

**STATE REVOCATION OF LAW ENFORCEMENT OFFICERS'  
LICENSES AND FEDERAL CRIMINAL PROSECUTION: AN  
OPPORTUNITY FOR COOPERATIVE FEDERALISM\***

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I. INTRODUCTION

A traditional response to the intentional violation of a suspect's constitutional rights by law enforcement officers has been federal criminal prosecution pursuant to the Civil Rights Act's criminal conspiracy and color-of-law provisions.<sup>1</sup> A relatively new approach for dealing with serious police misconduct is revocation of the state-issued license or certificate that permits an officer to work in law enforcement within a state. The number of officers whose licenses are revoked increases each year, and the numbers are significant: the total number of officers whose licenses have been revoked for just cause in the eleven states that participate in a national database is over 5,500.<sup>2</sup> This article suggests ways that Department of Justice ("DOJ") Attorneys, particularly from the Criminal Section of the Civil Rights Division, and Assistant U.S. Attorneys ("AUSAs") handling criminal prosecutions against law enforcement officers could make use of state revocation practices.<sup>3</sup> This article also suggests that Peace Officer Standards and Training Commissions ("POSTs"), the state agencies responsible for revocation, make use of investigatory, grand jury, and other material gathered in preparation for federal prosecution by agents of the Federal Bureau of Investigation ("FBI") and AUSAs when POSTs pursue revocation.

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\* The author thanks Professor Steven Puro for his valuable suggestions in the development of this article. The author also wishes to thank Amanda Altman, Stephen Felson, Margaret McDermott, Matt Piant, Laura Schultz, and Matthew Waltz for their assistance in the preparation of this article.

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1. *Screws v. United States*, 325 U.S. 91, 93 (1945). The criminal conspiracy statute is 18 U.S.C. § 241 (2002). The color-of-law provision is 18 U.S.C. § 242 (2002).

2. *See infra* text accompanying notes 20-23.

3. Congress has a role in encouraging the states to adopt revocation laws and assisting the states in keeping track of officers whose licenses have been revoked. *See infra* section II.B.

## II. STATE REVOCATION OF LAW ENFORCEMENT OFFICERS' LICENSES

### A. *How Revocation Works in the States*

For most of our history, local police chiefs and sheriffs have handled issues of hiring and firing. In the 1950s, however, the states began treating law enforcement as a profession, starting with setting minimum qualifications and training standards. One of the hallmarks of a profession is that professionals must live up to certain standards; if they do not, they lose the privilege of practicing their professions. Under current practice in most states, that process for law enforcement officers involves the revocation of an officer's certificate or license issued by the state POST.<sup>4</sup> To comply with constitutional norms, the officer is entitled to counsel and is given other due process protections, including, typically, a revocation hearing held before the POST or an administrative law judge.<sup>5</sup> Unlike discharge from a local department, which would permit the officer to work for another department in the state, revocation prevents the officer from continuing to work in law enforcement in the state. As of March 2003, forty-four states have the authority to revoke the licenses of law enforcement officers.<sup>6</sup>

Not surprisingly, revocation authority and practices vary from state to state. What constitutes conduct sufficient to warrant revocation differs among the states: in some states, only conviction of felonies and misdemeanors involving moral turpitude will trigger revocation;<sup>7</sup> in others, misconduct

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4. Revocation is the term used in most states; a few states use the terms "decertification," "cancellation," "annul," and "recall." Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 St. Louis U. L. J. 541, 543-44 nn. 8-10 (2001) [hereinafter *Revocation*]. Many states can impose sanctions less serious than revocation, for example suspension of the license for a term of years. N.D. Cent. Code § 12-63-12(2001).

With a colleague from the Political Science Department, Professor Steven Puro, I have been writing about revocation for many years. See, e.g., *Revocation, supra*; Steven Puro, Roger Goldman & William C. Smith, *Police Decertification: Changing Patterns Among the States, 1985-1995*, 20 Policing 481 (1997); Steven Puro & Roger Goldman, *Police Decertification: A Remedy for Police Misconduct?*, 5 Police and Law Enforcement 115-16 (1987); Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 Hastings Cons. L. Q. 45-47 (1987).

5. The standard of proof for revocation is either clear and convincing evidence or a preponderance of the evidence. See *Revocation, supra* note 4, at 553 nn.67-68.

6. For a citation to the laws, see *Revocation, supra* note 4, at 547 n.36. The State of Washington enacted its revocation law after the publication of the article; the citation is WASH. REV. CODE ANN. § 43.101.085 (2002). The six states without revocation power are Hawaii, Indiana, Massachusetts, New Jersey, New York, and Rhode Island. For a discussion of the reasons why revocation has not been authorized in these states, see *Revocation, supra* note 4, at 548 n.39.

7. See, e.g., ALA. CODE § 36-21-45 (1997 & Supp. 2000).

proven in an administrative hearing can result in revocation.<sup>8</sup> Some states specifically target conduct involving civil rights violations and excessive force.<sup>9</sup> States also differ in the type of law enforcement officers covered: in some states, only persons working as peace officers, like deputy sheriffs and police officers, are covered.<sup>10</sup> In other states, both peace officers and correctional officers come within the agency's jurisdiction.<sup>11</sup> Oregon's law covers even private security guards.<sup>12</sup> In some states, the only sanction is permanent revocation; in others, suspension, reprimands, and other sanctions are permissible remedies.

### B. *The United States and Revocation*

While regulation of peace officers is a state function, the federal government has long been concerned with policing issues. Recent examples of this federal concern include civil and criminal statutes relating to police misconduct,<sup>13</sup> and the provision of funding to the states for the hiring of additional law enforcement officers, pursuant to the Department of Justice's Office of Community Policing Services (COPS) Program.<sup>14</sup>

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8. See, e.g., MO. REV. STAT. § 590.080 (West, WESTLAW current through the end of the 2002 Reg. Sess.) (permitting discipline after a finding of cause by an administrative hearing commission).

9. See, e.g., S.D. ADMIN. R. 2:01:11:01 (2002) (conviction of a misdemeanor for conduct involving "interference with another's civil rights"); MINN. R. 6700.1600 N (2000) (revocation is authorized for "engaging in sexual harassment" as defined by state law); N.M. ADMIN CODE, tit. 10, § 29.1.11(5) (2000) (revokes for the commission of "acts of violence or brutality which indicate that the officer has abused the authority granted to him or her as a commissioned law enforcement officer"); in North Dakota, N.D. CENT. CODE § 12-63-12 (2001) (authorizes revocation if the officer has "used unjustified deadly force in the performance of the duties as a peace officer").

10. E.g., MO. REV. STAT. § 590.010-.020 (West, WESTLAW current through the end of the 2002 Reg. Sess.) (requiring license for peace officers, defined as law enforcement officers with the power of arrest).

11. E.g., Florida. In fact, in 1999, more Florida correctional officers lost their licenses (186) than did peace officers (120). *Revocation*, *supra* note 4, at 573 n.203.

12. In 1999, sixty private security guards had their licenses revoked in Oregon. *Revocation*, *supra* note 4, at 559 n.112.

13. E.g., 18 U.S.C. § 242 (2000) (criminalizes the intentional deprivation of citizens' constitutional rights by law enforcement officers and others); 18 U.S.C. § 241 (2000) (criminalizes civil rights conspiracies by two or more persons, including local, state, or federal officials); 42 U.S.C. § 14141 (2000) (authorizes the U.S. Att'y Gen. to bring a civil action for equitable and declaratory relief against a local police department to stop a pattern or practice of police misconduct).

14. In November 2001, President Bush signed a bill allocating \$1.1 billion for the Office of Community Oriented Policing Services (COPS), which provides funding for state and local law enforcement agencies. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, 115 Stat. 748, 762 (2001).

Congress could condition receipt of federal funding for local and state police agencies on the state's establishment of an effective revocation program: the United States would then have a direct role in ensuring that the police departments it funds are not hiring officers with a record of previous misconduct.<sup>15</sup> An analogous funding condition was applied by Congress to federal truth-in-sentencing grants.<sup>16</sup>

Congress could also assist local law enforcement agencies and state POSTs by establishing a national databank to help prevent officers who lose their license in one state from becoming employed as police officers in another state. Congress provided analogous assistance for the medical professions when it established the National Practitioner Data Bank (NPDB).<sup>17</sup> To support

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15. Were Congress to require a state to enact a revocation law under its Commerce Power, it would likely run afoul of the Tenth Amendment. *See* *Printz v. United States*, 521 U.S. 898, 923-24, 933 (1991) (Congress could not require state and local law enforcement officers to conduct background checks on prospective handgun purchasers pursuant to the Commerce Power). The federal interest in liberty and equality under the Fourteenth Amendment's equal protection and due process clauses permits Congress under section 5 of that Amendment to pass legislation protecting individuals from police misconduct by state and local law enforcement officers. *Cf.* *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 66, 82, 90 (2000) (invalidating Age Discrimination in Employment Act as applied to states); *University of Alabama v. Garrett*, 531 U.S. 356, 368, 374 (2001) (section 5 could not support damage suit under Americans with Disabilities Act brought by employee against state). However, requiring the state to set up a program for revocation would likely be viewed as "commandeering" the state executive branch, prohibited by *Printz*. The most appropriate constitutional source for such legislation would be Congress' power to tax and spend for the general welfare. U.S. CONST. art. I, § 8, cl. 1. Congress could condition the grant of COPS money on the state's agreeing to set up a system of revocation, and this would seem to be permissible under *South Dakota v. Dole*, 483 U.S. 203, 205-06, 208 (1987) (upholding a condition that a state forfeits 5% of its federal highway funds if it permits persons under 21 to purchase alcoholic beverages on the grounds that the expenditure was related to the general welfare, the condition was made clear to the state, and the condition was related to the federal interest).

16. The Death in Custody Reporting Act conditions receipt by states of federal truth-in-sentencing grants on reporting information regarding the death of persons arrested or in the custody of a state or local correctional facility. Death in Custody Reporting Act of 2000, 42 U.S.C. § 13704(a) (2000).

17. The NPDB was authorized under Part B of the Healthcare Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (2000). The NPDB requires reporting three types of information concerning professional conduct or competence of doctors, dentists, and other healthcare professionals: 1) state licensing boards have to report the removal of the doctor's license or other public sanctions, § 11132; 2) health care entities, like hospitals and managed care organizations, have to report the health care professional's loss of staff privileges or other sanctions where the punishment lasts more than 30 days, § 11133; and 3) the payer of malpractice judgments or settlements is responsible for reporting information regarding the payment and its circumstances, both to the NPDB and the state licensing board, § 11131; 45 C.F.R. § 60.7. The Act also provides qualified immunity for reporting. 42 U.S.C. § 11137 (2000) ("No person or entity . . . shall be held liable in any civil action with respect to any report made under this part . . . without knowledge of the falsity of the information contained in the report.").

creation of the NPDB, the federal Government Accounting Office (“GAO”) undertook a study which found that in over one-third of the cases where a doctor had been licensed in more than one state, but had lost one license, the second state was unaware of the revocation.<sup>18</sup> The GAO or the DOJ should undertake a similar study to determine if there is an analogous problem with law enforcement officers, because if Congress deems it important enough for the protection of the public to have a national databank on doctors and dentists whose licenses have been revoked or who have received other sanctions, it surely should consider doing so for law enforcement officers.<sup>19</sup>

While there is no government-sponsored databank, the International Association of Directors of Law Enforcement Standards and Training (IADLEST) has established a pilot National Decertification Database (NDD) that includes the names of officers whose certificates have been revoked for cause in eleven states.<sup>20</sup> Presently, the database contains over 5,500 records<sup>21</sup> and is accessible to POST agency personnel in each state, whether or not they are in one of the eleven states supplying information.<sup>22</sup> The records date back as far as 1973.<sup>23</sup> Unlike the NPDB, which is mandated by federal law, the NDD is a voluntary effort among the eleven states to track the movement of officers whose licenses have been revoked.<sup>24</sup> One reason that the information

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18. GENERAL ACCOUNTING OFFICE, REPORT TO THE SEC’Y OF HEALTH AND HUMAN SERVICES, EXPANDED FEDERAL AUTHORITY NEEDED TO PROTECT MEDICARE AND MEDICAID PATIENTS FROM HEALTH PRACTITIONERS WHO LOSE THEIR LICENSES 4 (1984).

19. The proposed Law Enforcement and Correctional Officers Employment Registration Act of 1996 would have established a registry at the DOJ that would have listed all criminal justice agencies for which an officer had worked and reported the fact that an officer’s license had been revoked. H.R. 3263, 104<sup>th</sup> Cong. (1996); S. 484, 104<sup>th</sup> Cong. (1995). Unlike the NPDB, which includes the names of only those medical professionals who have received some kind of sanction, the registry would have listed the names of all law enforcement and correctional officers in the country. This prompted Representative Schumer to say, “We have a list of every officer in the country. When we’re concerned only about so-called rogue officers, why not just list the few bad officers?” *Police Officers’ Rights and Benefits: Hearing on H.R. 218, H.R. 878, H.R. 1805, H.R. 29219, and H.R. 3263 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104<sup>th</sup> Cong. 37 (1996) [hereinafter *Hearing*]. Although there was a hearing on the bill in the House, it never made it out of committee. See THE LIBRARY OF CONGRESS, THOMAS, at <http://thomas.loc.gov> [hereinafter THOMAS].

20. The eleven states that currently supply information to the NDD are: Colorado, Connecticut, Florida, Idaho, Missouri, Montana, New Hampshire, New Mexico, North Dakota, Ohio and Texas. E-mail from Ray Franklin, Operations Manager, NDD, to Roger L. Goldman, Professor, Saint Louis University School of Law (Dec. 6, 2002) (on file with author).

21. *Id.*

22. E-mail from Ray Franklin, Operations Manager, NDD, to Roger L. Goldman, Professor, Saint Louis University School of Law (Sep. 17, 2002) (on file with author).

23. E-mail from Ray Franklin, Operations Manager, NDD, to Roger L. Goldman, Professor, Saint Louis University School of Law (Nov. 4, 2002) (on file with author).

24. The American Bar Association oversees a similar voluntary data bank, the National Lawyer Regulatory Data Bank, containing public discipline by state bar associations and state and

kept on the NDD is much more limited than the NPDB is that there is no qualified immunity for reporting.

### III. FEDERAL CRIMINAL PROSECUTION OF LAW ENFORCEMENT OFFICERS AND STATE REVOCATION

#### A. *Background*

The number of law enforcement officers who either plead guilty to or are convicted of conspiracy and color-of-law violations in federal court is just a fraction of the total number of complaints filed against such officers each year—approximately 1% in fiscal year (“FY”) 2001, the most recent reporting year.<sup>25</sup> Of the roughly 6000 complaints against law enforcement officers made to the DOJ in FY 2001,<sup>26</sup> approximately 1000 were investigated by the FBI<sup>27</sup> and only 100 or so resulted in federal prosecution.<sup>28</sup> An unknown number of

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federal courts. CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, NATIONAL LAWYER REGULATORY DATA BANK, <http://www.abanet.org/cpr/databank.html>.

25. Steven Puro, *Federal Responsibility for Police Accountability Through Criminal Prosecution*, 22 ST. LOUIS U. PUB. L. REV. 95, 111-12 (2003).

26. The number 6000 is a rough approximation based on the data that is available. See CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, ACTIVITIES AND PROGRAMS, at <http://www.usdoj.gov/crt/activity.html> (last visited Feb. 2003). This web page states that of the approximately 12,000 criminal civil rights complaints filed annually the majority are against “officials,” including “state and local police officers, prison superintendents and correctional officers, federal law enforcement officers and state and county judges.” *Id.* The actual number of criminal, civil rights complaints filed with the Civil Rights Division in fiscal year 2001 was 12,438. CRIMINAL SECTION, CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, SUMMARY OF CRIMINAL SECTION ACTIVITIES (FY1985 - FY2001) (n.d.) [hereinafter SUMMARY], included in a facsimile from Albert N. Moskowitz, Chief, Criminal Section, Civil Rights Division, U.S. Dep't of Justice, to Roger Goldman, Professor of Law, Saint Louis University (Mar. 4, 2002) (on file with author). It is assumed that complaints against law enforcement officers make up the bulk of the complaints against “officials” since there are many more law enforcement officers than other types of officials listed. Since the term “majority” refers to a number that is more than half of the total, it is assumed that after subtracting complaints against other “officials,” about half of the 12,000 complaints are against law enforcement officers.

27. The number 1000 is an approximation based on the incorporation of data from two sources. SUMMARY, *supra* note 26 (showing the total number of FBI investigations into criminal civil rights violations in fiscal year 2001 was 2241); *Police Brutality, Hearing Before the Subcomm. On Civil and Const. Rights of the House Comm. on the Judiciary*, 102d Cong. 7 (1991) (statement of William Baker, Asst. Dir., Criminal Div., FBI) (regarding civil rights matters, “the FBI places its highest priority on cases concerning police brutality, which comprise 50 percent of the civil rights inquiries that we initiate”). Assuming “cases concerning police brutality” includes all cases opened against police officers, and that William Baker’s “50%,” *id.*, is the exact percentage, the number of FBI investigations of police officers in fiscal FY 2001 was 1120. Because of the uncertainty in this calculation, 1000 is used as an approximation.

28. SUMMARY, *supra* note 26. While in FY 2001 the total number of criminal, civil rights cases filed against law enforcement officers was 49, the total number of defendants was 97.

complaints are not acted upon by the federal government pursuant to the DOJ's policy of deference to local or state agencies; the federal investigation is suspended once state or local criminal charges are filed.<sup>29</sup>

In addition to deference to state or local prosecutions, other reasons for declining federal prosecution are: lack of evidence of criminal intent by the officer; absence of a federal offense committed by the officer; and weak or insufficient admissible evidence against the officer.<sup>30</sup> None of these reasons would necessarily prevent the officer from having his license revoked, depending on the particular state's revocation law. Therefore, where it is determined that a case should be declined as not presenting a viable federal case, consideration should be given to sending the file to the officer's state POST for possible revocation.<sup>31</sup>

In FY 2001, 56 officers pled guilty or were convicted of conspiracy or color-of-law violations, the most in any of the past fifteen years according to the Criminal Section's *Summary*.<sup>32</sup> Of those cases that did proceed to trial in FY 2001, 14 officers were convicted and 13 were acquitted, a 52% conviction rate.<sup>33</sup> In contrast, in every case that went to trial against non-law enforcement civil rights defendants in both FY 2000 and FY 2001, 100% of the defendants were convicted.<sup>34</sup> It appears that law enforcement defendants (and their lawyers) are aware of the difficulty of getting convictions as shown by the

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29. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS RESOURCE MANUAL sec. 47 (Oct. 1997) [hereinafter CRRM], [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title8/cvr00046.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00046.htm), also available at [http://www.usdoj.gov:80/usao/eousa/foia\\_reading\\_room/usam/title8/t8rm.wpd](http://www.usdoj.gov:80/usao/eousa/foia_reading_room/usam/title8/t8rm.wpd).

Upon receipt of information by the FBI sufficient to justify initiation of a civil rights investigation, an investigation should be conducted regardless of the fact that a local or state investigation of the same incident is also being conducted. If, during the course of the FBI's investigation, state or local criminal charges arising out of the incident are filed against the subject(s), the FBI's investigation should be suspended and the United States Attorney and FBIHQ should be notified of the nature of the criminal charges and the likely timetable for prosecution of such charges. In all other situations, the investigation should continue to completion.

*Id.* Where the state prosecution proceeds, "the local prosecutive effort is deemed to vindicate federal interests." U.S. DEP'T. OF JUSTICE, CIVIL RIGHTS DIVISION, CRIMINAL SECTION OVERVIEW, at <http://www.usdoj.gov/crt/crim/overview.htm> (stating that occasionally there may be a federal prosecution, despite the fact there was a preceding state prosecution).

30. Puro, *supra* note 25, at 100-02.

31. The sending of files to units outside the Criminal Section already occurs within the Civil Rights Division. In police misconduct cases, among others, "the Criminal Section may refer complaints that do not present a criminal violation to other Sections or within the Civil Rights Division that have authority under separate civil statutes to file suit when a pattern of abuse is discovered." CIVIL RIGHTS DIVISION, U.S. DEP'T. OF JUSTICE, CRIMINAL SECTION OVERVIEW, at <http://www.usdoj.gov/crt/crim/overview.htm>.

32. SUMMARY, *supra* note 26.

33. *Id.*

34. *Id.*

number of defendants choosing a trial rather than entering pleas: 51% of law enforcement defendants went to trial in FY 2000 and FY 2001,<sup>35</sup> whereas only 11% of non-law enforcement civil rights defendants went to trial during that time period.<sup>36</sup> During FY 2000, for all federal criminal cases disposed of by a plea or judgment of acquittal or conviction (69,283 cases), only 6% of defendants went to trial, the remainder pleading guilty or *nolo contendere*.<sup>37</sup>

Because of the difficulty of obtaining convictions against law enforcement officers in civil rights cases, a federal prosecutor needs to consider the consequences of proceeding to trial and having the officer acquitted by the jury as occurred in 41% of the cases (29 out of 70) in FY 2000 and FY 2001;<sup>38</sup> the officer, in all likelihood, will be able to continue in law enforcement after the acquittal. Had the prosecutor been able to reach an agreement with the defendant to dismiss the criminal charges in exchange for the officer's giving up his state license, the officer would no longer have been able to work in law enforcement, at least within that state.

#### B. *Pretrial Diversion*

U.S. Attorneys have the discretion to choose not to prosecute a person but instead to divert the person into a program of supervision by the U.S. Probation Service for a period not to exceed eighteen months.<sup>39</sup> This typically occurs prior to charging, but may occur after the person has been charged.<sup>40</sup> If the person complies with the conditions agreed to for a certain period of time, there will be no criminal charges filed. If the person entered the program after charges were filed, they will be dismissed. The offender must agree to waive his or her speedy trial rights and waive any statute of limitations defense.<sup>41</sup> The person need not admit guilt but must acknowledge responsibility for the behavior.<sup>42</sup> "Innovative approaches are strongly encouraged,"<sup>43</sup> suggesting that an agreement not to work in law enforcement, at least during the eighteen months of supervision, would be permissible.

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35. *Id.*

36. *Id.*

37. Another 10% of all federal defendants had their cases dismissed or *nolle prossed*. Federal Justice Statistics Resource Center, at <http://fjsrc.urban.org> (statistic calculated out of database available at this website) (last revised June 18, 2002) (on file with author).

38. SUMMARY, *supra* note 26.

39. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-22.010 (1997) [hereinafter USAM].

40. *Id.*

41. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL, sec. 712(B)(1) (Oct. 1997), [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00712.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm).

42. *Id.*

43. *Id.* at sec. 712(E).

Two provisions of the U.S. Attorneys' Manual ("Manual") may limit the use of pretrial diversion for law enforcement officers: first, diversion is inappropriate for an individual who is "[a]ccused of an offense, which, under existing Department guidelines, should be diverted to the State for prosecution."<sup>44</sup> Second, pretrial diversion is inappropriate where the individual is "[a] public official or former public official accused of an offense arising out of an alleged violation of a public trust. . . ."<sup>45</sup> Assuming a law enforcement officer is a "public official" and that anytime a law enforcement officer is criminally prosecuted for something he or she does while on the job is a violation of a "public trust," pretrial diversion would not be an available option.

### C. *The Charging Decision*

In charging a law enforcement officer, whether for conspiracy to violate the civil rights of a person under 18 U.S.C. § 241, or for intentionally depriving a person of constitutional rights under 18 U.S.C. § 242, or for any other federal criminal charge,<sup>46</sup> the federal prosecutor should be well-versed in the revocation law in the state where the prosecution is brought; in some states, licenses are revoked only for felony convictions, while in others, some but not all misdemeanor convictions can result in revocation.

The Manual has a section on Non-Criminal Alternatives to Prosecution, recognizing that, because Congress and state legislatures "have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction," criminal prosecution may not be the only

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44. USAM, *supra* note 39, at § 9-22.100.

45. *Id.* Similarly, the Manual treats defendants who are governmental officials differently from other defendants in the area of non-prosecution agreements with defendants in exchange for their cooperation in testifying against other defendants. For most defendants, such agreements are within the discretion of the AUSA and his or her supervisor, USAM, *supra* note 39, at § 9-27.600A, but where the defendant is "[a] high-level Federal, state or local official" or "[a]n official or agent of a Federal investigative or law enforcement agency," approval from the appropriate Assistant Attorney General is necessary, USAM, *supra* note 39, at § 9-27.640. Thus, in a case involving multiple law enforcement officers as defendants, special permission must be obtained before negotiating non-prosecution agreements with any federal agent, regardless of rank, and with local police chiefs, sheriffs, and possibly with other command officers.

46. Law enforcement officers have been convicted of: RICO violations under 18 U.S.C. § 1962(c)-(d), *U.S. v. McDonough*, 959 F.2d 1137 (1st Cir. 1991); intent to facilitate an illegal gambling business under 18 U.S.C. § 1511, *id.*; receiving an illegal gratuity under 18 U.S.C. § 201(c)(1)(B), *U.S. v. Ahn*, 231 F.3d 26 (D.C.Cir. 2000); conversion of evidence and victim restitution money under 18 U.S.C. § 666(a)(1)(A), *U.S. v. Suarez* (6th Cir. 2001); perjury under 18 U.S.C. § 1623, *U.S. v. Radford*, 2001 WL 857192 (6th Cir. 2001); accepting bribes under 18 U.S.C. § 1951, *U.S. v. Clark*, 989 F.2d 447 (11th Cir. 1993); extortion under 18 U.S.C. § 1951, *U.S. v. Hamilton*, 263 F.3d 645 (6th Cir. 2001); and obstruction of justice under 18 U.S.C. § 1503, *U.S. v. Conley*, 249 F. 3d. 38 (1st Cir. 2001).

appropriate response to serious misconduct.<sup>47</sup> One suggested alternative response is the “reference of complaints to licensing authorities”<sup>48</sup> such as the POSTs. The Manual advises: “Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them . . . . Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution.”<sup>49</sup>

#### D. *Declining Prosecution*<sup>50</sup>

In setting forth the grounds for commencing or declining prosecution the Manual states that prosecution should be commenced if there exists a prosecutable case, unless: “1. No substantial Federal interest would be served by the prosecution; 2. The person is subject to effective prosecution in another jurisdiction;<sup>51</sup> or 3. There exists an adequate non-criminal alternative to prosecution.”<sup>52</sup> A prosecutable case is one in which the person will “probably be found guilty by an unbiased trier of fact.”<sup>53</sup> The likelihood that the fact-finder will acquit the defendant because of the unpopularity of some part of the case is not a factor against prosecution: “[I]n a civil rights case . . . it might be clear that the evidence of guilt—viewed objectively by an unbiased fact-finder—would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict.”<sup>54</sup> The Manual indicates that the prosecutor may still conclude it is better to proceed. Thus, in a case against a law enforcement defendant, the prosecutor could proceed even if it is clear the jury will acquit because, for example, the victim of the constitutional violation would not be a sympathetic witness to the jury. The Manual’s preference for prosecution, even if an acquittal is likely, may be an attempt to show that the United States means business when it comes to prosecuting civil rights violators.

On the other hand, the Manual permits the dropping of the federal charges if there is an adequate non-criminal alternative to prosecution. The factors to

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47. USAM, *supra* note 39, at § 9-27.250.

48. *Id.*

49. *Id.*

50. The Manual provides that ultimate authority to decline cases arising under federal civil rights law resides with the Assistant Attorney General for Civil Rights. USAM, *supra* note 39, at § 8-3.150.

51. See USAM, *supra* note 39, at § 8-3.170 (“Frequently, conduct which deprives persons of federally protected rights in violation of federal law also violates state law. In such cases, where state and local authorities undertake vigorous prosecution in state courts, it is Department policy to cooperate fully with the local prosecutor.”).

52. USAM, *supra* note 39, at § 9-27.220(A).

53. *Id.* at § 9-27.220(B).

54. *Id.*

consider are: “1. The sanctions available under the alternative means of disposition; 2. The likelihood that an effective sanction will be imposed; and 3. The effect of non-criminal disposition on Federal law enforcement interests.”<sup>55</sup> Thus, the Manual would permit the federal prosecutor to decline prosecution if assured that the state POST would permanently revoke the officer’s license. Thus, if an officer would be willing not to contest the license revocation, the federal prosecutor could agree to dismiss the charges, once notified that the license was revoked.<sup>56</sup>

#### E. Plea Agreements

Where possible, the prosecutor would want to negotiate a plea, in writing, prior to dismissal of the criminal charge or dropping the level of the charge,<sup>57</sup> in exchange for the defendant’s agreeing to the surrender of the state license.<sup>58</sup> This practice already occurs in plea-bargaining with professionals such as doctors or lawyers who agree to give up their licenses in exchange for lowering or dismissing the criminal charges.<sup>59</sup> In the revocation laws and regulations of two states, Texas<sup>60</sup> and Ohio,<sup>61</sup> officers are permitted to voluntarily surrender their licenses. In Texas, between January 1997 and September 2000, there were 110 voluntary surrenders, 104 permanent, and six for a term of years.<sup>62</sup>

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55. USAM, *supra* note 39, at § 9-27.250(A).

56. In effect, just such an agreement occurred when the Independent Counsel declined to prosecute President Clinton, waiting until after the Arkansas bar suspended his license for five years without a contest. See CTR. FOR PROF’L RESPONSIBILITY, *supra* note 24.

57. Color of law violations under 18 U.S.C. § 242 constitute felonies where death or bodily injury is proven; otherwise, a violation is a misdemeanor. 18 U.S.C. § 242 (2000).

58. In April 1998, two New Jersey state troopers who stopped a van carrying four minority students to a college basketball tryout and fired 11 shots into the van pled guilty in state court to official misconduct and making false statements. They were fined \$280, gave up their jobs with the state police, and agreed not to work in New Jersey in any public position. In exchange for their plea, they avoided jail time and the possibility of federal charges. They also agreed to give details about racial profiling by the state police. Angela Coulombis, *State Acts on Guilty Troopers’ Remarks*, PHILADELPHIA INQUIRER, Jan. 18, 2002, at B1. New Jersey is one of the states that does not have a revocation statute.

59. Although he did not technically enter into a plea agreement, the Independent Counsel, Robert W. Ray, declined to prosecute President Clinton relating to his testimony about Monica Lewinsky, in part, because the President had agreed to a suspension of his Arkansas bar license for five years. ROBERT W. RAY, FINAL REPORT OF THE INDEPENDENT COUNSEL, *IN RE MADISON GUARANTY SAVINGS & LOAN ASS’N, REGARDING MONICA LEWINSKY AND OTHERS* 20 (released Mar. 6, 2002), <http://0-icreport.access.gpo.gov/library.csuhayward.edu/lewinsky.html>.

60. 37 TEX. ADMIN. CODE § 223 (2000).

61. The POST Director has the power to revoke a certificate if the officer “[p]leads guilty to a misdemeanor. . . pursuant to a negotiated plea agreement. . . in which the person agrees to surrender the certificate.” OHIO REV. CODE ANN. § 109.77(F)(1)(b).

62. See *Revocation*, *supra* note 4, at 545 n.23.

The vast majority of voluntary surrenders in Texas are in the context of an actual or threatened criminal prosecution.<sup>63</sup>

Especially in the six states that have no mechanism for revoking the license of an officer even after a felony conviction, the federal prosecutor should obtain such an agreement so that the defendant will not be able to return to law enforcement.<sup>64</sup> The agreement should further provide that the defendant not seek a law enforcement license in any other state and that he waives the statute of limitations for bringing federal criminal charges should he violate the agreement.<sup>65</sup> All of the U.S. courts of appeals that have considered the issue have held that the statute of limitations is not a jurisdictional matter but an affirmative defense that may be waived by the defendant.<sup>66</sup> The agreement should be sent to the NDD and be made available to all state POSTs.

The Manual instructs the federal prosecutor to weigh all relevant considerations, including the seriousness of the offenses charged, the desirability of prompt and certain disposition of the case, the likelihood of obtaining a conviction at trial, and the public interest in having the case tried rather than disposed of by a guilty plea.<sup>67</sup> The Manual instructs the attorney to

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63. E-mail from Raymond Winter, TX Office of the Att’y Gen., to Roger L. Goldman, Professor, Saint Louis University School of Law (Sept. 26, 2002) (on file with author).

64. In the absence of a revocation statute, states vary on whether a person convicted of a felony may serve in law enforcement. *See Revocation, supra* note 4, at 569-70. The federal Gun Control Act of 1968 prohibits convicted felons from carrying a gun, but exempts, in many cases, state and federal law enforcement personnel under a “public interest exception,” 18 U.S.C. § 922 (2002); however, there is no public interest exception where the officer has been convicted of a “misdemeanor crime of domestic violence.” 18 U.S.C. § 922(g)(9) (2002).

65. Persons who wish to participate in the pretrial diversion program must agree to give up their rights to object to unreasonable delay in the bringing of an indictment, information or complaint under Rule 48(b) of the Federal Rules of Criminal Procedure, as well as any objection under the Sixth Amendment’s Speedy Trial Provision and the relevant statutes of limitations “for a period of months equal to the period” of the agreement. U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL, sec. 715 (Oct. 1997), [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/title9/crm00715.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/title9/crm00715.htm).

66. *United States v. Spector*, 55 F.3d 22, 24 (1st Cir. 1995); *United States v. Walsh*, 700 F.2d 846, 855 (2nd Cir. 1983); *United States v. Karlin*, 785 F.2d 90, 92-93 (3rd Cir. 1986); *United States v. Williams*, 684 F.2d 296, 299 (4th Cir. 1982); *United States v. Meeker*, 701 F.2d 685, 687-88 (7th Cir. 1983); *United States v. Wilson*, 26 F.3d 142, 155 (D.C. Cir. 1994). The 6th and 10th circuits at one time had found that the statute of limitations was a jurisdictional bar, which may be raised at any time by a criminal defendant. *See Benes v. United States*, 276 F.2d 99, 108-09 (6th Cir. 1960); *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964). *Benes* has been limited to apply only when there has not been an express waiver of the statute of limitations. *United States v. Del Percio*, 870 F.2d 1090, 1093 (6th Cir. 1989). Where there is no explicit waiver, the statute of limitations presents a bar to prosecution that may be raised for the first time on appeal. *United States v. Crossley*, 224 F.3d 847, 858 (6th Cir. 2000). The 10th Circuit effectively overruled *Waters* in *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987).

67. USAM, *supra* note 39, at § 9-27.420(A).

consult with the investigative agency (the FBI) and the victim for their views on these various factors.<sup>68</sup> In favor of proceeding to trial is the fact that the case involves an alleged violation of constitutional rights and that justice is done by exposing the violation at a public trial; on the other hand, given the difficulty of obtaining convictions as compared with other civil rights cases handled by the Criminal Section, it might be better to reach an agreement with the defendant to stay out of law enforcement forever rather than risk an acquittal and a return to the field.<sup>69</sup> Of course, a defendant may be unwilling to plead to a lesser charge or to give up his license in exchange for dropping all criminal charges; the point is that the federal prosecutor should be aware that the officer cannot remain in law enforcement without his state license. While it is true, as discussed below, that a federal judge is unable to bar the defendant permanently from engaging in law enforcement, the federal prosecutor can do so through a plea agreement in which the officer agrees to have his license revoked and also agrees not to seek a license in any other state.

#### F. Sentencing Recommendations

If a criminal case goes to trial and results in a conviction rather than a plea agreement, the remedy is supplied through the sentence. Sentencing is primarily the responsibility of the judiciary. When imposing a sentence of probation<sup>70</sup> or supervised release,<sup>71</sup> the judge is authorized by the Comprehensive Crime Control Act of 1984 to order the defendant to “refrain . . . from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.”<sup>72</sup> Federal prosecutors have a role to play at the sentencing stage of a case: “[T]he attorney for the government should assist the sentencing court by . . . making sentencing recommendations in appropriate cases.”<sup>73</sup> This could include a recommendation that the officer

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68. *Id.* at § 9-16.030. (This section notes that under the Victim and Witness Protection Act of 1982, P.L. 97-291, § 6, 96 Stat. 1256, there should be consultation with the appropriate federal investigative agency and consideration of the view of the victims in negotiating pleas.)

69. Cincinnati Police Officer Robert Jorg was charged with assault and involuntary manslaughter in the death of a suspect in a drug case, Roger Owensby, in November 2000. He was acquitted on the assault charge and there was a hung jury on the manslaughter charge. The county prosecutor declined to re-prosecute. Jorg left the Cincinnati Department to become a police officer in Clermont County. He also filed a \$30 million federal lawsuit against city and county officials. Gregory Korte, *Coroner's Review Verifies Owensby's Cause Of Death*, THE CINCINNATI ENQUIRER, Sept. 13, 2002, at A1, available at 2002 WL 20836698.

70. 18 U.S.C. § 3563(b)(6) (2002).

71. 18 U.S.C. § 3583(d) (2002).

72. 18 U.S.C. § 3563(b)(5) (2002) (probation); 18 U.S.C. § 3583(d) (2002) (supervised release).

73. USAM, *supra* note 39, at § 9-27.710(A).

refrain from engaging in law enforcement and not seek a license in another state while on probation or supervised release.

The Manual instructs U.S. Attorneys to make recommendations with respect to a sentence when “[t]he public interest warrants an expression of the government’s view concerning the appropriate sentence.”<sup>74</sup> However, since sentencing is primarily up to the judiciary, this should not be done routinely but should be reserved “for those unusual cases in which the public interest warrants” a recommendation.<sup>75</sup> The Manual notes the value of the “imposition of innovative conditions of probation if consistent with the Sentencing Guidelines.”<sup>76</sup> One possible condition of probation noted is that the defendant “desist from engaging in a particular type of business.”<sup>77</sup> In determining the recommendation, one of the factors to consider is the extent to which the proposed sentence “protect[s] the public from further offenses by the defendant.”<sup>78</sup> In most cases of police misconduct, a recommendation that the officer desist from serving in law enforcement would clearly be within the public interest and would protect the public from further offenses of the same nature as the criminal conduct.

With respect to the terms of probation, judges have broad sentencing discretion since they can require a defendant to “satisfy such other conditions as the court may impose.”<sup>79</sup> The 2001 Sentencing Guidelines Manual provides that as an additional condition of probation it may be appropriate for a court to impose occupational restrictions on the defendant,<sup>80</sup> but only if (1) a “reasonably direct relationship existed between the defendant’s occupation . . . and the conduct relevant to the offense of conviction,”<sup>81</sup> and (2) the restriction is “reasonably necessary to protect the public” because without the restriction it is likely that the defendant will “continue to engage in unlawful conduct similar to that for which the defendant was convicted.”<sup>82</sup> The guidelines further provide that should the court decide that such an occupational restriction is appropriate, such a restriction may only be imposed for a limited amount of time and to a limited extent.<sup>83</sup> In its report on the Comprehensive Crime Control Act of 1984, the Senate Judiciary Committee stated that the

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74. *Id.* at § 9-27.730(A)(2).

75. *Id.* at § 9-27.730(B)(3).

76. *Id.*

77. *Id.*

78. *Id.* at § 9-27.740(B)(2).

79. 18 U.S.C. § 3563(b)(22) (2002).

80. U.S. SENTENCING GUIDELINES MANUAL, 18 U.S.C. app. § 5B1.3(e)(4) (2001).

81. *Id.* at § 5F1.5(a)(1).

82. *Id.* at § 5F1.5(a)(2).

83. *Id.* at § 5F1.5(b) (“If the court decides to impose a condition of probation or supervised release restricting a defendant’s engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.”).

condition “should only be used as reasonably necessary to protect the public.”<sup>84</sup>

The Sixth Circuit, relying on § 5F1.5 of the Sentencing Guidelines Manual, upheld a condition of probation that prevented a lawyer from performing title search services during his probationary period.<sup>85</sup> The lawyer had been convicted of using false social security numbers, and the court found a direct relationship between the condition and the conduct of the relevant offense.<sup>86</sup> The court further found that the restriction was necessary to protect the public and that it met the limited scope and minimum time requirements.<sup>87</sup>

Other cases decided by the U.S. courts of appeals can be read to state generally that a federal judge would not be able to order, as a condition of probation, that a defendant permanently surrender his or her license to practice any profession,<sup>88</sup> but would be able to order the defendant not to participate in the profession for the duration of the probationary period or some shorter period of time.<sup>89</sup> Several of the cases relied on 18 U.S.C. § 3651, which provided that a judge may place a defendant “on probation for such a period and upon such terms and conditions as the court deems best.”<sup>90</sup> This section has since been repealed, but the language is similar to that found in 18 U.S.C. § 3563(b)(22);<sup>91</sup> thus the cases interpreting it are still good law. In one such case, the Second Circuit held that a district court’s condition that a lawyer

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84. S. REP. NO. 98-225, at 96 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182. (The committee’s report further explained that because the condition was not to be used “as a means of punishing the convicted person,” the use of the condition and its scope are limited “to the minimum reasonably necessary to protect the public.”)

85. *United States v. Manogg*, No. 93-3622, 1995 WL 290248 (6<sup>th</sup> Cir. May 11, 1995).

86. *Id.* at 1-2.

87. *Id.* at 3.

88. Cases that have found that a court may not require a person permanently to surrender a license include: *United States v. Pastore*, 537 F.2d 675, 683 (2d Cir. 1976); *United States v. Sterber*, 846 F.2d 842, 844 (2d Cir. 1988); *United States v. Polk*, 556 F.2d 803, 804 (6<sup>th</sup> Cir. 1977) (holding that a district court exceeded its authority by imposing as a condition that defendant surrender his license to practice law). See the discussion of *Pastore*, *infra* notes 92-95 and accompanying text, and the discussion of *Sterber*, *infra* note 95.

89. Cases that have held that occupational restrictions are appropriate during the probationary period include: *United States v. Villarin Genera*, 553 F.2d 723, 726-27 (1<sup>st</sup> Cir. 1977); *United States v. Brockway*, 769 F.2d 263, 265 (5<sup>th</sup> Cir. 1985); *United States v. Tonry*, 605 F.2d 144, 148 (5<sup>th</sup> Cir. 1979) (violating FECA was proper justification for condition that defendant not run for public office or engage in public activity while on probation); *United States v. Manogg*, No. 93-3622, 1995 WL 290248, at 4 (6<sup>th</sup> Cir. May 11, 1995); *see generally*, *United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995) (violating orders prohibiting extrajudicial statements in violation of local rule was proper reason for barring lawyer from practicing in E.D.N.Y. for 180 days). See the discussion of *Villarin Genera*, *infra* notes 96-98 and accompanying text, the discussion of *Brockway*, *infra* notes 99-101 and accompanying text, and the discussion of *Manogg*, *supra* notes 85-87 and accompanying text.

90. 18 U.S.C. § 3651 (repealed 1984) (emphasis added).

91. 18 U.S.C. § 3563(b)(22) (2002). *See supra* text accompanying note 72.

permanently resign from the bar after being convicted of filing false income tax returns and being placed on probation was improper.<sup>92</sup> The court found that the condition needed to bear a “reasonable relationship to the treatment of the accused and the protection of the public.”<sup>93</sup> The court was concerned that the defendant have a chance to contest the imposition of the condition and stated that before a defendant is required to give up his job or profession “he should be given a meaningful opportunity to demonstrate why such a condition might be inappropriate.”<sup>94</sup> The court further stated that expulsion from the bar is a responsibility best left to the state.<sup>95</sup>

Several courts have dealt with the imposition of occupational restrictions on police officers. The First Circuit has upheld a condition that a police officer resign from the police force during his probationary period.<sup>96</sup> The officer had struck a private citizen numerous times and had arrested him without probable cause, violating 18 U.S.C. § 242.<sup>97</sup> The court found that there was a reasonable relationship between the treatment of the officer and the protection of the public as there was a possibility that the officer might lose his temper on a future occasion, and limiting him to clerical duties might afford him the opportunity to commit unlawful administrative acts.<sup>98</sup> Similarly, in *U.S. v. Brockway*, the Fifth Circuit upheld a condition that an elected county sheriff not serve as a law enforcement officer during the probationary period.<sup>99</sup> The sheriff was placed on federal probation after brutalizing a pre-trial detainee to obtain a confession.<sup>100</sup> The court held: “Barring from law enforcement work one who has demonstrated such a recurring tendency to abuse the office . . . is clearly reasonably related to protection of the public.”<sup>101</sup>

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92. *United States v. Pastore*, 537 F.2d 675, 676-77, 683 (2d Cir. 1976).

93. *Id.* at 680.

94. *Id.* at 682.

95. *Id.* at 683 (stating that because “expulsion from the state bar is a sanction precisely governed by statute and regulation, it would seem preferable not to impose that sanction except by procedure and for the reasons prescribed.”); *c.f.* *United States v. Sterber*, 846 F.2d 842, 843 (2d Cir. 1988) (refusing to uphold a district court’s condition that a pharmacist surrender his state pharmacy license after he furnished false information on a federal drug form, and stating again that because state law “sets forth well-defined procedures to determine whether revocation of [the defendant’s license] is an appropriate sanction and provides [the defendant] with a meaningful opportunity to contest the imposition of such a sanction . . . the special condition of probation was improper.”).

96. *United States v. Villarín Genera*, 553 F.2d 723, 724 (1<sup>st</sup> Cir. 1977).

97. *Id.*

98. *Id.* at 727 and n.9 (explaining that while performing administrative duties the officer might swear out false complaints or testify falsely before a Grand Jury or at trial).

99. *United States v. Brockway*, 769 F.2d 263, 264 (5<sup>th</sup> Cir. 1985).

100. *Id.*

101. *Id.* at 265.

The foregoing suggests that a federal judge does not have the authority to require that an officer permanently give up his peace officer certification as a condition of probation or supervised release. Additionally, because a state is required to take action to decertify an officer, a condition that an officer relinquish his certification would ultimately result in a federal court impermissibly directing the state to take action.<sup>102</sup>

It is apparent that in most cases involving civil rights violations under § 241 and § 242 or public corruption such as perjury and extortion there is a need for keeping the officer out of law enforcement. Thus, as a matter of course, the prosecutor should recommend to the court that the officer be prohibited from returning to his job during the probationary period. This is particularly true because there is no guarantee that the local police agency will fire the employee, or that the state POST will immediately revoke the officer's certificate upon conviction.

#### IV. FEDERAL COOPERATION WITH STATE POSTS

##### A. *After a Conviction*

Where the federal prosecutor is successful in getting a conviction, a copy of the conviction should be forwarded to the state POST.<sup>103</sup> In most states, a felony conviction is a ground for revocation of the license. Conviction of certain misdemeanors is a ground for revocation in many states. Since an officer certified in one state may seek to obtain a certificate in another state, information that the officer has been convicted of a crime in federal court should be sent to all state POSTs, even to POSTs in states that do not have the authority to revoke, because the conviction may prevent a person from being certified in the first instance.<sup>104</sup> In the absence of a national databank on law enforcement officers who have lost their licenses or otherwise engaged in misconduct, the DOJ and IADLEST should confer on how best to get

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102. *United States v. Martinez*, 988 F. Supp. 975, 978 (E.D. Va. 1998) (“[A] condition of federal probation that restricts a state-granted or state-established right is permissible as long as the condition is reasonable, is not imposed for a term greater than the duration of the probationary period, and does not require a state official to enforce a federal judicial order.”).

103. *See* OKLA. STAT. ANN. tit. 70, § 3311 (West 2001), *amended by* 2002 Okla. Sess. Law Serv. Ch. 22 (H.B. 2924) (West 2002) (imposing the duty on the district attorney who prosecutes a peace officer for a felony or crime involving moral turpitude to report pleas to the state Council on Law Enforcement Education and Training).

104. Indiana and Rhode Island, two states without revocation authority, prohibit by regulation entry into the police academy where an applicant has been convicted of a felony or any crime involving moral turpitude. IND. ADMIN. CODE tit. 250 r. 1-3-9 (WESTLAW through Aug. 9, 2002); Facsimile from Glenford J. Shibley, R.I. Mun. Police Acad., to Roger L. Goldman, Professor, Saint Louis University School of Law (Dec. 21, 2000) (on file with author).

information on convictions to POSTs. Perhaps the NDD<sup>105</sup> would be the appropriate place for such data to be kept.

*B. After an Acquittal*

Where there is an acquittal after a federal prosecution, the state POST should be informed of that fact and told of the availability of trial transcripts of witnesses that might be helpful to the POST in deciding whether to proceed administratively against the officer, because some states permit revocation or other sanctions for reasons other than a criminal conviction. Of course, transcripts from state criminal cases that result in acquittals would also be helpful. Consideration should be given to regular meetings of state and federal prosecutors with POST personnel to share this and other information.

*C. When There Is No Federal Prosecution*

As discussed above, the vast majority of complaints against law enforcement officers received by the federal government do not result in prosecution.<sup>106</sup> While the complaint may not be deemed worthy of federal prosecution, it may indicate misconduct that constitutes grounds for revocation under state law. In these cases the DOJ should consider adopting a policy of notifying the state POST of the complaint.<sup>107</sup> Notification should also include

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105. See *supra* note 20-23 and accompanying text. In cases of civil judgments or settlements under 42 U.S.C. § 1983 involving color-of-law violations by police officers, Congress should consider requiring payers—malpractice insurance companies or municipalities in the case of self-insurers—to report the amount paid to the NDD and the state POST. This is analogous to the requirement imposed by federal law in cases of malpractice judgments or settlements against health-care practitioners. See *supra* note 17.

106. See *supra* notes 25-29 and accompanying text.

107. Consider the incongruity presented by the fact that DOJ attorneys, like all other attorneys, have an obligation to inform state bar officials if they have “knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (1999), but there is no duty to report misconduct of law enforcement officials to their corresponding disciplinary authority. The same policy rationale that supports the duty to report lawyers—protection of the public—supports a practice of informing state POSTs, a practice that should be followed with respect to serious misconduct by law enforcement officials. For a discussion of state laws requiring reporting of decertifiable conduct by local police departments to POSTs and providing qualified immunity for reporting such conduct, see Puro et al., *Police Decertification: Changing Patterns Among the States, 1985-1995*, 20 *Policing* 481, 489-94 (1997).

Regarding immunity for reporting alleged misconduct, the court in *Weber v. Cueto*, 568 N.E.2d 513 (Ill. App. Ct. 1991), noted that an absolute privilege exists when a lawyer makes a report under Illinois Disciplinary Rule 1-103, the equivalent to Rule 8.3. *Id.* at 519. Both rules place an absolute duty on the lawyer to report and subject him to discipline should he fail to report. Whereas Rule 8.3 requires the reporting of only serious violations, the Illinois rule requires the reporting of every violation. The *Weber* court took guidance from several cases

transmission to the POST of both FBI investigative files and grand jury testimony. While rules governing the disclosure of this information may make sharing problematic, there are exceptions to the rules that may enable the DOJ to provide POSTs with this information. Because most state POSTs are understaffed, the receipt of federal investigative files and grand jury transcripts could be quite useful in carrying out their important task of protecting the public by removing the licenses of unfit officers.

The kinds of cases appropriate for revocation but not for prosecution would include those in which the facts suggest the commission of a crime but the federal prosecutor could not show proof beyond a reasonable doubt. Some states permit revocation by a preponderance of the evidence,<sup>108</sup> others by clear and convincing evidence.<sup>109</sup> Some states permit revocation without regard to whether the action is criminal, for example, “[c]onduct which would tend to disrupt, diminish or otherwise jeopardize public trust and fidelity in law enforcement.”<sup>110</sup>

For a set of related cases, deemed worthy of prosecution but for which “there exists an adequate, non-criminal alternative to prosecution,”<sup>111</sup> the Manual already contemplates this type of information sharing. In section 9-27.250, Non-Criminal Alternatives to Prosecution, the Manual states that when considering such an alternative, “[I]t should be noted that referrals for non-criminal disposition may not include the transfer of grand jury material unless an order under Rule 6(e), Federal Rules of Criminal Procedure, has been obtained.”<sup>112</sup>

The Criminal Section statistics do not indicate how many law enforcement cases, if any, are referred to POSTs, nor at what point in the process these referrals are made. As implied by the Manual and as discussed below, there may be limits on what kind of information can be shared, but there does not seem to be any restriction on sharing information depending on the stage of the

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outside of Illinois which held that an absolute privilege exists where a law requires reporting. See *Miller v. Lear Siegler, Inc.* 525 F. Supp 46, 59 (D. Kan. 1981) (“When a statement is required by federal law, an absolute privilege must exist.”); *Newman v. Legal Services, Inc.*, 628 F. Supp. 535, 543 (D.D.C. 1986) (holding that statements disseminated pursuant to the FOIA were absolutely privileged because the government was required to produce the documents); *Johnson v. Dirkwager*, 315 N.W.2d 215 (Minn. 1982) (defamatory material in employee termination letter was absolutely privileged where law required disclosure of defamatory material). The *Weber* court then reasoned: “[W]e can make no meaningful distinction between the compulsion effected by a law enacted by the legislature and that effected by a disciplinary rule promulgated by the Supreme Court of Illinois.” *Weber*, 568 N.E.2d at 519.

108. *E.g.*, ARIZ. ADMIN. CODE § R2-19-119 (1999).

109. *E.g.*, WASH. REV. CODE ANN. § 43.101.380(1) (West 2002).

110. UTAH CODE ANN. § §53-6-211(1)(d)(v) (2002); W. VA. CODE ST. R. § 149-2-16.1 (2001).

111. USAM, *supra* note 39, at § 9-27.250(B).

112. *Id.*

investigation and prosecution process. Therefore, even if a complaint is one of the approximately 5000<sup>113</sup> annually that do not result in an FBI investigation, if the allegations in the complaint might constitute revocable conduct under state law, the POST should be informed.

The next sections will discuss whether there may be disclosure of grand jury materials and whether there may be disclosure of non-grand jury information.

### 1. Disclosure of Federal Grand Jury Materials

The common law had a “long-established policy that maintains the secrecy of the grand jury proceedings in federal court.”<sup>114</sup> Rule 6(e) of the Federal Rules of Criminal Procedure codified the common law policy that matters occurring before a grand jury should not be disclosed. This general rule of secrecy undoubtedly includes “all testimony, legal instructions, prosecution remarks, and any other statements given before the grand jury.”<sup>115</sup> Yet, Rule 6(e) has two exceptions that may be applicable to the current situation: 6(e)(3)(C)(i) first provides that that “disclosure . . . of matters occurring before the grand jury may also be made when so directed by a court preliminary to or in connection with a judicial proceeding.”<sup>116</sup> A second exception to the rule provides that disclosure may be made “when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law.”<sup>117</sup>

#### a. 6(e)(3)(C)(i)(I)

The first exception requires the party seeking disclosure to prove that the materials will be used “preliminary to or in a judicial proceeding.”<sup>118</sup> The

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113. Only about 1000 investigations are initiated from the approximately 6000 complaints received against police officers annually by the Criminal Section. Thus, about 5000 complaints are received and not investigated. *See supra* notes 26-27.

114. *U.S. v. Sells Engineering*, 463 U.S. 418, 424 (1983).

115. PAUL S. DIAMOND, *FEDERAL GRAND JURY PRACTICE AND PROCEDURE*, §10.01 (1991 Supp.) The book notes, however, that Rule 6(e) does not apply to ministerial grand jury records or to “individual documents subpoenaed by the grand jury.” *Id.* (citation omitted). Exceptions to this rule are documents that might contain information relating to the strategy or direction of the grand jury investigation, as well as Department of Justice memoranda submitted to the grand jury. *Id.*

116. Fed. R. Crim. P. 6(e)(3)(C)(i)(I).

117. Fed. R. Crim. P. 6(e)(3)(C)(i)(IV).

118. Fed. R. Crim. P. 6(e)(3)(C)(i)(I).

Supreme Court has also said that there must be a “strong showing of particularized need for grand jury materials. . . .”<sup>119</sup>

The major problem in applying this rule is determining what constitutes a judicial proceeding or a matter preliminary to a judicial proceeding. Generally, disclosure is permitted in connection with federal, state and local court proceedings.<sup>120</sup> In addition, grand jury proceedings are deemed to be “preliminary to” criminal court proceedings, and therefore disclosure is allowed for use in federal and state grand jury proceedings.<sup>121</sup>

Other uses for these materials, however, are not so clear, but over the years courts have established some guidelines. In *United States v. Baggot*, the Supreme Court stated that the rule “contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated.”<sup>122</sup> The Court further noted that it is “not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge.”<sup>123</sup> Instead, the Court held: “[t]he focus is on the *actual use* to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure . . . is not permitted.”<sup>124</sup> In *Baggot*, the Court held that disclosure of grand jury materials for use in an IRS audit of civil tax liability was not allowed under the rule, making it clear that agency proceedings would often not qualify for disclosure.<sup>125</sup> The reason for the Court’s decision was that the focus of the IRS’s actions was “to perform the non-litigative function of assessing taxes rather than to prepare for or to conduct litigation.”<sup>126</sup> Therefore, the Court held that these actions were not preliminary to a judicial proceeding.<sup>127</sup>

The issue of whether a proceeding qualifies under the rule as either preliminary to a judicial proceeding or as an actual judicial proceeding is often contested. However, there is a general consensus among courts that both state disciplinary proceedings against attorneys or judges and local disciplinary

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119. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983); *see also* 1 SARA BEALE ET AL., *GRAND JURY LAW AND PRACTICE* §§ 5:9-5:10 (2d ed. 1997).

120. BEALE ET AL., *supra* note 119, at § 5:9, at 5-58.

121. *Id.*

122. *United States v. Baggot*, 463 U.S. 476, 480 (1983).

123. *Id.*

124. *Id.* (emphasis in original).

125. *Id.*; *see also* BEALE ET AL., *supra* note 119, at § 5:9, at 5-59.

126. *Baggot*, 463 U.S. at 483; *see also* BEALE ET AL., *supra* note 119, at § 5:9, at 5-60.

127. *Baggot*, 463 U.S. at 483; *see also* BEALE ET AL., *supra* note 119, at § 5:9, at 5-60. The court did not suggest, however, that a taxpayer contesting a tax liability in court would not be a judicial proceeding. To the contrary, the court seemed to suggest that this would be a judicial proceeding for purposes of the rule. *Baggot*, 463 U.S. at 481.

proceedings against police officers constitute judicial proceedings or matters preliminary to judicial proceedings for purposes of the rule.<sup>128</sup>

In *In re Special February 1971 Grand Jury v. Conlisk*, the Seventh Circuit permitted disclosure to a police superintendent who summoned five police officers to appear before the Chicago Police Department's Board of Inquiry.<sup>129</sup> The officers had earlier appeared before a criminal grand jury investigating allegations of conspiracy and corruption.<sup>130</sup> The superintendent sought the grand jury minutes and testimony of the court reporters in order to conduct an investigation into allegations that the officers violated departmental rules.<sup>131</sup> The court allowed disclosure on the basis that the police board hearing was preliminary to a judicial proceeding.<sup>132</sup> The court's rationale was that the statutory scheme gave the police officers a right to judicial review of their case should the board choose to impose a penalty on them.<sup>133</sup> The court also noted that the "purpose of rule 6(e) is to facilitate efficient adjudication for the protection of the public."<sup>134</sup> The court continued: "Certainly, the release of grand jury testimony to a police board seeking to prevent those who may be perpetrators of crime from clothing themselves in the trappings of the law can only redound to the protection of the public with whom such figures of authority come into contact."<sup>135</sup>

*Conlisk* involved a local disciplinary proceeding rather than a state revocation proceeding, which is more analogous to a state bar disciplinary proceedings, seeking to disbar a lawyer. Since courts have permitted disclosure of federal grand jury materials for state bar proceedings,<sup>136</sup> the outcome should be no different for a state POST requesting disclosure for a police license revocation proceeding. Furthermore, the statutory scheme in

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128. See BEALE ET AL., *supra* note 119, at § 5:9, at 5-60, n.17 (citing *United States v. Sobotka*, 623 F.2d 764 (2<sup>nd</sup> cir. 1980) (attorney disciplinary proceedings); *In re Disclosure of Testimony Before Grand Jury, Troia*, 580 F.2d 281 (8<sup>th</sup> Cir. 1980), *aff'g* *United States v. Salinitro*, 437 F.Supp. 240 (D. Neb. 1977) (commission on judicial qualifications); *In re Holovachka*, 317 F.2d 834 (7<sup>th</sup> Cir. 1963) (police board of inquiry); *Doe v. Rosenberry*, 255 F.2d 118, 120 (2<sup>d</sup> Cir. 1958) (attorney disciplinary proceeding); *In Re Petition to Inspect Grand Jury Materials*, 576 F. Supp. 1275 (S.D. Fla. 1983) (judicial disciplinary panel); and *In Re Grand Jury Transcripts*, 309 F. Supp. 1050 (S.D. Ohio 1970) (police board of inquiry)).

129. *In re Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7<sup>th</sup> Cir. 1973).

130. *Id.* at 895.

131. *Id.*

132. *Id.* at 897.

133. *Id.* at 896-97. The Illinois statutory scheme provided that the officers could seek judicial review in the Circuit Court, with an appeal as of right to the Appellate Court of Illinois. *Id.* at 896.

134. *Id.* at 898.

135. *Id.* at 897.

136. See *Baggot*, *supra* note 122; see generally BEALE ET AL., *supra* note 119, at § 5:9 (citing many cases in which the Rule 6(e) determination has been made).

*Conlisk* is similar to revocation statutes in that both allow officers to seek judicial review of the administrative decision. Therefore, since the procedures in *Conlisk* were deemed preliminary to a judicial proceeding, the same could hold true for a POST revocation proceeding.<sup>137</sup>

b. 6(e)(3)(C)(i)(IV)

Although courts have held that police officer disciplinary proceedings constitute matters preliminary to judicial proceedings, one problem that sometimes arises is that state authorities are not aware of the facts developed in the federal investigation.<sup>138</sup> If this is the case, state authorities may be unable to prove that they have a particularized need for the information or that proceedings are even contemplated.<sup>139</sup> In this situation, the state agency will not qualify for disclosure under 6(e)(3)(C)(i)(I).

In 1985, however, the Advisory Committee amended Rule 6(e) to include subdivision 6(e)(3)(C)(i)(IV), which allows disclosure of grand jury material if authorized by the court after the request of a government attorney. With respect to the problem presented by the requirement that the state to show a particularized need, the Advisory Committee notes stated: “This inability lawfully to disclose evidence of a state criminal violation—evidence legitimately obtained by the grand jury—constitutes an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws.”<sup>140</sup> The committee also noted: “It is clearly desirable that federal and state authorities cooperate.”<sup>141</sup>

With respect to the Advisory Committee comments the Manual remarks: “It is both the intent of the amended rule, and the policy of the Department of Justice, to share grand jury information wherever it is appropriate to do so.”<sup>142</sup>

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137. In order to obtain materials under this exception, the POST would file a petition for disclosure “in the district where the grand jury convened.” FED. R. CRIM. P. 6(e)(3)(D); *see also* DIAMOND, *supra* note 115, at 10-18. Written notice of the petition for disclosure must be given to the prosecutor, the parties to the proceeding, and “such other persons as the court may direct.” FED. R. CRIM. P. 6(e)(3)(D); *see also* DIAMOND, *supra* note 115, at 10-18. Prior to granting the petition, the parties given notice will be allowed an opportunity to be heard on the subject. FED. R. CRIM. P. 6(e)(3)(E); *see also* DIAMOND, *supra* note 115, at 10-18. In the case of a POST requesting this information, it seems that the interest of protecting the public would most likely outweigh the general rule of grand jury secrecy, and disclosure would be available under the 6(e)(C)(i) exception.

138. BEALE ET AL., *supra* note 119, at § 5:9, at 5-56 to 5-57.

139. *Id.* at § 5:9, at 5-57. Beale noted that the Advisory Committee’s Note in support of the amendment “observed that information developed in a federal grand jury proceeding often arises outside the context of any pending or contemplated state court proceeding and under current provisions could not be disclosed. . . .” *Id.* at n.8.

140. FED. R. CRIM. P. 6 Advisory Committee Notes.

141. *Id.*

142. USAM, *supra* note 39, at § 9-11.260.

The Manual lists some requirements for disclosure under the rule. First, disclosure may be made to “any official whose official duties include enforcement of the State criminal law whose violation is indicated in the matters for which disclosure authorization is sought.”<sup>143</sup> Second, the Manual requires that prior to a request to a court for disclosure, the Assistant Attorney General in charge of the Division having jurisdiction over the matter must give authorization.<sup>144</sup> Authorization should only be given when there exists a substantial need to support the disclosure.<sup>145</sup>

This exception appears to be broader than the first exception because there is no requirement for the POST to show a “particularized need,” but there must only be shown a substantial need for the materials, and there is no requirement that disclosure under this rule be in connection with a judicial proceeding.<sup>146</sup> The problem is that the wording of Rule 6(e)(3)(c)(i)(IV) is quite narrow, applying only when a state prosecution is contemplated. The Advisory Committee or Congress should consider expanding the exception to permit disclosure of grand jury information to professional licensing agencies, like POSTs, where there is evidence of misconduct that constitutes grounds for revocation under state law.<sup>147</sup> The countervailing argument is that sharing such information would chill potential grand jury witnesses, particularly law enforcement officers who risk ostracism were it known that they testified before a grand jury against a fellow officer.

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143. *Id.*

144. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL, sec. 157 (Oct. 1997), [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00157.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00157.htm). The Manual provides that a request for authorization must be made in writing and must include all of the information required by the Resource Manual 157. In making the decision whether to give authorization, an AAG will consider, *inter alia*, whether: “(1) The State has a substantial need for the information; (2) The grand jury was convened for a legitimate Federal investigative purpose; (3) Disclosure would impair an ongoing Federal trial or investigation; (4) Disclosure would violate a federal statute (e.g., 26 U.S.C. § 6103) or regulation; (5) Disclosure would violate a specific Departmental policy; (6) Disclosure would reveal classified information to persons without an appropriate security clearance; (7) Disclosure would compromise the government’s ability to protect an informant; (8) Disclosure would improperly reveal trade secrets; and (9) Reasonable alternative means exist for obtaining the information.” *Id.*

145. *Id.*

146. While there is no requirement to show the court that the state has a “particularized need,” DOJ policy does require approval of the request to the court by the “Assistant Attorney General in charge of the Division having jurisdiction over the matters that were presented to the grand jury.” USAM, *supra* note 39, at § 9-11.260, see also DIAMOND, *supra* note 115, at § 10.03[E], at 10-26 (“The Department will not require “particularized,” but only “substantial,” need for the disclosure.” (citing § 9-11.260 (1992-1 Supp.)).

147. Note that Congress has recently amended the rule to permit sharing of information among federal agencies concerning terrorists. USA Patriot Act, Pub. L. No. 107-56, § 203, 115 Stat 272, 279 (2001); FED. R. CRIM. P. 6(e)(3)(C)(i)(V).

## 2. Disclosure of Other Material

Other investigative materials compiled by the federal government should also be shared with state POSTs when there is substantial evidence that a law enforcement officer has engaged in serious misconduct, albeit not a federal crime. The kinds of materials sought would include FBI interviews with the officer, victim, or witnesses, any records obtained, such as medical records, photographs, and financial records, if the case involved public integrity matters. This information could be extremely useful to POST personnel; however, federal law generally makes this information non-discoverable.<sup>148</sup>

The Freedom of Information Act of 1966<sup>149</sup> (“FOIA”) provided “for disclosure to the public of records, files, and other information of federal departments and agencies in the executive branch.”<sup>150</sup> Yet, there are exceptions to the general rule that when documents are requested they should be disclosed, most importantly § 552(b)(7), which provides:

[the Act] does not apply to records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial . . . , (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . , (E) would disclose techniques and procedures for law enforcement investigations or prosecutions . . . , or (F) could reasonably be expected to endanger the life or physical safety of any individual.<sup>151</sup>

If POST personnel were to seek information, they would most likely be seeking “records or information compiled for law enforcement purposes,” as addressed by § 552(b)(7). None of the circumstances listed as exceptions in § 552(b)(7)(A)–(F) seem applicable in a typical revocation case, and therefore such information should be subject to disclosure under the FOIA upon the filing of a request with the component of the Department of Justice that maintains the records.<sup>152</sup>

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148. See *infra* notes 155-63 and accompanying text.

149. 5 U.S.C. § 552 (1994 & Supp. 1997).

150. USAM, *supra* note 39, at § 3-17.100.

151. 5 U.S.C. § 552(b)(7) (1994 & Supp. 1997).

152. USAM, *supra* note 39, at § 3-17.120; see 28 C.F.R. § 16.3 (West, WESTLAW, current through Oct. 1, 2002). The request should be in writing and must contain a detailed description of the records. 28 C.F.R. § 16.3. Generally, the component of the Department first receiving the request is responsible for responding. *Id.* at § 16.4(a). The head of that component has the authority to grant or deny the request. *Id.* at § 16.4(b). This portion of the regulation also notes the following: “Whenever a request is made for a record containing information that relates to an investigation of a possible violation of law and was originated by another component or agency, the receiving component shall refer the responsibility for responding to the request regarding that

The FOIA must be read in conjunction with the Privacy Act of 1974 (“PA”).<sup>153</sup> POST officials need to be aware of the PA rules as well as the procedures for obtaining disclosure. The PA provides: “No agency shall disclose any record . . . unless disclosure would be . . . required under section 552 of this title.”<sup>154</sup> Therefore, if disclosure is required under the FOIA, meaning none of the exemptions to disclosure applies, then the PA does not prevent disclosure.<sup>155</sup>

Federal regulations also provide rules for situations in which DOJ employees are asked to testify or to produce documents in response to demands or subpoenas of courts issued in state or federal proceedings.<sup>156</sup> The general rule in this situation is that “no present or former employee of the Department of Justice may testify or produce Departmental records . . . issued in any state or federal proceeding without obtaining prior approval by an appropriate Department official.”<sup>157</sup>

Additionally, provisions in the Civil Rights Resource Manual govern the response to a request for disclosure of information collected by the Civil Rights Division.<sup>158</sup> The power to authorize disclosure of such information is vested in the United States Attorney for the district in which the demand originated.<sup>159</sup> Generally, the Department “favors cooperation in state and

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information to that other component or agency or consult with that other component or agency.” *Id.* at § 16.4(d). The component has twenty business days from the time a request is received to make a determination to grant or deny the request. *Id.* at § 16.6(b). The person requesting the information will be notified in writing and will receive the documents if disclosure is granted. *Id.* If a request is denied, it may be appealed under 28 C.F.R. § 16.9. *Id.* at § 16.6(c)(4).

153. 5 U.S.C. § 552 (1994 & Supp. 1997).

154. 5 U.S.C. § 552(b)(3) (1994).

155. The Office of Information and Privacy (“OIP”), advises the Department “on questions of policy relating to the interpretation and application of the [FOIA].” USAM, *supra* note 39, at § 3-17.121. Although the Code of Federal Regulations addresses requests made for disclosure of records under the PA, the procedure is the same as that under the FOIA. 28 C.F.R. 16.48 (West, WESTLAW, current through Oct. 1, 2002). The OIP serves as the reviewing authority for appeals of FOIA decisions by components of the DOJ. *See* USAM, *supra* note 39, at § 3-17.121. An appeal must be made within 30 days after receipt of the Department’s determination. *See* 28 C.F.R. 16.48(a); *see also* U.S. DEP’T OF JUSTICE, EOUSA RESOURCE MANUAL, sec. 138 (1997).

156. 28 C.F.R. § 16.21-.29 (West, WESTLAW, current through Oct. 1, 2002); *see* USAM, *supra* note 39, at § 1-6.210.

157. 28 C.F.R. § 16.22 (West, WESTLAW, current through Oct. 1, 2002); *see also* USAM, *supra* note 39, at § 1-6.100. Information regulated includes: (1) material contained in the files of the Department; (2) information relating to materials contained in the Department’s files; and (3) information acquired by a Department employee as part of that employee’s official duties or because of that employee’s official status. 28 C.F.R. § 16.22.

158. CRRM, *supra* note 29, at sec. 48, [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title8/cvr00047.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00047.htm).

159. 28 C.F.R. § 16.22, *supra* note 156; *see also* USAM, *supra* note 39, at § 1-6.240. In Civil Rights Division cases, the US Attorney must contact the Deputy AAG of the Division who refers

federal cases in which the testimony of one of its employees is sought or in which information obtained by the Department is sought.”<sup>160</sup> The regulations do list possible factors, similar to some of those listed in 5 U.S.C. § 552(b)(7) (the FOIA), that lead to denial of such requests.<sup>161</sup> But even if these factors are present, an official may still authorize disclosure if the “administration of justice” requires it.<sup>162</sup> As opposed to records requests, when FBI agents who have conducted investigations in connection with a Criminal Section case are subpoenaed to testify in state or federal proceedings, the DOJ’s policy is to resist the subpoena unless the agent can give eyewitness testimony.<sup>163</sup> The Manual notes that “[q]uite often the subpoena is issued on behalf of a state defendant in a criminal case seeking to obtain the results of an FBI investigation into alleged police mistreatment of the defendant.”<sup>164</sup> It is unlikely that a state POST would need to subpoena an FBI agent to testify in a revocation proceeding; it is the agent’s investigative file that would be sought.

#### V. IMPLEMENTING COOPERATION

One way to initiate the relatively intensive cooperation suggested above would be to convene a meeting between the national organization of POST directors (IADLEST), members of the Criminal Section, and representatives of the US Attorneys, followed by a meeting of each US Attorney, FBI investigators, and the POST Director in each state with a revocation program. In these meetings, each side could get a better understanding of what the other does, what their needs are, and what the existing barriers are to better cooperation. Task forces could be formed, as is currently being done in the area of health care fraud and abuse, between the DOJ, other federal agencies, and state and local agencies.<sup>165</sup> A possible model is set forth in the proposed

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the matter to the Section chief. CRRM, *supra* note 29, at sec. 48, [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title8/cvr00047.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00047.htm).

160. USAM, *supra* note 39, at § 1-6.240.

161. 28 C.F.R. § 16.26(b) (2001); USAM, *supra* note 39, at § 1-6.240 (stating that a denial is not usually permitted unless one of the six factors in § 16.26(b) is present).

162. USAM, *supra* note 39, at § 1-6.440 (indicating that the Deputy Attorney General or the Associate Attorney General has authority to order disclosure despite the presence of one of the following factors: (1) seriousness of the violation or the crime; (2) past history of violator; (3) importance of relief sought; (4) importance of legal issues presented; and (5) any other matters).

163. *Id.* at §8-3.180.

164. *Id.*

165. See U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL sec. 983 (1998), [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00983.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00983.htm). (“Federal, State, local or regional health care fraud task forces/working groups can improve health care fraud enforcement by encouraging communication and coordination among law enforcement officials in the use of criminal, civil, and/or administrative remedies. Successful resolution of these cases and operation of the task forces depends on mutual cooperation.”).

Law Enforcement Trust and Integrity Act of 2000,<sup>166</sup> which would establish a federal task force composed of ten individuals from such DOJ components as the Criminal Section, COPS, and the Special Litigation Section whose duties would be to coordinate “investigative, prosecutorial, and enforcement efforts of Federal, state, local and Indian tribal Governments in cases related to law enforcement misconduct” as well as to “consult with professional law enforcement associations . . . labor organizations, and community-based organizations . . . to coordinate the process of the detection and referral of complaints regarding incidents of alleged law enforcement misconduct.”<sup>167</sup> POST Directors, through IADLEST, should be included in the groups with whom the task force consults.

Pending a decision on the extent of cooperation between DOJ officials and state POSTs, the DOJ should undertake an examination of the law enforcement data from complaints that have not resulted in federal prosecution: approximately 80,000 complaints, and approximately 25,000 FBI investigations and grand jury proceedings that did not return an indictment.<sup>168</sup> These files should be examined to get an understanding of the kinds of cases that are not pursued at the federal level, the reasons for lack of federal prosecution, and what percentage are likely to present a strong case for state revocation. There should be a follow-up on cases in which the DOJ deferred to the state for prosecution to determine how many actually were prosecuted by the state. Additionally, an analysis should be pursued to determine where complaints are originating: in which states, from what geographic and demographic areas (e.g., rural or urban), etc. Currently, there are no data to determine how many of the cases are frivolous or meritorious from the perspective of POST revocation. It is fair to say that thousands of hours have been expended by federal investigators and prosecutors on cases that are never pursued and we should try to learn something from that experience.

Should it be determined that many of the cases neither prosecuted by the DOJ nor referred to the states for prosecution do involve revocable offenses, current restrictions on POSTs’ gaining access to federal records involving law enforcement officers should be abandoned. To the extent the Manual, federal rules, and federal statutes do not permit such sharing, consideration should be

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166. H.R. 3981, 106th Cong. § 801 (2000).

167. *Id.* at § 801(c).

168. The total number of complaints in the years 1985-2001, rounded to the nearest 100, is 164,400. SUMMARY, *supra* note 26. Making the assumption that half are against law enforcement officers, *id.*, results in an estimated 82,200 complaints against law enforcement officers. The total number of FBI investigations in the years 1985-2001, rounded to the nearest 100, is 51,000. SUMMARY, *supra* note 26. Making the assumption that half of the investigations are of law enforcement officers, *Police Brutality*, *supra* note 27, results in an estimated 25,500 complaints against law enforcement officers. It was stated above that of these only a small fraction, possibly 2%, results in prosecution. *See supra* notes 25-28 and accompanying text.

given to amending them.<sup>169</sup> To the extent that current law requires POST staff, who may be unaware of the federal activity, to request the information from federal sources, consideration should be given to federal officials' at least notifying the appropriate POST of the existence of colorable claims of revocable offenses.

## VI. CONCLUSION

Each year approximately 5900 complaints against law enforcement officers' conduct are received by the DOJ and deemed not worthy of federal prosecution.<sup>170</sup> Certainly some of these complaints present facts for which there is sufficient evidence to lead to revocation of the accused officer's license to serve. Revocation can occur only if the state POSTs become involved. Undoubtedly, some of these complaints do come to the attention of the POSTs, but this article suggests that for the protection of the public the system for handling complaints against law enforcement officers should be enhanced so that more of these complaints are brought to the attention of state POSTs. To achieve this goal, this article suggests two primary avenues of cooperation between the DOJ and the state POSTs, but notes this cooperation may require a new approach to, and possibly even amendment of, DOJ guidelines, federal regulations and federal statutes.

The suggested cooperation involves communication in both directions between the DOJ and state POSTs. First, AUSAs and Criminal Section attorneys should become familiar with the revocation law in the state in which the defendant officer is licensed so that the attorney is mindful of revocation as an alternative or a supplement to federal prosecution when the defendant is charged, when plea negotiations take place, and when sentencing occurs. Such familiarity with state laws, rules, and procedures may be assisted by communications to the DOJ by POST personnel. Second, federal prosecutors should share as much information with POSTs as possible, including the fact

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169. Note that in the aftermath of the terrorist attacks of September 11, 2001, Congress has amended Rule 6(e)(3)(C) by permitting the sharing of grand jury information concerning intelligence matters with certain federal officials. USA Patriot Act, Pub. L. No. 107-56, §203, 115 Stat 272, 279 (2001). The House passed a bill that would extend the sharing of similar information with state and local officials. Homeland Security Information Sharing Act, H.R. 4598, 107th Cong. § 6 (2002) (referred to the Senate Committee on the Judiciary on June 27, 2002). This bill was not reported out of the Senate Committee during the 107th Congress. See THOMAS, *supra* note 19. Congress has authorized the FBI to share "rap sheets" with state and local officials, among others. 28 U.S.C. § 534(a)(4) (Matthew Bender 2001).

170. Of the 6000 criminal, civil rights complaints received by the Criminal Section each year against law enforcement officers, about 100 are prosecuted, leaving 5900 that are not. See *supra* notes 26 and 28.

that convictions have been obtained,<sup>171</sup> the relevant parts of trial transcripts regardless of whether a conviction was obtained, investigative materials collected by FBI agents, and grand jury transcripts. This sort of cooperation is a significant undertaking, but models exist for achieving it.

In the past decade, state POSTs have shown that they are serious about professionalizing law enforcement by removing unfit officers; the DOJ has long been concerned with combating police misconduct, and citizens have the right to expect they will not be subject to abuse by law enforcement officers. Particularly in the aftermath of the terrorist attacks of September 11, 2001, there have been efforts at federal-state-local cooperation in the area of law enforcement. To support the goals and concerns of all parties involved—state POSTs, the DOJ, and the public—those cooperative efforts should extend to practices relating to the revocation of the licenses of law enforcement officers who are clearly unfit to serve.

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171. Regarding the sharing of the fact of conviction, the ABA model rules on lawyer discipline require that state courts report convictions of lawyers to the appropriate disciplinary agency. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 19(A) (1999), *reprinted in* AM. BAR ASS'N/BUREAU OF NAT'L AFFAIRS, *LAWYER'S MANUAL ON PROF'L CONDUCT* § 01:618 (2002) ("The clerk of any court in this state in which a lawyer is found guilty of a crime shall within [ten] days after the finding of guilt transmit a certified copy of proof of the finding of guilt to counsel for the lawyer disciplinary agency of every state in which the lawyer is admitted to practice.").