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Panel Discussion: The Prosecutor's Role in Light of Expanding Federal Criminal Jurisdiction

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PANEL DISCUSSION: THE PROSECUTOR'S ROLE IN LIGHT OF EXPANDING FEDERAL CRIMINAL JURISDICTION

MODERATOR

*Honorable Barbara S. Jones**

PANELISTS

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JUDGE JONES: Good morning. I am Barbara Jones of the U.S. District Court in the Southern District of New York. As a friend of Bill Tandy and his family, it is my pleasure to be here to moderate our first panel, "The Prosecutor's Role in Light of Expanding Federal Jurisdiction."

Before we get to that subject, though, let me take just a quick minute to introduce the members of this panel. I am doing it because I want you to appreciate the breadth of experience and wisdom that we have on this panel.

Our United States Attorney for the Eastern District of New York, Zachary Carter, began his public service career in the U.S. Attorney's Office in the Eastern District, and when he left, he was the Deputy Chief of the Criminal Division. Zach also has been a criminal court judge, a Magistrate in the Eastern District, and an Executive Assistant in the Brooklyn District Attorney's Office. He comes to us with a wealth of experience.

Elizabeth Glazer is the Chief of Crime Control Strategies in the U.S. Attorney's Office. Her title alone shows that federal jurisdiction is expanding. Liz was the Chief of the Violent Gangs Unit.

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She also has experience in City Government, having worked for the City Council President and the Justice Division before joining the U.S. Attorney's Office.

Philip Heymann is currently the James Barr Ames Professor of Law at the Harvard Law School. Phil has served as a Deputy Attorney General of the United States from 1993 to 1994 and as Assistant Attorney General for the Criminal Division of the Department of Justice from 1978 to 1981. We are extremely lucky to have him on our panel, as he is a well-known author and expert in the criminal justice area, with tremendous practical experience.

Bob Litt is the Co-Moderator for this panel. He will comment from time to time on what is occurring on this panel. Bob is currently the Principal Associate Deputy Attorney General at the Department of Justice ("Department" or "DOJ"). He served with me in the United States Attorney's Office, where he was Chief of the Appeals Bureau.

David Sklansky is Acting Professor of Law at the UCLA Law School, where he teaches evidence, criminal law, and criminal procedure. More importantly, he was Professor of the Year in 1996. He also comes to us with experience as an Assistant United States Attorney from the U.S. Attorney's Office in Los Angeles, and he has contributed a number of articles to the Harvard, Stanford, and UCLA law journals.

Having said all that, expanding federal jurisdiction is a topic that we could discuss all day and never get to another panel. I thus want to discuss three, and only three, broad areas.

First, new criminal statutes where Congress has decided to increase the responsibility of federal prosecutors — the kinds of statutes that make Justice Rehnquist nervous because he is afraid that there will be an additional caseload — such as the Anti-Car Theft Statute of 1992¹ and the Violence Against Women Act of 1994.²

The second category that I would like to try to touch on is how the federal prosecutors themselves decide how they are going to expand their jurisdiction by using, for lack of a better term, old statutes in new ways. One example of this is the use of the federal racketeering statute ("RICO"),³ which was obviously crafted with the intention of combating the organized crime families of La Cosa

1. Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (1992).

2. Violence Against Women Act, Violent Crime Control and Law Enforcement Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat. 1796 (1994).

3. Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et. seq. (1984 & Supp. 1998).

Nostra in the 1960s, but is now being used to prosecute street-corner youth gangs that are selling drugs and committing homicides.

Finally, I was hoping that we could discuss an area where federal prosecutors have expanded their role, and it is because of decisions of both the Congress and prosecutors, including the Attorney General, who came to the Department of Justice with a state prosecution model. That essentially gives the federal prosecutor a role in the community, both through "weed and seed" programs⁴ that are funded by the Department, as well as the notion that federal prosecutors might even get involved with the community in terms of crime prevention programs, et cetera.

The tension in all of these expansions of federal prosecution is that each and every one of them, to some degree or other, encroaches on areas of investigation and prosecution that have traditionally been handled by the state, by state investigators and by state prosecutors.

What I hope that we can debate a little bit this morning are just a few questions that these encroachments raise:

- Should federal prosecutors undertake these roles; or should they concentrate their resources on other priorities, such as the anti-terrorism cases that we just heard Director Freeh talk about,⁵ or sophisticated white collar crimes?
- Do federal prosecutors even have the expertise to handle these types of roles? Do they know the street? Are they involved enough in the community? Do they have the expertise? There is a question of whether or not there are dangers in getting involved in the community.
- Should federal prosecutors retain a certain amount of distance in order to obtain or retain a certain amount of objectivity?
- Does the public know or care who prosecutes which crimes, so long, as Bill Tandy would say, "the bad guys go to jail?"

What I would like to do at this point is turn to our U.S. Attorney from the Eastern District and basically ask a very general question: Zach, where have you seen the most significant change, as well as the greatest expansion of federal jurisdiction, contrasting the earlier days with your tenure now as U.S. Attorney?

4. An anti-drug program sponsored by the federal government but works in conjunction with local authorities. See R. Norman Moody, *Trailer Filed with Fun on Way to Brevard Anti-Drug Program Hopes Sports Gear will Provide Kids with Positive Pastime*, FLORIDA TODAY, Jan. 6, 1999, at 1B.

5. See Hon. Louis Freeh, Symposium, *Keynote Address*, 26 FORDHAM URB. L.J. 649 (1999).

MR. CARTER: I am seeing the emergence of a fully integrated system of criminal justice. You used the term "encroachment," or "possible encroachment," to describe the exercise of federal criminal jurisdiction in areas where the state had formerly had primacy.

What I see, instead, is an emerging partnership between federal and state authorities, both in terms of investigative agencies and prosecutors' offices, in which there is, by mutual consent, a sensible division of labor in accordance with resources and laws that facilitate conviction in certain areas. For me, "encroachment" implies imposition, and it is hard for me to think in terms of imposition where we are now being openly invited into full participation as partners in areas in which we formerly have not been participating.

You mentioned the use of RICO and other tools that have been focused primarily on traditional organized crime groups. One of the things that struck me when I was first appointed United States Attorney was that our office had taken enormous, and quite justifiable, pride in having convicted John Gotti and other major figures in traditional organized crime. That was something that the community and the Office could feel good about.

But it certainly struck me that there were neighborhoods in New York — like East New York and Flatbush and Bushwick, areas in Queens, in the inner city, in housing projects and tenements and other economically depressed areas — where people were not particularly jumping for joy that John Gotti had been successfully prosecuted, because he was not the person making the most difference in their lives in terms of the danger in their communities. It was really local, nontraditional organized crime groups who were peddling crack and who were elevating the level of dangerousness in the communities during that time.

During the time of the prosecution of Gotti and other major organized crime figures, the violence associated with the crack cocaine trade was at its peak; when parents had to give the unfortunate instruction to their children not to linger too long in front of windows lest they be hit by stray gunfire. We saw widely publicized accounts of people being caught in cross-fire between competing drug trafficking organizations.

It was with the acquiescence and by the invitation, to a large extent, of local authorities that the Federal Government became more fully involved in partnership with police agencies, and local prosecutors' offices, in bringing the tools that we have used successfully to address traditional organized crime in the past to ad-

dress organizations that were involved in similar conduct, but at the neighborhood level.

I do not believe that the exercise of federal jurisdiction in that context does any violence to any conventional notions of federalism, and particularly because, this is something that we have been doing by invitation, and not imposing the federal will on local authorities.

JUDGE JONES: Phil, it all sounds wonderful. What is wrong with it?

PROF. HEYMANN: All the advantages Zach describes are there. I know Boston, and Boston is getting all of those advantages.

But there are real problems and real worries here. They fall into four categories. Let me take them one at a time.

Barbara, you dismissed the idea of more statutes creating a problem, and I generally agree with you, because the evidence is very strong that when Congress passes a new statute giving some power over what has traditionally been a local crime, generally nothing happens, unless the federal investigators or prosecutors have requested it for their previously existing purposes.

So, is there any problem on this side with more statutes? The answer is yes, there is a problem. Sarah Beale, Professor at Duke, asked the question: "How would you feel about having a federal statute that said 'as far as it is constitutional, the Federal Government can investigate and prosecute any state crime it wants?'"⁶

We are moving in that direction. It is not a fanciful hypothetical.

The answer is that a lot of people would be made very nervous. The idea of writing Congress out of the process of setting priorities altogether or Congress writing itself out of the process of setting priorities altogether makes people nervous, and I think rightly so.

We do not really want federal prosecutors, who have the power to prosecute anything they want, set their priorities anywhere they want and exercise their discretion anywhere they want, across the whole realm of local crimes. So the first problem is federal discretion; it is not that too many federal cases are brought in the wrong area.

6. See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984) (arguing that the supervisory power doctrine has blurred the constitutional and statutory limitations on the authority of the federal courts and has fostered the erroneous view that the federal courts exercise general supervision over federal prosecutors and investigators).

The second problem is shifting priorities. Director Freeh spoke in a very interesting and persuasive way about the remarkable international developments and computer-based developments that are now hitting the FBI.⁷

There are two views on what federal jurisdiction should be. One view is that the Constitution determined that the Federal Government should not be doing the things that — as Zach points out — it is doing very usefully in the cities.

I do not find much clarity about these issues in Constitutional law. A view that is much more persuasive to me is that the Federal Government should be doing what the locals cannot do, that there should be a division according to comparative advantage.

That raises the question: What is the price of moving into local drugs, local violence, local gangs? If you have an expanding number of prosecutors and investigators, there is no price in terms of being unable to do the things that Director Freeh described that only the Federal Government can do.⁸ But as resources become scarce, these new activities will force the Federal Government out of the business of what only it can do, and that will create a gap.

The third problem is that some people, particularly appellate federal judges, complain a lot about expanding caseload. Now, more cases come with more law enforcement personnel, not with new statutes. Judge Newman of the Second Circuit has a different complaint: that federal courts are becoming just like local courts, in that they are losing their specialization.⁹ I think that does happen as you substantially increase the number of drug agents and the number of drug cases.

Now, here is the really interesting problem, the last one: local-federal relations. What are the problems there?

Zach says — and I think he is absolutely right — that the federal prosecutors and agents and the local prosecutors and agents can avoid what we have traditionally thought of as the problems of overlapping jurisdiction — confusion and conflict. They avoid it by the federal prosecutors and agents only going where they are invited, helping out only when they are wanted.

7. See Freeh, *supra* note 5, at 653.

8. See *id.*

9. Jon O. Newman, *Fifty-Seventh Judicial Conference of the Third Circuit: Looking Forward to the Next Millennium: Litigation Reforms and the Dangers of Growth of the Federal Judiciary*, 70 TEMPLE L. REV. 1125, 1129 (1997) (discussing the risks to the federal judiciary of an unchecked increase in the number of federal judges).

In Boston, the picture is very simple. The federal prosecutors will take over a case when a person that the locals think is a very dangerous criminal is found with a gun and get him or her a very long sentence. The federal prosecutors are "adopting" locally investigated cases in that category and, working with the locals, they are bringing gang cases, and using federal authority to lock gang members up for a very long period of time, with great success. I think it has all the advantages that Zach described.

What are the problems? Well, there are some serious ones.

First of all, what you are doing there, when feds and locals work very closely together, is allowing the locals to use federal procedures, federal statutes, federal sentences, and federal jails simply because the state legislature wants different procedures, different statutes, different penalties. In other words, you are allowing local prosecutors to decide whether to comply with the rules that the state government has set up.

If the local prosecutor, a D.A. in Brooklyn, goes to Zach and say, "Would you bring this case because you have better procedures or you have longer penalties?" and Zach does it, something is happening to the relationship between the local D.A. and the New York Legislature. He or she is managing to bypass it completely.

Number two, you are freeing state legislatures from the responsibility of deciding what kind of procedures the state needs for dealing with the toughest or the most vicious individuals or gangs. They are supposed to be responsible for this. When Zach takes it over, they do not exercise that responsibility.

Number three, the U.S. Attorney becomes an even more powerful figure in local government. If the District Attorney in Brooklyn relies a lot on Zach, which I assume is true, Zach becomes a rather powerful figure in the local government of Brooklyn. That has problems.

Finally, and most importantly, there is an immense amount of discretion being exercised as to whether the accused will receive a very long federal sentence or a relatively short state sentence by somebody without any substantial review, probably by the local authorities who come to Zach and say, "This is a very bad guy" or "This is a very dangerous gang." They are making the judgment that this group should get a sentence totally different from other people in Brooklyn — the exact opposite of the Sentencing Guidelines effort — and on that basis, we are locking up people for a long time. If they are wrong, that is serious.

A last word. Boston has a famous case there. There was a guy named Cardoza who was thought by the locals to be a very dangerous person who had done terrible things, probably including murders.¹⁰ He had been convicted three previous times of felonies.¹¹ When he was caught carrying one bullet by the locals,¹² they brought it to the U.S. Attorney in Boston. The U.S. Attorney prosecuted Cardoza as a federal felon, using gun statutes,¹³ and sent him to jail for nineteen years.¹⁴ Then the locals posted signs on telephone poles throughout Boston saying "Remember Cardoza: He Went Away for Nineteen Years." It is very effective, but there is a lot of dangerous discretion going into that.

JUDGE JONES: What about that dangerous discretion?

PROF. SKLANSKY: I think, from the West Coast perspective, a lot of the things that Professor Heymann is talking about have gone well past the realm of theory. We are seeing them in practice.

For a long time the federal-state issues that you are talking about may have seemed theoretical, because we were in an era when there seemed to be an insatiable appetite, both in federal constituencies and state constituencies, for heavier penalties, and more tools for prosecutors. But, as crime rates are falling, I think we may begin to turn that corner, and the problems that Phil talked about may become more and more apparent.

In California, the voters of the state have decided that it should not be a crime to use marijuana for medical purposes.¹⁵ In Alaska, the state judiciary has decided that all interrogations need to be tape recorded when possible.¹⁶ We do not have many executions in California.¹⁷ If the federal presence in death sentences becomes

10. See *United States v. Cardoza*, 129 F.3d 6 (1st Cir. 1997) (affirming conviction and sentencing).

11. See *id.* at 16.

12. See *id.* at 9.

13. Felon-in-Possession, 18 U.S.C. § 922(g)(1); Youth Handgun Safety Act, 18 U.S.C. § 922(x); see *Cardoza*, 129 F.3d at 16.

14. See *Cardoza*, 129 F.3d at 17 (Cardoza was sentenced to 235 months in prison and 5 years of supervised release).

15. Lionel Van Deerlin, *So Much for 'the Will of the People'*, SAN DIEGO UNION-TRIBUNE, Dec. 2, 1998, at B11.

16. See *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) (holding that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible") (citations omitted).

17. Since executions resumed in 1992, California has only executed six people, yet the state attorney general's office estimates that ten more last minute clemency requests will be presented to Governor Gray Davis over the next two years. See Dan

more enhanced, we may see pressure, particularly if the Department of Justice wants to regularize criteria across the country for more federal executions in California.¹⁸

In all of these instances, a decision has to be made about whether it makes sense in particular cases to override decisions that are made by the states. In the past, prosecutors could lean on courts and Congress to make that kind of decision, but more and more they are not going to be able to.

I think that means that prosecutors need to be much more self-conscious about the ways in which they exercise discretion. We are well past the time when we can just say, as Attorney General Jackson did, that being a prosecutor is like being a gentleman, and that if you do not know how to do it, telling you will not help.¹⁹

We need prosecutors to think more explicitly and more specifically about how they decide to exercise their powers, and that should not be an activity that prosecutors carry out alone.

One of the many advantages to prosecutors being more self-conscious about exercising their authority is that it can facilitate a dialogue with people outside of the Department of Justice about in what instances the federal interest should override the state's.

Another example where prosecutors must be more self-conscious is that prosecutors must become less dependent on agencies to select which cases should be prosecuted federally and which cases should not.

JUDGE JONES: Thank you. Bob?

MR. LITT: Could I just add something here? To a certain extent, we are talking on two different intellectual levels here.

The first level deals with the actions of the federal legislature in determining which crimes will be the subject of federal jurisdiction. Also, to a certain extent, there are budgetary allocations, in terms of the vastly increased resources that have poured into the federal law enforcement system.²⁰

Smith, *Life or Death? Its Up to Davis Clemency Appeals to Test Governor's Hard Line Stance*, SACRAMENTO BEE, Jan. 22, 1999, at A1.

18. See Rory Little, *History of the Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999) (providing detailed historical account of federal death penalty and current DOJ procedures for selecting capital cases).

19. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

20. UNITED STATES GENERAL ACCOUNTING OFFICE, COMBATting TERRORISM - FBI'S USE OF FEDERAL FUNDS FOR COUNTER TERRORISM-RELATED ACTIVITIES (1998).

On the other hand, we are operating on the level of the individual prosecutor when he or she is faced with those broad statutes, which was probably much more familiar to Bill Tandy.

The kind of individual responsibility that David is talking about works very well when dealing with the problems on that second level. If you have prosecutors whom you trust and they exercise their discretion wisely, you can be relatively confident that the public interest will be served.

But it does not deal with some of the institutional issues that Phil identified, which operate more at the first level: when you determine which statutes you pass, what are you going to make a federal crime, and how is this going to impact the relationship of the Federal Government and the states in the long run. Individual prosecutorial responsibility cannot really deal with that issue.

JUDGE JONES: Liz?

MS. GLAZER: I just wanted to respond to one of the things that both Phil and David have commented on, which is, what is it that the states are actually saying?

If you look at New York and the state legislature there, after many years, they have finally passed a death penalty bill, which I think has debatable effects on reducing crime. And yet, at the same time, they have consistently refused to amend any of the statutes that would actually provide District Attorneys' offices with an effective tool for going after murderers, such as accomplice evidence rules²¹ or joinder rules.²² There is a whole array of the kinds of techniques that are forbidden to state prosecutors.

Now, does that mean that the principles of federalism should prohibit federal prosecutors from going in and using the tools available to prosecute those murderers, because we are able to use accomplice evidence, we are able to do joinder, and we are able to do the kinds of things that Zach's office and my office have done? It cannot be that deference to the state means that the people want those murderers to go free.

PROF. HEYMANN: But if the only reason you are doing it is because the state prosecutor comes to you and says, "Will you prosecute this case; our legislature has not given us the tools we need," there you are running directly contrary to the state legislative decision. I have the same feeling you do, I want the murderers

21. See N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1998).

22. See N.Y. CRIM. PROC. LAW § 200.40 (McKinney 1998).

off the street. But there has to be a good federal reason for prosecuting, for example, if he killed a federal agent.

MS. GLAZER: But to what extent in the real world does the State Assembly reflect the will of New York citizens any more or less than the Congressman or the Senator? How many people know who their Assemblyman is, and how many people know who their Senator is?

PROF. HEYMANN: But you are not claiming that Congressmen or Senators have given you this authority?

MS. GLAZER: Well, they passed the racketeering statute.²³ Congress has given federal prosecutors the authority to prosecute these laws, we are sworn to uphold the laws that Congress has passed, and the courts have consistently affirmed these kind of uses of those federal laws.

PROF. SKLANSKY: I think the problem with that is that Congress has always legislated with a background understanding that prosecutors will exercise discretion. And so, if you are going to faithfully execute the laws, that includes the duty to exercise some discretion. Part of that discretion has to be sensitivity to federalism issues.

MR. CARTER: But local prosecutors represent people as well as legislators. Decisions whether to prosecute and decisions about what a sensible division of labor should be the product of a consultative enterprise between federal and local authorities. Thus, the people of the State of New York, by way of example, are represented in that process by the District Attorney who makes the decision to cede authority to the feds, or to join by cross-designation in a federal criminal or prosecutive enterprise.

PROF. SKLANSKY: I am not sure it works that easily, though, because imagine you are a federal prosecutor in Alaska and the District Attorney comes to you and says: "We have these cases. We did not tape record the interrogations. We just thought that was not the way to prosecute these cases effectively. We are not going to be able to bring them in state court. Take them federal, please."

Or suppose he comes to you even before the investigation begins and says: "We think it would be strategically helpful not to tape record the interrogations. Your FBI knows how helpful that can

23. RICO, 18 U.S.C. §§ 1961-1968.

be. We would like to do the same thing. So if we do not do that, will you make them federal?"

It seems to me you cannot just say, "Well, the District Attorney is representing the people of the State of Alaska, and if he is uncomfortable with the tape-recording requirements, sure, we will help him circumvent it."

PROF. HEYMANN: Because he is obligated to obey the decisions made by the state legislature.

MR. CARTER: If that local prosecutors persuades the U.S. Attorney that there is a separate federal interest to be vindicated by a prosecution of those cases, then that would be an appropriate exercise of federal prosecutive authority.

If, on the other hand, as sometimes happens in the forfeiture context, the prosecutors use federal forfeiture laws²⁴ to avoid more stringent local laws.²⁵ If there is nothing that separately justifies the exercise of federal jurisdiction, then, whether or not that is a prudent exercise of discretion to take on that case is reasonably questioned.

MR. LITT: But, Zach, how broadly would you define a separate federal interest? In some of the cases that have been brought with tremendous success by your office, by the Southern District, and in Boston, the separate federal interest seems to me to have been defined as little more than "this is somebody who is really bad and we want to get them off the street to protect the public."

MR. CARTER: Well, at least in the way that I like to think that we exercise our discretion in our office, that separate federal interest has been in prosecuting organizations, as opposed to individuals. That is exemplified by the enactment of RICO-type statutes — attacks on the enterprise. We have in the past narrowly focused on Italian mobsters, as opposed to African-American mobsters, Latino mobsters, Asian mobsters. It is simply applying a federal statute targeted at enterprises on a different set of enterprises than we had focused on in the past. To me, that is separate and federal.

PROF. HEYMANN: Zach, would you argue that, as a general matter, juvenile street gangs should be treated as a federal responsibility? In Boston, we handle them federally because we can get longer sentences and we can use investigative procedures that Bos-

24. 18 U.S.C. § 982 (1998) (as amended by Pub. L. No. 105-318, 112 Stat. 3007 § 6(a) (1998)).

25. *See, e.g.*, N.Y. PENAL LAW § 60.30 (McKinney 1998).

ton could not otherwise use. What about ordinary street gangs, drug-dealing street gangs? Isn't there a certain amount of violence about them too?

MS. GLAZER: But why is it any different than classic mob prosecutions? I cannot think of anything more intensely local than gambling and protection rackets and prostitution, and yet there is something about the mythology and the romance of the mob that says, "Well, those racketeering prosecutions are different."

JUDGE JONES: Aren't we overstating the impact of these relatively new federal prosecutions of the street gangs and the concentration or the prioritization by U.S. Attorneys for prosecuting violent crime? If you really look at who is getting prosecuted for what in this country, it is a drop in the bucket compared to what state and local prosecutors are still doing.

I realize all of life is not numbers, but are we concerned about something that is not really going to have that great an impact? I mean, states are still perfectly free and, in vastly greater numbers, are continuing to prosecute their way.

MS. GLAZER: I think it has an impact for exactly the reasons that Phil is concerned about, which is what the Federal Government can do effectively that sometimes the states cannot is, in a comprehensive and really relatively devastating way, take out the entire group of murderers, whose major crime is murder and who have occupied that neighborhood for several years, and put them away for longer sentences so that they will not be arrested ten times in their career, they will be arrested once.

MR. LITT: In terms of the official title of this, concerning the changing role of the federal prosecutor, what Liz has just talked about highlights in a very significant fashion one way that the role of the federal prosecutor has been changing.

Historically, prosecution and law enforcement have been reactive to a great extent. What the Department of Justice is trying to do now is to work with the state and local government, and with the community, to identify particular law enforcement problems in the area and go out and get a strategy in advance for knocking out the entire problem cooperatively. This is a very different kind of role for the prosecutor.

I know that Don Stern in Boston has one prosecutor on his staff who does no prosecutions whatsoever. Her job is to administer this program, to work with the community groups, and to make sure that all of these things flow smoothly. She gets no cases on

her statistics every year, and yet she is an incredibly valuable part of that office. It is a different role for the federal prosecutor.

PROF. HEYMANN: I was going to say Liz asked a fair question: What makes one federal and the other not, between organized crime and street gangs? I have always thought the answer was that organized crime required wiretaps, undercover, very prolonged investigations, very sophisticated investigations, sometimes accountants to look at books and records, very long trials, all part of a set of things that local prosecutors — necessarily preoccupied with murder, rape, robbery — cannot devote and do not have, and local police do not have. So the Federal Government should do it because it can specialize in long-term, complicated investigations, and, to a lesser extent, trials.

MS. GLAZER: But isn't that also true of taking down a large and murderous gang? If you arrest forty-three members of the Latin Kings in a racketeering indictment, that is just as significant.

PROF. HEYMANN: I think the locals can do that fine. I think they ought to be able to do it fine. In most places defendants will get lesser sentences because federal drug sentences and gun sentences are, on the average, much more severe. In practice, this turns out also to be true in New York. They are not more severe on the books, but they are in practice.

MR. CARTER: But the difference in the penalties is not the chief advantage for federal law enforcement and that is not the reason why it is important for us to intervene with non-traditional organized crime groups.

First of all, they resemble traditional organized crime to a much greater extent than you think. There is "West Side Story" and then there is the Latin Kings.

PROF. HEYMANN: Can I interrupt you just for a second, Zach? I would just like you to respond to this. What they do in Boston is they go out and they make buys from the gang. They are almost always dealing drugs. They buy relatively small quantities. They do it for a period of time before they arrest anybody. When they have got almost everyone in the gang, they bring a case against everyone there for selling small quantities of drugs and they impose federal sentences on them. Why would that be hard for the local prosecutor?

JUDGE JONES: Many local prosecutors do that. In New York, the local district attorneys have been prosecuting gangs alongside

the U.S. Attorney's Office for several years — not jointly, but their own gang prosecutions. I suppose this is an exception to your general objections to U.S. Attorneys getting into this area.

The exception in New York for street gangs would be that because there are so many of them it is helpful to have a second prosecutorial agency taking them off the street.

PROF. HEYMANN: But you were the one who pointed out that the Feds are, in total, a tiny fraction of locals.

JUDGE JONES: There is a vast difference between drug prosecutions and targeted gang prosecutions. There, if you are talking about youth gangs in a precinct in northern Manhattan — and there are at least twenty of them²⁶ — and you can only do ten because of your prosecutorial resources, then it is wonderful to have another prosecutor's office, even if it is federal.

MR. CARTER: It is not just numbers, though. The most important tool, as far as I am concerned, in the federal arsenal for investigative purposes is the lack of corroboration requirement for accomplice testimony. We can make a legally sufficient case based on the uncorroborated testimony of an accomplice witness. That tends to certainly accelerate the pace of investigations into any organized street gang activity.

PROF. HEYMANN: But doesn't the state legislature have something to say about this? Liz expressed some skepticism about the state legislature. I bow to no one in my doubts about the wisdom of legislatures when they deal with crime, but, in theory, the legislature is supposed to have something to do with that.

MS. GLAZER: In theory, but would they do that if there was not the safety net of the possibility of federal prosecution?

MR. LITT: That goes in just the opposite direction. Which is cause and which is effect here? Does the growth of federal prosecutions induce laziness in state legislatures — who are, regardless of the familiarity of most citizens with the names of their Congressman or their Assemblyman (most people probably do not know the name of either), closer in a geographical sense, in terms of the size of the district, to the people, and should be, at least in the theory of the structure of the federal system, charged with the primary responsibility for protecting public safety?

26. See, e.g., Bill Berkeley, *'Jheri Kurls' Trademark of Uptown Gang*, NAT'L L. J., Feb. 24, 1992, at 8.

MS. GLAZER: What is the cost of making the incentive for them to be less lazy? That is, what is the cost then for federal prosecutors to say, "We are simply not going to execute the laws that are our responsibility until there is such a public outcry because these guys are on the street so the State Assembly will pass accomplice corroboration rules or joinder rules?"

MR. CARTER: There is one other thing, though. There are rules that exist in the area of procedure and evidence that serve salutary purposes for ninety percent of the kinds of cases the prosecutors prosecute. I have lived both in the state and federal systems.

It was interesting that former Judge Wachtler characterized the state system as one in which a ham sandwich could be indicted,²⁷ never having visited a Grand Jury in the Federal System, where hearsay was admissible.

One of the reasons why I finally have learned that a rule that practically required you to try your case in a state Grand Jury is important is because prosecutors are constantly confronted with strangers — not law enforcement professionals, but strangers — accusing each other of crimes, of wrongdoing, and they have to test the veracity of those strangers in the system all the time. Rather than doing that independently and then having some agent report second-hand to the Grand Jury what occurred, the system requires that people come in personally and be evaluated by those twenty-three grand juries.

That is just one example why that system, those rules are very important. Those rules may impede a federal investigation, but they serve very important purposes of protecting against the possibility that one stranger may falsely accuse another and cause another person's indictment.

So I do not believe that we could leave it to the states to make grand adjustments in their system to address these problems that federal law enforcement is uniquely suited to address, because there are other good reasons for the system staying exactly the way it is.

PROF. HEYMANN: My argument is that the one thing we should not consider, in deciding what is federal and what is local, is the superiority of federal procedures, the prosecutor-friendliness of federal procedures, sentences, or statutes because that is something

27. See, e.g., Alan M. Dershowitz, *New York Forum About Justice*, *NEWSDAY*, Dec. 7, 1989, at 76.

that the state really does decide. It is not a competence that is hard to build up. They could pass a statute tomorrow correcting one of those things.

You gave an example, Zach, of the State of New York really having good reason for a certain Grand Jury rule. If they want an exception to it for some of their cases, okay, make an exception to it for some of their cases. The Federal Government should have its own Grand Jury rule. I agree with that.

What I am saying should not happen, in principle, though I can see the great advantage given the number of lives that have been saved by it, is that the local D.A. should not come to you and say, "I've got this case, it is a great case, but I cannot make it under New York rules, or I am less likely to make it under New York rules. You try it under federal rules."

We have the same problem, by the way, in Boston. Under local law, consensual monitoring with a microphone or a tape recorder is not allowed in almost any case.²⁸ That is a big disadvantage. But the state has to face up to it, either it wants that or it does not want it, and if the local District Attorney goes to the local U.S. Attorney and says, "Would you investigate this corruption case, which is not for some other reason federal, because you can do it with a consensual monitoring device," the U.S. Attorney probably ought to say, "No. Go to your legislature. Do not come to me. Go to your legislature."

JUDGE JONES: That is a tough position. Assuming the federal procedures are lawful, which we all do, they are authorized, and you have, as Zach earlier said, a representative of the state coming and saying, "Let me use this," why should these criminals get off the hook? That is what Bill Tandy would want to know.

PROF. HEYMANN: The answer is because this is a democracy, and in a democracy the state legislature gets to tell state prosecutors what they can do and what they cannot do. If it is too restrictive, the public is going to go to the state legislature and say, "You are out of office." But that is the way a democracy is supposed to work.

28. *See, e.g., Commonwealth v. Blood*, 507 N.E.2d 1029, 1037 (1987) (holding that it is "objectively reasonable to expect that conversational interchange in a private home will not be invaded surreptitiously by warrantless electronic transmission or recording and that consent to the transmission or recording by one party to such a conversation did not obviate the need for a warrant").

What you are doing in the cases, I am assuming, is you are end-running the state legislature in a case that is only federal for the reason that you do not like the state procedures.

MS. GLAZER: But in a democracy Congress is also empowered to pass laws and Congress empowers federal prosecutors.

PROF. HEYMANN: They give discretion, not a directive. You keep making it sound like you are systematically enforcing Title 18. You are enforcing one out of a thousand federal statutes. Your whole office is enforcing one out of a hundred federal statutes.

MS. GLAZER: But many of those statutes are the statutes that the state, for whatever reason, is unable to prosecute. It does not seem as if there has been a tremendous popular outcry against federal prosecution of certain kinds of crimes. You know, you think of something like the Reagan Administration, which was surely a great proponent of states' rights, and they were one of the greatest proponents also expanding federal jurisdiction.

PROF. SKLANSKY: It seems to me that the real problem here for prosecutors — and for legislators — is how we muddle through in a gray area, because there are no clear answers. I like the approach of asking whether there is a distinct federal interest to be pursued. The problem is figuring out what that means in a particular case.

One traditional guideline has been the comparative advantage approach that Phil mentioned. The problem is that often a comparative advantage, looked at from another perspective, will be a choice that a state has decided not to make.

One example you gave of a comparative advantage was wiretap capabilities. Many states could have wiretap capabilities if they wanted them. They could pass laws that would facilitate wiretaps and they could build the institutional infrastructure that they need to carry them out.

So, on the one hand, I think that Liz is exactly right, that prosecutors cannot just throw up their hands and say, "Well, if the State of New York has not gotten around to building a prosecutorial machine that will allow us to lock up some murderers, we are not going to do their work for them."

On the other hand, prosecutors cannot just say, "Well, if we have the tool and if there is some federal interest in the case, we will use it," because the problem is that, if you look hard enough, you can find a federal interest in most cases.

There are no easy answers here. Aside from the question of which polar answer is less unpalatable, it seems to me that there is another big question: how do you muddle through in an area like this?

One way you can muddle through is just to say, "Well, prosecutors should exercise good judgment." Another way to muddle through is to say that prosecutors need to start talking about this in a more self-conscious way.

The traditional way you spur that on is through the development of guidelines. Guidelines have a lot of problems. They can seem cumbersome, they can seem silly, they take time that prosecutors could use to be in court or to prepare papers for court. On the other hand, they have a lot of advantages. One is that they can spur self-consciousness in the people who develop them. Another is that they can facilitate dialogue with other groups.

My own feeling is that the advantages outweigh the disadvantages and that what we need, among other things, is a good deal more time spent on the kind of thing that a lot of prosecutors probably instinctively think is a bureaucratic waste of time.

JUDGE JONES: With that phrase, we are going to switch to the third area of expanding jurisdiction.

Zach, I want to go back to you and talk about federal prosecutors going into the community. They did not. They do now. Will you tell us about it?

MR. CARTER: Particularly under the "weed and seed" program, U.S. Attorneys have taken a more prominent role in organizing communities around local crime problems by providing a forum by which community leaders, local law enforcement agencies, federal law enforcement agencies, local prosecutors, and federal prosecutors can get together and help local law enforcement with the assistance and advice of the community.

JUDGE JONES: You are handing out money, aren't you?

MR. CARTER: The money helps. The money attracts people to the table. It is interesting. We had a commemorative event in North Amityville in Long Island in connection with a "weed and seed" site that we established out there a couple of years ago.²⁹ At the conclusion of the ceremony that I addressed, a number of peo-

29. See Collin Nash, *A Chance to make a Difference: A Mother Volunteers in a Campaign to Improve the Quality of Children's Lives*, *NEWSDAY*, Dec. 6, 1998, at G17.

ple approached me and thanked our office for having organized this effort and established this "weed and seed" site.

Not one person thanked us for the money we had given the site. Instead, all of them thanked us for providing an opportunity for community groups who had been warring against each other for a decade to sit down and actually bury the hatchet and work together around these problems. The money attracted them to the table, but it was not what kept them there.

JUDGE JONES: Doesn't this frighten you even more than the other area?

PROF. HEYMANN: No. First of all, I think the U.S. Attorney has a special role to play among competing law enforcement agencies, and also perhaps competing prevention agencies, in a city. Zach and Mary Jo are natural leaders in their areas, and so they are bringing something to the table. They are able to assemble people, they are able to make peace, they are able to make suggestions, in a way that nobody else can.

That does not bother me at all, and it is certainly not defying the state legislature. It is not the notion that the state legislature has disapproved and so that is the reason they are in it.

I think we would all be happier if the locals took the lead on everything like that, but in that absence, frequently they are going to need the U.S. Attorney to pull them together.

MS. GLAZER: U.S. Attorneys, because they are not local politicians, often can be a kind of neutral convener and do the kinds of things that Zach's office has done in bringing together parties that otherwise have long histories. It is not that prosecutors themselves are running the after-school programs, but they are able to bring the people with that kind of knowledge to the table.

JUDGE JONES: All right. I think our time is up. I want to thank everybody very much.

MR. LITT: This morning I began to wonder whether in fifteen or twenty years people will view this Symposium as a discussion of a trend or as an artifact of a particular historical point in time.

Much of what has been attacked as the over-federalization of crime has come in the area of drugs and violent crime, which is a response to the particular crime problem that we have today. As David noted, in the short term the trend is down. Nobody can tell what the trend is going to be five or ten years from now.

But if you listened to Director Freeh, we are facing at the same time the growth of a whole series of new problems that I think are going to be perceived as distinctly federal — the internationalization of not only white-collar crime, but more traditional organized crime; a tremendous explosion in the involvement of computers in crime as well as the problem of terrorism.³⁰

It may be that in fifteen or twenty years, the kind of problems that we are talking about today are no longer around because, as a society, we have decided we want our federal law enforcement resources devoted elsewhere.

I guess that is just another way of saying that fundamentally this all boils down to a political issue, in the good sense of politics.

30. See Freeh, *supra* note 5.

