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Epstein Case A Turning Point In Prosecutorial Accountability?

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Law360 (February 11, 2019, 9:30 PM EST) --

The [U.S. Department of Justice](#) is reviewing a deal that a Trump administration official cut as a federal prosecutor, and the case has added fuel to a bid to change how the DOJ handles prosecutorial misconduct probes.

Last week it came to light that the DOJ's Office of Professional Responsibility had [opened an investigation](#) into how Labor Secretary Alexander Acosta handled a 2008 investigation into an underage sex trafficking ring when he was a U.S. attorney. The Miami Herald reported in November that Acosta and another prosecutor worked with lawyers for billionaire Jeffrey Epstein to keep the public eye off the case and have Epstein charged with state crimes even though investigators had gathered evidence of an international trafficking scheme.

The case has become part of a rallying cry for some members of Congress who instead want to see such investigations into potential prosecutorial misconduct done by the DOJ's Inspector General, which is independent from the agency.

The law currently gives the OIG power to investigate alleged misconduct by DOJ employees, except when the claims "relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal

advice.”

In January, the [U.S. House of Representatives](#) unanimously passed a bill called the Inspector General Access Act that would delete that exception.

At the hearing, Rep. Debbie Wasserman Schultz, D-Fla., said that while lawmakers on both sides of the aisle have long supported the concept, the situation has become “urgent.”

“The American people and the victims of these horrific crimes deserve to know why justice was not served in this disturbing case, and the lack of transparency still cloaking it is deeply disturbing,” Wasserman Schultz said at the hearing, referring to the Epstein case.

Since 1975, the OPR has been in charge of fielding and investigating complaints against the DOJ’s attorneys. The office opens full-blown investigations into a fraction of those complaints, ultimately determining how the incident occurred, be it a mistake or willful misconduct.

In the past, prosecutors have been suspended or reprimanded. In some cases where the OPR has found that the conduct didn’t rise to misconduct, findings get reported back to the attorney’s supervisor.

“If you work in the Justice Department, it is really scary to be reviewed by OPR,” said Jennifer Rodgers, a former federal prosecutor who now serves on the advisory board at the Center for the Advancement of Public Integrity at Columbia Law School.

But sometimes the attorneys the OPR investigates are long gone by that point. According to the most recent

OPR report from 2017, six of the 13 attorneys who were found to have committed professional misconduct in that year had already left the DOJ by the time the investigation concluded. The office authorized reporting most of them to their state bar associations.

While the OPR focuses on individuals, Rodgers said the OIG's mandate is broader and involves putting out public recommendations for systemic change within the DOJ. The OIG already gets to review and issue advice on issues that involve other DOJ staff, such as [FBI](#) agents. The bill before Congress would put attorneys on the same footing.

"This may be the case that pushes that over the line. And I am OK with that," Rodgers said of the Epstein matter.

The OPR has also changed over the years. In 2015, the office started documenting whether its findings actually resulted in discipline after a recommendation from the [Government Accountability Office](#). The office also expanded the number of DOJ attorneys who could be reported to bar associations.

Still, some members of Congress believe the Inspector General is better suited to the job, pointing to the fact that the OPR is not independent from the DOJ and has fewer reporting requirements.

The Inspector General Access Act is pending before the Senate Judiciary Committee. Similar bills have been proposed before, including one last year by a group of Republican senators including then-Judiciary Committee head Chuck Grassley of Iowa. Grassley supports the 2019 bill, his staff confirmed.

DOJ Inspector General Michael Horowitz wrote to Congress in support of the bill in November, saying

as a statutorily independent agency the OIG is better situated to investigate misconduct claims than the OPR, which reports to the deputy attorney general.

“The credibility of the department’s disciplinary process is inevitably reduced when the responsible component operates under the direction of the department’s senior leadership and is not subject to public scrutiny because of limited transparency,” Horowitz wrote.

The OPR does issue an annual report breaking down the number of complaints received and how many resulted in action. The vast majority of complaints pass through the office without further action. In 2017, 72 of the 636 complaints the OPR received resulted in a formal inquiry or investigation. The OPR report also gives the outlines of what happened in a sample of the cases.

Bruce Green, a [Fordham University](#) law professor who writes on prosecutorial misconduct, said the OPR’s summaries aren’t enough to reassure the public, particularly given that the office is overseen from within the DOJ.

“Do they go too easy? Are they too willing to credit what prosecutors told them? It’s hard to know,” Green said.

The biggest issue is the lack of independence, Green said. He pointed to the example of John Yoo, the DOJ attorney in the Bush administration who famously authored memos offering a legal justification for tactics such as waterboarding that the [CIA](#) used after the 9/11 terrorist attacks.

The OPR issued a report in 2009 finding that Yoo and Jay Bybee, another DOJ attorney, had committed professional misconduct and recommending they be

referred to the state bar for discipline. A DOJ official vetoed the move, saying the pair had not violated a clear standard.

Green has written that the advent of digital media seems to have initiated a shift towards prosecutorial accountability, particularly in the states. However, changing the game for federal prosecutors has proven more difficult.

He pointed to laws that were proposed but never passed in the wake of the disastrous prosecution of former U.S. Senator Ted Stevens, R-Alaska, on federal corruption charges. In that case, the OPR had concluded that two prosecutors had “engaged in reckless professional misconduct” for not handing over certain evidence to the defense.

“For a moment in time, there was a push to reform discovery law. But then it died down,” Green said.

--Editing by Kelly Duncan and Alanna Weissman.