief history of the court, see THE HISTORY OF THE UNITED STATES COURT OF FEDERAL CLAIMS, at http://www.cofc.uscourts.gov/USCFChistory.htm.

[66] *Id*.

[67] Adnan Awad v. United States, 301 F.3d 1367, 1367, 1374 (Fed. Cir. 2002).

[68] *Id*. at 1372. The court cited the $10,000 dollar figure because, under the Tucker Act, 28 U.S.C. § 1491 (1988), the district courts also possess jurisdiction over contract claims seeking $10,000 or less.

[69] *Awad*, 301 F.3d at 1375.

[70] Pl. Compl. ¶¶ 3, 65.

[71] *Id*. ¶¶ 7, 10.

[72] *Id*. ¶ 13.

[73] *See* Pl. Compl.

[74] Pl. Compl. ¶ 38.

[75] *Id*. ¶ 61; Adnan Awad v. U.S., No. 1:93CV376-D-D, 2001 WL 741638, *1 (N.D. Miss. April 27, 2001).

[76] *Id*.

[77] Adnan Awad v. United States, 301 F.3d 1367 (Fed. Cir. 2002).

[78] In arguing against transfer in the United States Court of Appeals for the Federal Circuit, Mr. Awad argued that the CFC lacked jurisdiction because the government's actions were those of a sovereign nature, and were not proprietary. *Awad*, 301 F.3d at 1374. By making this assertion, Mr. Awad hoped that the Court of Appeals would not transfer the action, since the transfer statute provides "that a court may transfer an action to another court if the transferor court lacks jurisdiction to hear the action and the transferee court would have jurisdiction." *Id*. Rather than determining the jurisdiction of another court, the Court of Appeals instructed the CFC to determine its own jurisdiction. Id.

[79] Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3452 (1999).

[80] Adnan Awad v. United States, 301 F.3d 1367 (Fed. Cir. 2002).

[81] Tucker Act, 28 U.S.C. § 1491(a) (2003).

[82] Globex Corp. v. United States, 54 Fed. Cl. 343, 347 (2002); Shellman v. United States, 9 Cl. Ct. 452, 455 (1986); see also Overall Roofing & Constr., Inc. v. United States, 929 F.2d 687 (Fed. Cir. 1991).

[83] United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941).

[84] Kania v. United States, 650 F.2d 264, 269 (Ct. Cl. 1981), *citing*, *Testan*, 424 U.S. at 399.

[85] United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); McMahon v. United States, 342 U.S. 25, 27 (1951); *Globex*, 54 Fed. Cl. at 347.

[86] *Globex*, 54 Fed. Cl. at 347, *quoting*, Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1373 (Fed. Cir. 1994).

[87] Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 818 (1988).

[88] United States v. Mitchell, 463 U.S. 206, 212 (1983); Sadeghi v. United States, 46 Fed. Cl. 660, 662 (2000).

[89] 28 U.S.C. § 1491 (1988).

[90] Kania v. United States, 650 F.2d at 268, *cited in*, Silva v. United States, 51 Fed. Cl. 374, 377 (2002); *Sandeghi*, 46 Fed. Cl. at 662; Doe v. United States, 37 Fed. Cl. 74, 77 (1996); Commonwealth of Kentucky, Natural Res. and Envtl. Prot. Cabinet v. United States, 27 Fed. Cl. 173, 179 (1992); Grundy v. United States, 2 Cl. Ct. 596, 598 (1983).

[91] *Kania*, 650 F.2d at 264, *cited in*, *Silva*, 51 Fed. Cl. at 377 (emphasis added).

[92] Adnan Awad v. United States, 301 F.3d 1367, 1374 (Fed. Cir. 2002); Adnan Awad v. United States, No. 1:93CV376-D-D, 2001 WL 741638, *1, *4 (N.D. Miss. April 27, 2001).

[93] Pl. Compl. ¶¶ 7, 18.

[94] *See* Akutowitz v. United States, 859 F.2d 1122 (2d Cir. 1988) (finding no liability under FTCA based upon the government's alleged wrongful withdrawal of claimant's citizenship, because that act was a governmental function of a quasi-adjudicative nature for which no private analogue exists); Sea Air Shuttle Corp. v. United States, 112 F.3d

532, 536 (1st Cir. 1997) (finding that claimed failure of Federal Aviation Administration to take enforcement action has no private analogue).

[95] *See* Horowitz v. United States, 267 U.S. 458, 461 (1925) ("It has long been held by the Court of Claims that the United States, when sued as a contractor, cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as sovereign"); *Doe*, 37 Fed. Cl. 74, 77 (1996) (finding no jurisdiction over breach of an agreement to seek a reduction in a prison sentence); Drakes v. United States, 28 Fed. Cl. 190 (1993) (finding no jurisdiction over breach of plea agreement); *Grundy*, 2 Cl. Ct. 596 (finding no jurisdiction over witness protection agreements); *Kania*, 650 F.2d at 268 (finding no jurisdiction over an immunity agreement).

[96] The holding in *Kania* has been consistently upheld and followed by the Court of Federal Claims in many different contractual situations. *See*, *e.g*., *Doe*, 37 Fed. Cl. 74 (reduced sentence agreement); *Drakes*, 28 Fed. Cl. 190 (plea agreement); *Commonwealth of Kentucky*, 27 Fed.Cl. 173 (MOU agreement); *Grundy*, 2 Cl. Ct. 596 (witness protection agreement).

[97] *Kania*, 650 F.2d at 267.

[98] *Id*. at 266.

[99] *Id*.

[100] *Id*.

[101] *Id*.

[102] *Id*. at 268.

[103] *Id*.

[104] *Id*. at 268.

[105] Commonwealth of Kentucky, Natural Res. and Envtl. Prot. Cabinet v. United States, 27 Fed. Cl. 173, 173 (1992); Grundy v. United States, 2 Cl. Ct. 596, 596 (1983).

[106] *Grundy*, 2 Cl. Ct at 597.

[107] *See id.*

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] Commonwealth of Kentucky, Natural Res. and Envtl. Prot. Cabinet v. United States, 27 Fed. Cl. 173, 175 (1992). "Divestiture" is defined as the "[a] firm's act of selling off one or more of its parts." BLACK'S LAW DICTIONARY 478 (6th ed. 1990).

[112] *Commonwealth of Kentucky*, 27 Fed. Cl. at 180.

[113] *Id*. at 179.

[114] *Id*.

[115] *See*, *e.g*., Doe v. United States, 37 Fed. Cl. 74 (1996) (reduced sentence agreement); Drakes v. United States, 28 Fed. Cl. 190 (1993) (plea agreement); *Commonwealth of Kentucky*, 27 Fed.Cl. 173 (MOU agreement); *Grundy*, 2 Cl. Ct. 596 (1983) (witness protection agreement).

[116] *See* Kania v. United States, 650 F.2d 264, 264 (Ct. Cl. 1981) (emphasis added) (citing this specificity exception as dicta); *see also* Sadeghi v. United States, 46 Fed. Cl. 660, 662 (2000) (citing the specificity exception as a rule of law).

[117] Florida Rock Indus. v. United States, 791 F.2d 893, 898 (Fed. Cir. 1986).

[118] City of El Centro v. United States, 922 F.2d 816, 826 (Fed. Cir. 1990).

[119] 8 U.S.C. § 1421(a).

[120] In 1985 a section was added that would have allowed Mr. Awad to become a citizen without meeting the residency requirements, but only upon the agreement of the Attorney General, the Director of the CIA, and the Commissioner of Immigration. 8 U.S.C. § 1427(f). This section only applies to persons making extraordinary contributions to national security. *Id*.

[121] 8 U.S.C. § 1421(a).

[122] *See* Pl.'s Compl.

[123] *Id*. ¶ 7.

[124] *See Sadeghi*, 46 Fed. Cl. at 663 ("Even if we accept [the] allegation of specific authority, the text . . . offers no specific language on the determination of liability.")

[125] *See* U.S. ATTORNEY'S MANUAL § 1-2.306 (2003)(calling for the supervision of the Director when appropriating funds) [hereinafter "USAM"]; *Kania*, 650 F.2d at 264.

[126] *See* USAM, *supra* note 124, at § 1-2.306.

[127] *See* Pl. Compl. ¶ 10.

[128] Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2081 (2000) [hereinafter "*Federal Prosecutors*"]; *see also* DAVID R. PAPKE, THE LEGAL PROFESSION AND ITS ETHICAL RESPONSIBILITIES: A HISTORY, IN ETHICS AND THE LEGAL PROFESSION 29, 35-46 (Michael Davis & Frederick A. Elliston ed., 1986).

[129] *Federal Prosecutors*, *supra* note 128, at 2082.

[130] *Id*. (footnotes omitted).

[131] Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

[132] The Amendment was named after its primary sponsor, Congressman Joseph McDade (R-Pa). *Federal Prosecutors*, *supra* note 128, at 2081 n.2 (citing Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. 2 (1996) (statement of Rep. Carlos J. Moorhead, Chairman)). Interestingly, scholars have questioned Congressman McDade's motives for sponsoring this Amendment; they allege that he was on a personal drive to limit federal prosecutorial power because he believed he had been improperly investigated. *See*, *e.g.*, Fred C. Zacharais & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 201, 209 (2000).

[133] Ethical Standards for Attorneys for the Government, Pub. L. No. 105-277, §§ 801, 530(B), 112 Stat. 2681-3118 (1998) (codified at 28 U.S.C. § 530(B) (1999)).

[134] *Federal Prosecutors*, *supra* note 128, at 2081.

[135] 28 U.S.C. § 530(B) (1998).

[136] *Id*.

[137] Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1511-12 (2000).

[138] *Id*. at 1525.

[139] *Id*. at 1512.

[140] In 1908, the ABA first adopted loosely defined ethical standards entitled the Canons of Professional Ethics. *Federal Prosecutors*, *supra* note 128, at 2082. The ABA's Model Code was adopted in 1969 as the first ethical rules that were intended to be

adopted by state authorities. *Id*. Because of growing dissatisfaction with the Model Code, the ABA adopted the Model Rules in 1983. *Id*.

[141] MODEL RULE OF PROF'L CONDUCT R. 4.1(a) (2003) (hereinafter "MODEL RULE").

[142] United States v. Whittaker, 268 F.3d 185 (2001); Pa. Rules of Professional Conduct Rule (4.1)(a) (2003).

[143] *Whittaker*, 268 F.3d at 195-96 (overturning United States v. Whittaker, 201 F.R.D. 363 (E.D.P.A. 2001)).

[144] *Whittaker*, 268 F.3d at 187.

[145] *Id*. at 187.

[146] *Id*.

[147] *Whittaker*, 201 F.R.D. at 373. The district court stated: "As Judge Adams put it so well a quarter century ago, "Public confidence in the integrity of legal institutions serves as an over-arching consideration beneath which attorneys practice their profession. The semblance of unethical behavior by prosecutors may well be as damaging to the public image as improper conduct itself."

Id. at 371 (quoting Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 759 (2d Cir. 1975) (Adams, J., concurring)).

[148] *Whittaker*, 268 F.3d at 194.

[149] *Id*.

[150] Model Rule 8.4(c).

[151] MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A) (2003).

[152] Romero-Barcelo v. Acevedo-Vila, 275 F. Supp. 2d 177, 206 (D.P.R. 2003) (quoting Office of Disciplinary Counsel v. Anonymous Attorney A, 714 A.2d 402, 407 (Pa. 1998)).

[153] In re Greene, 620 P.2d 1379, 1383 (Or. 1980); *see also* Matter of Richards, 694 P.2d 1032, 1032-35 (N.M. 1997) (finding that public censure was warranted for attorney's omission of certain portions of dialogue from appellate rehearing memorandum).

[154] In re Hubert, 507 P.2d 1141, 1141-42 (Or. 1973).

[155] *D.C. Bar Opinion 323: Misrepresentation by an Attorney employed by a Government Agency as Part of Official Duties*, *at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion323.cfm.

[156] *Id*.

[157] *Id*.

[158] *See*, *e.g*., In the Matter of John Matthew Chancey, No. 91CH348, slip op. at 17 (Report of Review Board of the Illinois Attorney Registration and Disciplinary Commission April 21, 1994) (imposing a public reprimand where an experienced prosecutor prepared and delivered to another person a fake court order); In the Matter of Malone, 480 N.Y.S.2d 603 (App. Div. 1984) (censuring the Inspector General of the New York State Department of Correctional Services for counseling and instructing a witness to give misleading testimony and attempting to mislead or deceive a party for the purposes of protecting a witness).

[159] *Romero-Barcelo*, 275 F. Supp. 2d 177, 206 (D.P.R. 2003), *quoting*, Office of Disciplinary Counsel v. Anonymous Attorney A, 714 A.2d 402, 407 (Pa. 1998).

[160] *See* discussion *infra* Part III.B.

[161] USAM, *supra* note 124, at 1-4.100.

[162] Podger, *supra* note 137, at 1527; Jim McGee, *Prosecutor Oversight is Often Hidden from Sight*, WASH. POST, Jan. 15, 1993, at A1 ("Critics say OPR and the Justice Department not only have failed to set clear standards for prosecutors and investigators, but have failed to hold them publicly accountable for misdeeds when it is determined they have occurred."); *see OPR Only Part of the Problem, Expert Say*, DOJ ALERT, Jan. 3-17, 1994, at 3-4 ("The February 1992 [General Accounting Office] study concluded that OPR was understaffed, highly informal in its operation and disorganized in its investigations.")

[163] *See* Office of Prof'l Responsibility, U.S. Dep't of Justice, OPR's Annual Report for the Fiscal Year 1997, *available at* http://www.usdoj.gov/opr/97annual.htm.

[164] *Id*.

[165] Green & Zacharias, *supra* note 2, at 396-97.

[166] *Id*.

[167] *Id*. at 398; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 726-27 (2001) (asserting after a comprehensive review of published disciplinary decisions that authorities have "targeted particularly serious prosecutorial misconduct and cases in which private clients are affected and public remedies are

unlikely to address the prosecutor's behavior"); Jennifer Blair, Comment, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. § 530B and the Reality of Inaction*, 49 UCLA L. REV. 625, 639 (2001) (stating that state discipline of federal prosecutors has been rare since the adoption of the McDade Amendment).

[168] Green & Zacharias, *supra* note 2, at 398-99.

[169] Sun Eagle Corp. v. United States, 23 Cl. Ct. 465, 473 (1991).

[170] USAM, *supra* note 124, at 1-1.200.

[171] *Id*.

[172] *Id*. at 1-1.100.

[173] *Id*.

[174] 28 C.F.R. § 16 (2003).

[175] USAM, *supra* note 124, at 1-1.300.

[176] *Id*. at 1-1.000-1-12.00.

[177] *Id*. at 2-1.000-2-4.000.

[178] *Id*. at 3-1.000-3-19.000.

[179] *Id*. at 4-1.000-4-10.000.

[180] *Id*. at 5-1.000-5-15.000.

[181] *Id*. at 6-1.000-6-8.000.

[182] *Id*. at 7-1.000-7-5.000.

[183] *Id*. at 8-1.000-8-3.000.

[184] *Id*. at 9-1.000-9-139.000.

[185] *See id*. at 9-2.136, 9-13.500, 9-13.510, 9-21.310.

[186] *Id*. at 9-13.500, 9-13.510.

[187] *Id*. at 9-21.310.

[188] *Id*.

[189] *Id*. at 1-1.1000-9-139.000.

[190] *Id*. at 1-1.1000.

[191] OEO is the Office of Enforcement Operations at the DOJ.

[192] USAM, *supra* note 124, at 9-21.310.

[193] *See* discussion *supra* Part III.

[194] Government attorneys are only subject to the laws of their bar membership state and the state or states in which the action is taking place. See discussion supra Part III.

[195] *Id*.

[196] *See* discussion *supra* Part II.

[197] 28 U.S.C. § 1491(a)(1).

[198] Pasternak, *supra* note 5, at 1.