

Summary of a Presentation by Mr. Bruce C. Swartz  
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Continuing Legal Education and Judicial Conference

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[Introduction by Chief Judge James Baker]

Well thank you Jamie, thank you for those warm words. I should say that the Chief Judge told me this conference was in Hawaii too when I agreed to speak, but I never check these things too carefully. It is a great pleasure to be with you this morning, and as the Chief Judge has said, he is absolutely right, you are the face of the United States overseas for rule of law matters. And that's why it is an honor to be here to speak with you today. The topic that I am going to discuss actually touches on that issue. It is the globalization of justice. And I use that in two senses. First, the extent to which the Department of Justice itself, particularly since September 11th, has become a global agency. But also the question of the globalization of criminal justice standards, a process that has taken place really over the past decade and more, without a great deal of attention has some very important implications for you, for all of us, and also has some countervailing trends.

Let me begin talking first about the Department of Justice, and how it intersects with what you do. This is the part that the Chief Judge told me I had to do, the useful part of the discussion, as opposed to the discussion that I actually intended to do. The Department of Justice as you know is not typical of what a department of justice or a ministry of justice is overseas. In most countries, a justice ministry is a relatively limited, relatively tightly constrained ministry. In the Department of Justice, the Attorney General has a role that really in some countries such as the United Kingdom is fulfilled by four different people. In the first place, it is classically an Interior Ministry in the European sense. That is, it has the law enforcement components within the Department of Justice, in fact often times in separate ministries. So of course our major law enforcement agency is the FBI, the Drug Enforcement Administration, the United States Marshals Service, ATF, are all within the Department of Justice, not in a separate ministry, all report to the Attorney General.

It is also a justice ministry in the classic sense of a ministry that has a justice minister that provides legal advice. And there we have the Office of Legal Counsel, which many of you may be familiar with, may have dealt with, and it has some of other components many times found in ministries of justice, such as the Bureau of Prisons. It also has the role of an attorney general in many countries in which the attorney general is the legal advisor to the cabinet. And of course the Attorney General has that role. And finally, of course, it has the role of director of public prosecutions, so it has the responsibility for all federal prosecutions. So that much is known to you, there is nothing surprising about that.

What is less well known, I think, is the extent to which the Department of Justice is truly a global agency. It's global in a sense that most people don't expect to find, not only terms of the work it does, but actually in terms of the personnel it has overseas. Of course everything we do is dwarfed by everything you do, in terms of personnel, so our numbers, which seem enormous to you, are not particularly large. I should note about the Attorney General's roles, that when were in Ireland he noted that the Minister of Justice in Ireland is also the Minister of Defense and thought that might be an interesting thing. We have no immediate plans though to extend that.

Let me give you some idea of where we are overseas now just in some of these. These are the locations of the FBI legal attaches abroad. Those of you who have served in other countries probably have encountered these. These are lead law enforcement representatives in these countries, 62 countries around the world, and multiple agents in those countries. These are the locations of the Drug Enforcement Administration attachés abroad. As you can see, they too have enormous, in fact greater, coverage abroad, 65 countries, 85 foreign offices within those countries. And again, a truly remarkable reach within those countries in terms of contacts and sources they develop and the work they do.

This is where we have our Department of Justice attachés abroad, a much smaller number. But, this is, there are two streams of personnel from the prosecutorial side that are abroad. The Department of Justice attachés, the judicial attachés, these are the people who work on extradition, mutual legal assistance, cooperation on cases. And they all have regional responsibilities in those locations. And this is where we have ICITAP and OPDAT. We like, like you, to have acronyms no one can possibly understand. ICITAP is the International Criminal Investigative Training Assistance Program, those are our police and security services technical assistance programs. These are purely capacity building programs. OPDAT is the overseas prosecutorial group, that's the group that works on capacity building for prosecutors. And these are funded largely by the State Department, although as I'll come back, we also have received funding from the Department of Defense, and we work very closely with these offices. And again, in any given year, their locations will be in different countries, but these tend to be the ones where they are most consistently located. So that gives you some idea of the global reach in terms of personnel.

But I think that is only part of the way in which there is a global context here, and a context in which you are likely to be involved, particularly if you are serving overseas. First, in terms of points of contact, with the Department of Justice, depending on what you've done, there are a number of different components you may come into contact with, the law enforcement agencies obviously as we've seen overseas. But also the National Security Division, which is a new division within the Department of Justice, which is designed to look at counterterrorism, counterespionage, and intelligence matters. They work very closely with the JAGs, particularly of course with regard to military commissions. So that division, the National Security Division, is one in which you are likely to have some fairly regular contact.

Other components in which you might have some interaction, Office of Legal Counsel, as I mentioned, which is the office responsible for legal opinions, not just on behalf of the Department of Justice but on behalf of the United States. The Office of International Affairs,

which I will come back to in particular, is our office which deals with overseas extraditions, mutual legal assistance matters. The Office of Foreign Litigation, which deals with lawsuits brought against the United States overseas, and can help with regard to representation in that regard. And then, as I mentioned, OPDAT and ICITAP, and let me go back to them in particular. OPDAT and ICITAP, as I said, are capacity building programs, created with funding from State Department, Department of Defense, USAID, and others. These are in locations, as you can see, ranging from countries in which we have fairly extended and well developed relations, particularly in Eastern Europe, to war zones, including Afghanistan and Iraq. And these are organizations that work directly with DOD on a daily basis. So those are some of the points of contact with regard to organizational aspects of it. But they are also points of contact with regards to structures if you will.

We have very close relationships with DOD, thanks to the support to law enforcement that DOD provides on a regular basis. In particular, through such groups as the Narcotics and Transnational Crimes Center, which has been created, that's in Crystal City, it's a group of analysts funded by DOD that works extremely closely with DEA, with FBI, with DHS, actual case cooperation and building analytical backgrounds for those cases. In war zones, we have a number of operational groups that are working together with DOD. In Afghanistan, for instance, DEA has its "fast teams." FBI has had its counterterrorism groups there as well. And that interaction is likely to have implications for legal issues that you may come into contact with.

And then in the commands, we are increasingly placing attachés in the commands, both from our law enforcement agencies and from OPDAT and ICITAP, our capacity building programs. For instance, in PACOM, the one that I dropped in for a few hours to visit, we have an FBI attaché who has been extremely active, not only with regard to thinking through how we can work together collaboratively on investigations and other matters that might advance our common interests with regard to certain countries, but also has been looking at how we can work together on training efforts in India, in other places in the region. Our ICITAP leader in the Philippines has been working very closely with SOCOM and Mindanao, and with SOCOM support has helped built some of police training efforts there. And then in turn help advance our interests in working with the insurgency there.

And then finally, of course, and this is where I think interactions with the JAGs are most important, we have the interaction on cases, on particular matters of interest. And that really crosses the full range of what you do and what we do. Just some representative cases over the past years in which I have been involved. There is the Abu Omar matter in Italy, which involved the criminal prosecution of alleged CIA agents and one military officer, so there were enormous issues there, on a variety of issues of fronts including the SOFA in which we worked incredibly closely. There's the Cuso case coming out of Spain in which there is a criminal prosecution against U.S. military officers in connection with the death of a Spanish journalist during the invasion of Iraq in Baghdad. There are fraud cases, as numerous examples would bear out, and as many of you may have experienced. We work very closely with you on fraud cases involving contractors, in regards to military operations overseas. There are export control cases where we also look to you for assistance. And then there's MEJA, the Military Extraterritorial Jurisdiction Act, which is of extreme importance for all of us, for you, and in which we have a special

prosecution group within the Department of Justice, within the Criminal Division, that works on those issues.

But on the practical front with regard to this, there are two things that I would like to leave you with, and I actually will physically leave you with these. Two offices that you should always bear in mind if you have any issues. First is the office of International Affairs, one of the offices that I supervise. As I mentioned, this office is responsible for all of our overseas matters within the Department of Justice. And it is the central authority -- that is the term of art -- for the United States as a whole on our extradition and mutual legal assistance arrangements. So that means not just for the Department of Justice, not just for the federal government, but for state and local governments as well. And this office is the office that I would strongly suggest that you contact at the earliest possible instance if you are overseas and you have any matter that seems to have a criminal justice aspect to it, a fraud case, a question about whether or not there has been some criminal conduct that might have implications for the United States. As you can see, and I'll leave this with you, these are points of contacts for each of the regions but you can go directly to Molly Warlow, the director, you can actually contact me if you like, and I will give you my number. But, this is an office that is very used to dealing with the most difficult issues, not only legal issues, but foreign policy relation issues presented by the cases that we have. And we have within that office in particular, one JAG who is now in the reserves, who is Dan Segall, who has been enormously helpful in dealing with a number of issues that you address. But it's important that you contact them early, because of course you can get far down the road pretty quickly on criminal investigations and that can have implications for the ability to actually prosecute those cases in the future. So I'll leave that with you.

And the next office that I would urge you to be in contact with is the Office of Foreign Litigation, which is really the office that focuses on litigation that is brought against the United States, including of course civil litigation that is brought against the Department of Defense, any litigation overseas. They are also important to contact if you have become involved in a case in which the United States may have some role in a criminal prosecution, not as a defendant but as a complaining party in an overseas jurisdiction. As you can see, for cases pending in Europe, Donna Mazel -- who has the job that no one knows about, we have a Civil Division attorney actually sitting in the embassy in London, she doesn't usually like me to emphasize that, but as you long as you don't tell anybody else -- she's the person to contact if you have something in Europe. Otherwise for the rest of the world, Bob Hollis, who is the head of the office. They too do nothing but think through how we should obtain representation for the United States abroad. When, for instance, if we enter into or accept service of process, we are taking steps that may bind the United States in a way that we don't intend to. If nothing else comes of this discussion, that office, the Foreign Litigation Office, and this office, the Office of International Affairs, are ones that I think you should look to.

So that gives you some idea of, I think, the range of work we do, in terms of actual personnel. In terms of the broader sense of where we are, where we are as a Department of Justice, where we are as a country with regard to criminal justice. I think it's fair to say that there are really two competing trends at work right now. One is a trend, if I may call it, of globalization, one that is, if you will, the centripetal forces that are pushing us together in terms of criminal justice issues worldwide. The United States, its allies, even countries we wouldn't think of as allies, we're

finding common grounds on criminal justice issues. And then there's a contrary trend that we I think we can call Balkanization, as long as the Balkans aren't offended by that, the trends that are pushing us further apart and that threaten actually many of the advances we've made in efforts with our allies and with others in building a common system. And I'd like to talk a little about those because I think they have implications for the work you do as well.

The first trend, the one of globalization, of bringing us together, is driven at its most fundamental level by the changing nature of crime itself, something you've all seen in your experience. Certainly in the time I've been at the Department of Justice it's really been a noticeable and dramatic trend. When I first joined the Department the Assistant Attorney General of the Criminal Division, who had served originally in the Carter administration, said that when he was U.S. Attorney in Detroit, international crime meant essentially that maybe someone had crossed in from Windsor, from Canada to Detroit, and that was about the extent of it. But as I think you have seen in your work, certainly as we've seen in our work, there is hardly a significant federal case at the present time that doesn't have some international aspect to it. It doesn't necessarily mean that the defendant is an overseas national, but the evidence may be there. Communications involved in the case may have gone across national boundaries. We may need to seek persons maybe as witnesses, sometimes as defendants, from overseas. So that trend has carried across in a variety of contexts, cybercrime of course being perhaps the most prominent. With the rise of cyber technology, the ability to commit crimes from remote locations, the necessity that all of us face with storing our information on cyber systems, some of which may then in turn store the information in other countries. All of those things have driven a quite remarkable internationalization of crime. The same is true of international finance, telecommunications, and then of course the rise of crimes that themselves have an international component: terrorism and of course international organized crime.

That trend has made it obviously more essential than ever that we work together. And over the past 20 or 30 years we really had an intensive program within the Department of Justice and with our colleagues, with the Chief Judge when he was at the National Security Counsel, to extend our bilateral network of treaties and agreements to ensure that we have the capacity to obtain the defendants and evidence that we need to prosecute these cases. So we have an extensive network of extradition treaties, an increasing number of mutual legal assistance treaties, as well as a variety of agreements that we have tried to negotiate that are at a lower level that allow for informal law enforcement cooperation without the need for using the formal techniques of the mutual legal assistance treaty.

Those are, I think, and you've probably encountered those, and I think you've probably encountered the other aspect, which in many ways I think is even more remarkable, and that's the creation through multilateral conventions of what essentially is an agreed upon framework of international criminal law, not in terms of international humanitarian law, but I mean in terms of law about particular types of crimes.

The trend was established first in some ways with the UN terrorism conventions which as you know dealt with a series of topics and moved forward from one type of terrorism to another.

But, even more strikingly, for the day to day work we do, I think are the UN conventions on transnational organized crime and the convention against corruption, both UN conventions. What these conventions do, in each instance, some fairly remarkable things. First, they establish an agreed upon set of substantive crimes; that is, the parties that join the conventions agree that they will criminalize certain types of conduct. So that in transnational organized crime, for instance, it establishes the types of crimes with regard to certain organizations or people entering into organized groups. That might not seem at first blush to be a remarkable agreement, but it obviously is. It starts building a common framework for these types of crimes. The same with the Corruption Convention, which is obviously extremely important in terms of ensuring that we are going to have partners that we can deal with overseas to have an understanding of a level playing field and governments that are themselves not corrupt.

So the first thing that they do, as I said, is they establish a substantive set of crimes, and they establish then as well certain procedural mechanisms, which is very important. For instance, in these contexts it may require that the parties have the ability to seize assets, or to freeze assets, or to forfeit the assets in connection with the Transnational Organized Crime Convention, and those in turn allow us to ensure that our partners have the capacity to do what we would like them to do, which is to strike, in the case of forfeiture, at the wealth that has been created by criminal organizations. But it also leads to the third important aspect of these agreements, which is that they create requirements for international cooperation.

So, each of these conventions incorporates what we call a mini-MLAT, a mini mutual legal assistance treaty. And that in turn means that we can count on, even for countries where we don't have a treaty relationship, that, as long as they are a party to the convention and we are a party to the convention, that we can make demands upon that country, a treaty demand for information relevant to the type of crime. And since the Transnational Organized Crime Convention is quite broad in its reach, as is the Corruption Convention, those are very important things to have. They also create extradition relationships, if the country in question permits extradition pursuant to a multilateral treaty. The United States does not, but it still has great utility for us, because we can ask other countries that do recognize an extradition relationship on that basis to extradite individuals to us.

So those two -- the Transnational Organized Crime Convention and the Corruption Convention - - really are landmarks in terms of globalization of a common standard of criminal justice. And there's a third convention, one that has not had the same kind of universal acceptance yet, but is extremely important for our work together, and that's the Council of Europe Cybercrime Convention, sometimes called the Budapest Convention. That convention is, in the view of the United States, among the most critical of our foreign policy goals in the criminal justice area, trying to ensure universal acceptance of this convention, because it provides the essential tools for investigating cybercrime, which I think all of us here in this room would recognize as one of the great threats that we face, including the ability to freeze accounts in response to requests from an overseas partner and criminalization of the actual types of cyber criminality that we want to see criminalized.

There has been push back by some countries, Russia and China in particular, who have called for the negotiation of a UN cybercrime convention. It's the view of the United States that that

would weaken, not strengthen, the regime that we are trying to create. Plus, it would divert our resources for a multi-year negotiation that we don't have. No country really has extensive resources in this area; we rely on very few experts to get critical work done on cybercrime. But it is itself a further indication of an expanding and agreed upon set of offenses and activities that we want to work against.

So that's the structure if you will of agreed upon crimes through international and multilateral conventions. But there are also a number of organizational structures that have been driving this same type of globalization. Interpol, of course, is one that you're probably familiar with. Although Interpol has gone way beyond what it was a decade ago; Secretary General Ron Noble has driven a complete overhaul in terms of their electronic communications abilities. But beyond that, has moved them into areas that may have some implications for the work you do, including the ability to send multilateral teams into a particular country to assist in circumstances in which it may be too sensitive to have the United States go alone or otherwise.

We've also created a number of organizations under various headings, whether it's the G-8, the OECD or otherwise, including the Financial Action Task Force, which is designed to assess countries, including the United States, to make sure that their financial laws meet the standards necessary to fight crime. We have created a 24-7 high tech crime network that has been extremely important in fighting cyber crime, under the heading of the G-8. And, as I'm sure you know, the United States has, and seems never to be able to stop the growth of working groups, both on a bilateral and multilateral basis. Hardly a week goes by where we are not meeting the Department of Justice for some kind of counterpart discussion. We have the Cross Border Crime Forum, which the attorney general of Canada attended last week, although we declined the Canadians' challenge to engage in a curling match with them, which I think was designed solely to humiliate us, so we carefully avoided that.

We have from our closest allies such as the UK and Australia, New Zealand, Canada, where we have a quintet meeting with the attorneys general, to countries that are more problematic, such as China, where for more than a decade I've been working on the joint liaison group with the Chinese on law enforcement matters. And we have our good years and bad years, but there I think the goal is to try and make sure that we have where we can work together on cases, we have an ability to talk about those cases, and where we can't, we have a forum to discuss our differences in that regard. So that's the good news aspect of I think where we are in the criminal justice process, this kind of globalization, the kind of building of common standards, this kind of organizational frameworks that bring us all together.

The more problematic side are the forces that are pushing back against these common understandings, the things that lead to balkanization if you will, to a division of views about how we engage in criminal justice. And this trend has its own momentum, and it's unfortunate because at a time in which the climate itself demands that we be able to work together. The fact that we have these countervailing pushes makes our lives that much harder, and I think has implications for you.

The first set of issues, and then there really are, I think, three major sets of issues, which we can call if you will, the war issues. And by that I mean the post 9/11 issues that have continued to

raise issues among other countries. And then there are criminal law issues about the criminal justice system of the United States. And then the third is privacy issues. And let me address each of those briefly, and then open it up for your questions.

On the war issues if you will, the military issues, there is no doubt, and I'm sure you've seen this yourselves, we find ourselves post-9/11 having often times to explain ourselves at a minimum, and sometimes even more than that with regard to our activities even in the context of dealing with our closest allies. The Chief Judge mentioned the National Defense Authorization Act, and that and military commissions, and those issues, as I'm sure many of you are aware, are ones that even that countries we work really on the closest of bases have raised issues about. Other countries, other than close allies, have not always been willing to accept the framework of the military commissions, or they've been willing to accept it but have to been willing to have it applied to their nationals. And the National Defense Authorization Act has raised that issue again to the fore, the idea that nationals of other countries, including our allies, might be placed in military custody has raised a number of issues.

As I think you've seen in the implementing procedures that were put forward last week, there are categorical exceptions and waivers possible to deal with some of these issues. But there is no doubt that our task, one of our key tasks, and one of the key tasks that you face and can play an important role is ensuring that other countries understand that military commissions do honor concepts of due process, that they are in accordance with international standards. As it now stands, and as I think many of you know, we have to give, and we have always had to give, since 9/11, since military commissions were established, assurances, in almost every one of our extradition cases, certainly in an extradition case that focuses on military matters, that we will not place the individual in a military commission. That is, that they will have a trial in an Article III court. So that is a fairly standard assurance we have to give. We also have to assure other countries that individuals will not be moved to Guantanamo. And Guantanamo itself, as you know, if you deal with individuals overseas, has taken on meanings far beyond the actual physical location at Guantanamo.

We do have, unfortunately, an uphill battle to fight in some of these instances to assure other countries that we are honoring the rule of law. And our target audience is not just the executive agencies of those countries, but also the judiciaries of the other countries who often have the key role in deciding whether or not an individual will be extradited, sometimes whether or not evidence will be provided. And those judges, the counterparts you deal with, every day the message we need to send is one that we do care about the same principles they care about. I know it's hard for us sometimes to imagine as Americans of the United States that people would think otherwise, but those of you who have served overseas may know that that may be the case.

So if those are the first set of issues, the issues arising post-9/11, that I think tend to drive some wedges in our work together, the second are criminal justice issues. Some of these issues have been long in place. The death penalty issue, again, as I think all of you know, we have to give for virtually every country an assurance when we extradite somebody that they will not be subject to the death penalty. The United States is virtually alone amongst the countries that we deal with as allies that has the death penalty in place.



Life imprisonment is now becoming an issue, as is the question of imprisonment in the Supermax facilities. So, right now, before the European Court of Human Rights, as again I'm sure some of you know, we have about eight terrorism cases from the United Kingdom pending on the issue of whether life imprisonment without parole or whether confinement to a Supermax facility violate the European Convention on Human Rights. And, this is a trend we are seeing, not only at that level, but in a number of other countries as well at a sort of bilateral level. And increasingly what we find is that, what used to dominate, the rule of non-inquiry, the rule that courts would simply send someone if the extradition treaty was in place and the terms were met, has now been displaced in some countries by an actual examination into the U.S. criminal justice process and our penal policies.

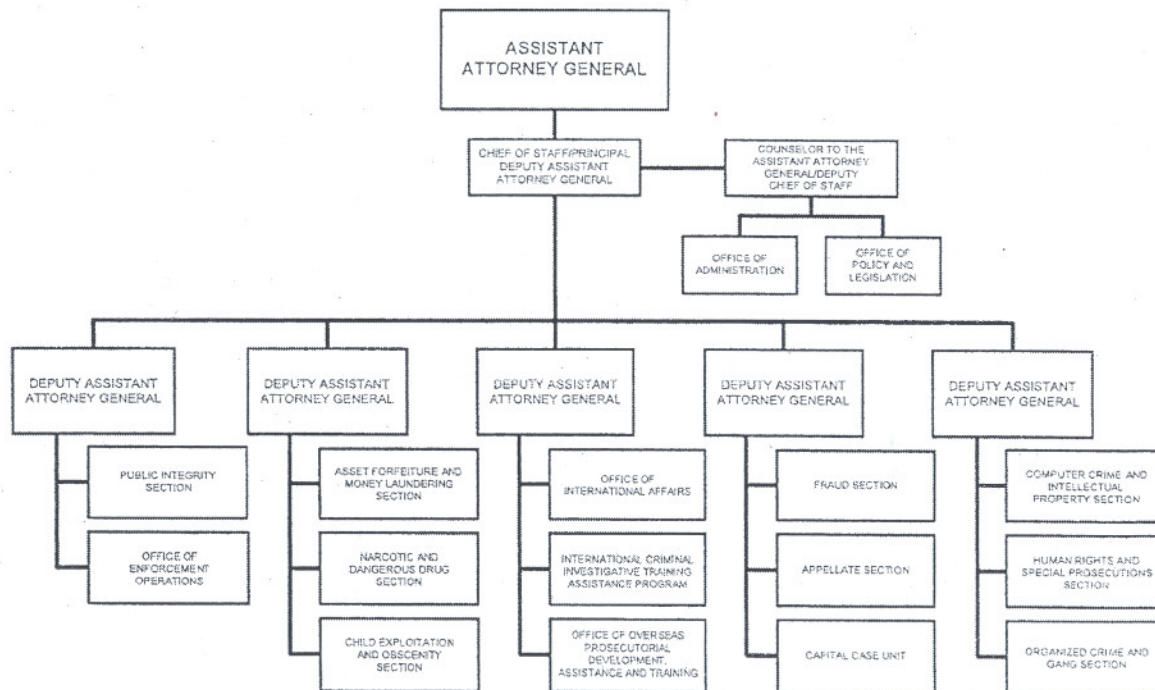
And then finally in this regard is privacy. And this is an issue that again may be one sounds an unusual one to be concerned about. But the perception of the PATRIOT Act, which as all of you know is widely misunderstood overseas, to justify everything from surveillance that it does not justify to supposedly enhanced interrogation with which it had nothing to do. But on the front of privacy, we do face the perception that the United States does not honor privacy with regard to information, and particularly in the context we deal with, with law enforcement information, information conveyed by other countries. Again, we've pointed out time and again, the Attorney General has spoken about this overseas, particularly in the European Union where this is a constant theme of our dealings with them. But this is a country that was built on notions of privacy, and built on a suspicion about government activity in that regard. But, nevertheless, the PATRIOT Act, FISA, all of these issues have now driven forward a number of steps, particularly within the European Union, to try and restrain the sharing of law enforcement information without much more extensive safeguards, a much more formalized process, and really placing that exchange under the supervision of data protection commissioners, who are not elected, who are not part of the ministry. And this too will have serious implications for our ability to move forward and share information in the future.

So those are the countervailing considerations pushing us back and forth towards greater unity of effort with our allies and then also dividing our efforts as we try and deal with these issues. And again, and let me conclude with this point and then open it for questions, the role you play is really critical. The Chief Judge could not have been more correct in saying, you are the face of justice overseas in many instances, and how you handle these issues is essential to how we are seen. And, having been through the last 15 years, I can say that, in my experience, the JAGs have always done an enormously effective job of the presentation. I think the positions that the JAGs took on positions ranging from enhanced interrogation to other issues coming out of 9/11 are things that the United States can be extremely proud of. And I certainly thank you for the work you've done and for your service in that context. But we want to ensure that we are your partners in this as well, going forward, and to let you know that we are there for you, and that you should really feel free to call us on any of these issues, and to think of us as your partners.

And with that, thank you for your time.



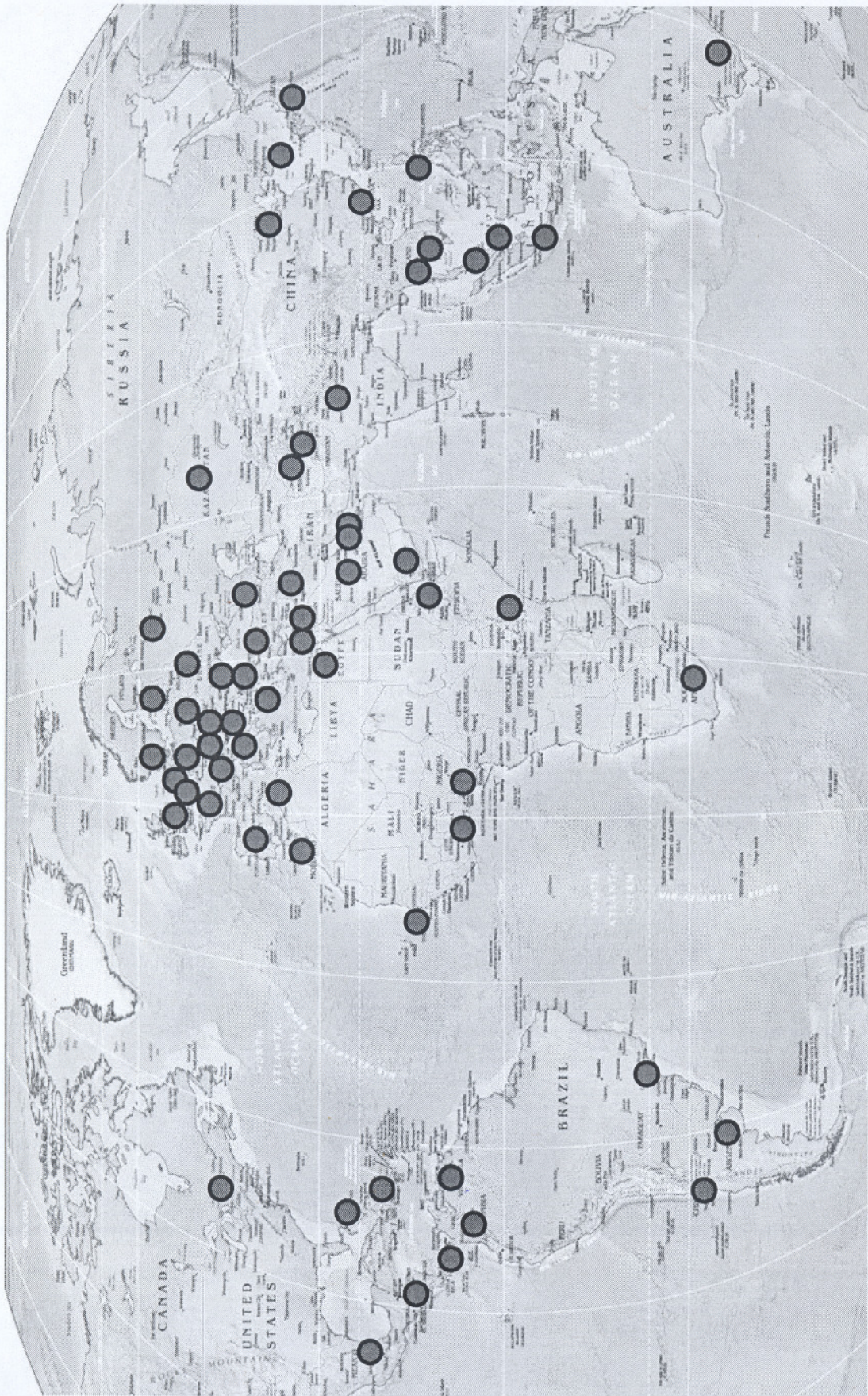
# CRIMINAL DIVISION



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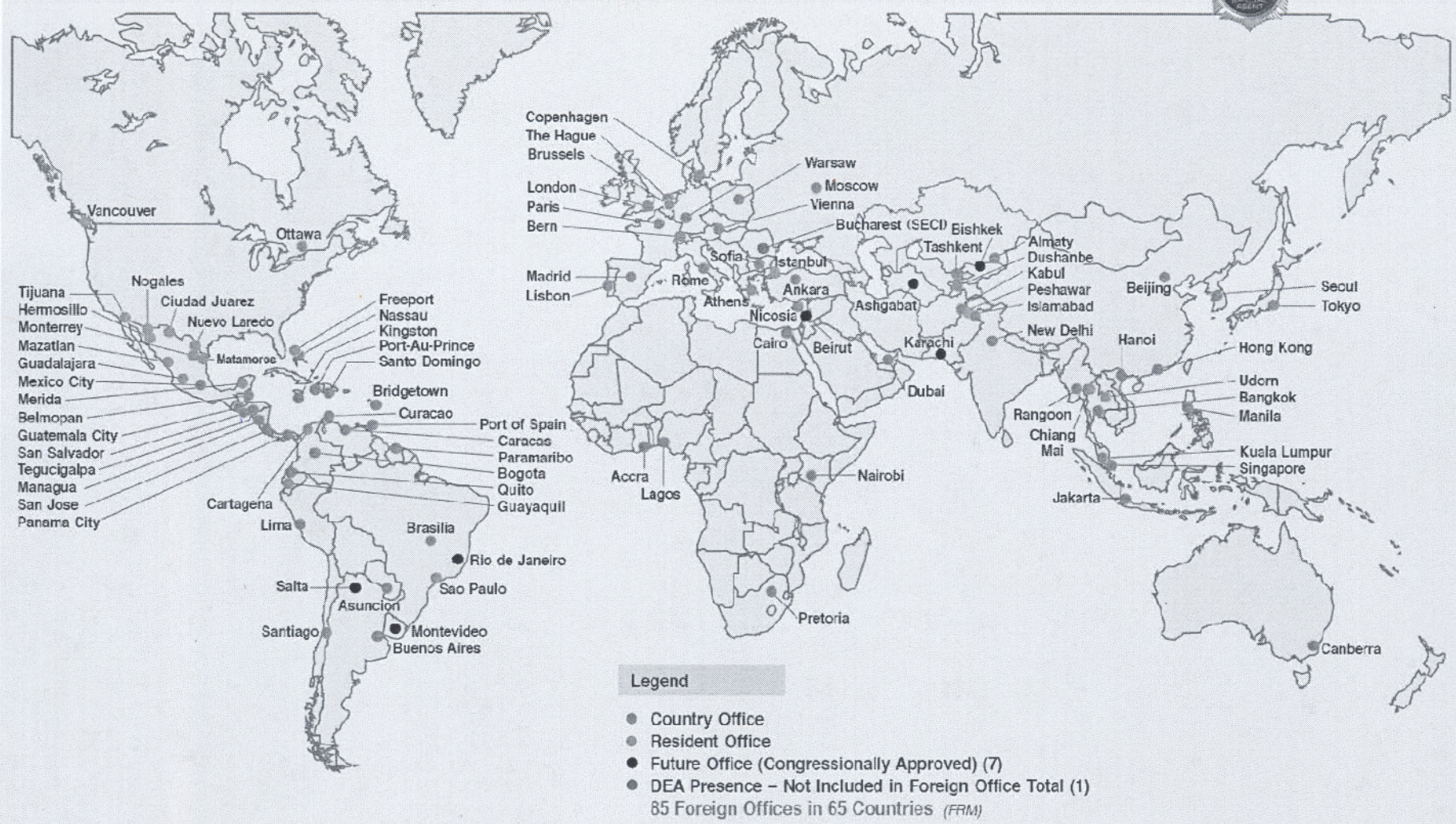
ERIC H. HOLDER, JR.  
Attorney General

Date: 10/04/10



# DEA Foreign Offices

U.S. Department of Justice  
Drug Enforcement Administration



## Department of Justice Attaches

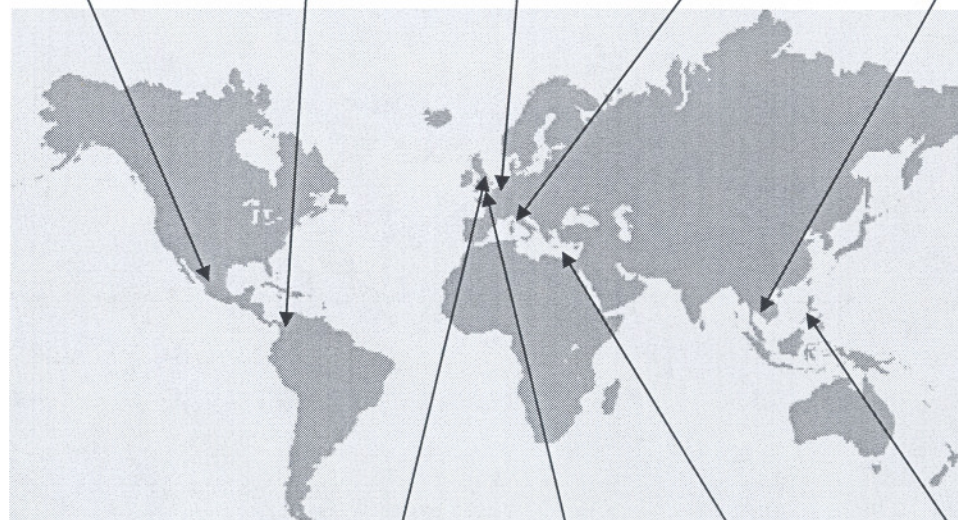
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## Global Reach of ICITAP & OPDAT Field Offices

