

1999

## PANEL DISCUSSION: THE REGULATION AND ETHICAL RESPONSIBILITIES OF FEDERAL PROSECUTORS

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### Recommended Citation

*PANEL DISCUSSION: THE REGULATION AND ETHICAL RESPONSIBILITIES OF FEDERAL PROSECUTORS*, 26 Fordham Urb. L.J. 737 (1999).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol26/iss3/14>

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**PANEL DISCUSSION:  
THE REGULATION AND ETHICAL  
RESPONSIBILITIES OF  
FEDERAL PROSECUTORS**

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PROF. GREEN: Good afternoon. I am Bruce Green. I teach here at Fordham Law School.

This last panel focuses on an issue that has been touched on by the other panels: the ethics and professional regulation of federal prosecutors. This raises essentially two sets of questions.

One is the substantive set: What are the current understandings of federal prosecutors' ethical responsibilities? What are the obligations beyond those imposed by the Due Process Clause or the Rules of Criminal Procedure? What are the obligations beyond those undertaken by other lawyers? And how, if at all, have those understandings changed over time?

The second set of questions relates to process: How are federal prosecutors' ethical obligations enforced both internally and externally? What do individual U.S. Attorney's Offices and the U.S. Department of Justice do to ensure that individual prosecutors have an appropriate understanding of their ethical obligations and a commitment to their ethical role? What do they do to monitor prosecutors' conduct and to enforce standards of conduct? What

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do courts and lawyers' disciplinary agencies do? And how, if at all, has the regulation of federal prosecutors changed over time?

To help us discuss these issues we have a very distinguished group of panelists. First of all, we have two current high-ranking government lawyers. Michael Bromwich is the Inspector General of the Department of Justice. He spent many years both as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York and as an Associate Counsel for the Office of Independent Counsel Lawrence Walsh. Mark Pomerantz is now Chief of the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, having returned there after some time in private practice and having previously been an Assistant U.S. Attorney, and also Chief of the Appellate Unit there.

Then, we have three academics with a background in federal law enforcement. Robert Precht, now at the University of Michigan Law School, was formerly a criminal defense lawyer in a number of contexts, including in the Federal Defender's Office in New York, where he represented one of the defendants in the World Trade Center bombing case. Rory Little, now at the University of California, Hastings College of Law, was formerly both in the Department of Justice and an Assistant United States Attorney in California. Finally, John Barrett, now at St. John's School of Law, formerly worked both in the Office of the Inspector General of the Department of Justice and as an Associate Counsel in the Office of Independent Counsel Lawrence Walsh. So we have quite a range of experience among the panelists.

I plan to conduct this session a little like my seminars, which is to say I will throw out a question and then the conversation can go anywhere it wants to, and I will not control it unless there is a lull, in which case I may have to call on people. Because this is a panel on ethics, I would ask people to be as honest as possible, and also, to the extent possible, somewhat civil.

Let me begin with a very general question. It picks up on a theme that ran through the prior panels. There is a notion that we have all heard expressed about prosecutors' obligation to do justice or seek justice, about the role of prosecutors as ministers of justice.<sup>1</sup> It is a notion that goes back more than 100 years in published decisions. But we often think of it as having been originated by the

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1. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. [hereinafter MODEL RULES].

Supreme Court in *Berger v. United States*,<sup>2</sup> which talked about the duty of the prosecutor to refrain from improper methods and to use only legitimate means to bring about a just result.<sup>3</sup>

We associate it with a speech given by Robert Jackson in the late 1930s, talking about how prosecutors' immense power to strike at citizens demanded of prosecutors a spirit of fair play and decency.<sup>4</sup> And, Mary Ellen Kris mentioned a little while ago the obligation of fairness and integrity.<sup>5</sup>

The question is whether the duty to seek justice is more than just a platitude for prosecutors. If so, what does it mean, and how is its meaning communicated to Assistant U.S. Attorneys?

MR. POMERANTZ: I think it does have a meaning, and it has a substantive meaning that translates into the small case by case decisions that are made every day in our office. We do not view ourselves as constrained only by ethical codes or case law or statutes or the general requirements of due process. There is beyond that the sense that prosecutors are supposed to do the "right" thing. Of course, defining the right thing is trickier.

Starting with the general obligation, that is something that new Assistants are told literally the day they walk into the office. I meet with the new Assistants and tell them, among other things, that while in our office they should never be in the posture of doing something that they do not believe is the right thing to do; and that there are many supervisors around who they should come and talk to about anything that troubles them.

Apart from that, as case decisions are made, they are reminded all the time that their obligations in the way they do their job transcend what the law requires. So if, for instance, there is a *Miranda*<sup>6</sup> issue that has surfaced in conversations with agents, i.e. whether there has been a *Miranda* violation, and the question is whether to just call the agents who remember, perhaps wrongly, that *Miranda* rights were given and not to call the agent who remembers clearly that they were not given, we disclose that to the court and disclose that to the adversary and the chips fall where they may on that issue.

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2. 295 U.S. 78 (1935).

3. *Id.* at 88.

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

5. See *Panel Discussion: The Federal Prosecutor's Role in the Regulatory Process*, 26 FORDHAM URB. L.J. 709, 711 (1999) [hereinafter *Panel Discussion: Regulatory Process*].

6. *Miranda v. Arizona*, 384 U.S. 436 (1966).

There is not a formal training program, per se, but there is on-the-job training that goes on every day and in every case.

PROF. GREEN: Jerry Lynch said this morning that he was an Assistant U.S. Attorney for several years before he realized that you did not have to indict every case that was handed to you.<sup>7</sup> Has anything changed? As you described it, Mark, Assistants are told to do the right thing and you hope that people have a finely calibrated sense of right or wrong and know how to translate their God-given sense of right or wrong into everyday conduct in the U.S. Attorney's Office. Is that enough?

MR. POMERANTZ: No. The voice of God is transmitted through the Unit Chiefs. It is not just one's innate moral compass, which may point in a variety of different directions. The degree of supervision in the office is really all-important to those kinds of things.

Written work is reviewed, for instance, during one's first year. All written work is reviewed by supervisors. There are case reviews. It is the day-to-day grist of the mill. The charging decisions, tactical decisions, and decisions about how to handle every aspect of the case are discussed constantly, one hopes — and if that is uneven, it points out the importance of the hiring decision in some respects.

MR. PRECHT: May I just comment on that? I regret introducing perhaps a note of dissent in the general tone of today's proceedings, but I think that is why I was invited.

Mark mentions the ongoing effort to teach prosecutors to do the right thing, and we have heard a lot today about the need for training, and the need for sensitizing prosecutors. But I think, really, we are facing a very different situation from the one we faced when Bill Tandy started in this business.

I think some of the statistics are rather stark. We have heard from a number of panelists today that the powers of the prosecutor are at an all-time high. In Bill Tandy's day, they could affect plea bargaining through charging decisions. Now the Guidelines have given them substantial power to determine sentence as well.

At the same time, prosecutors today, an Assistant in his or her first year, is, to an unprecedented extent, inexperienced in terms of trial work. In Bill Tandy's day, *The New York Law Journal* reported about three years ago that, a starting Assistant could expect

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7. See *Panel Discussion: The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator*, 26 FORDHAM URB. L.J. 679, 685 (1999) [hereinafter *Panel Discussion: Trial Counsel to Investigator*].

three to seven trials a year.<sup>8</sup> That has dropped to one to three trials per year.<sup>9</sup> That is a sixty-six percent drop.

When Bruce asked what can prosecutors do, I think the key here is to let the adversary system work, let defense lawyers work, because one of the chief ways for prosecutors to do the right thing, in my view, is to stimulate the adversary system.

But what we have seen, really, is something that has actually developed into — and Jerry Lynch very eloquently detailed this<sup>10</sup> — an administrative system in which, not only do we have inexperienced trial lawyers determining the fates of defendants, we have a system in which there is no real cross-examination opportunity.

But if I had asked in many of these meetings I had with the prosecutors, “Well, here is your paper evidence; would you please bring in this eye witness and can I cross-examine him?” I would have been sent packing. But we all know that cross-examination is one of the best ways to reveal hidden weaknesses.

At the same time, it can be an utterly secret process. We have a situation in which decisions are made behind closed doors and there is no external mechanism to promote accountability there. I think we are facing a very dire threat to our traditional notions of justice. As a part of the plea negotiation, the defense is routinely required to give up any appellate right.

So I this is a very timely discussion, and I hope that, in terms of thinking how to improve the system, we can think of ways in which to stimulate the adversary system, because ultimately that is the best safeguard.

It is a safeguard that ultimately redounds to the benefit of prosecutors, because if we have the closed system that Jerry Lynch speaks of, and a fact-finding system, both of which are largely controlled by prosecutors, that effectively excludes the defense and the judge and the jury. Basically, we have concentrated not only the fact-finding process in the hands of the prosecutors, but ultimately the ethical responsibility to maintain the integrity of the fact-finding process.

Of course, that responsibility was spread among several parties in a properly functioning adversary system. I felt as responsible as

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8. See Deborah Pines, *Drop in Criminal Cases in City's Federal Courts*, N.Y. L.J., July 27, 1995, at 1.

9. See *id.*

10. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

a prosecutor did in terms of eliciting from witnesses weaknesses in testimony. I can't play that role in plea bargaining.

PROF. LITTLE: I guess I will be the first one to say that what Mr. Precht says is both completely right and completely wrong.

He is right, and Jerry Lynch is right, that the system is somewhat of a pre-trial system these days. This is not so different, I would say, than in Bill Tandy's time. In fact, prosecutors controlled sentencing then as much as they do now, and more so, in that they could pile on charges and there was no merging of offenses at time of sentencing. Judges' discretion has been eliminated by the Guidelines, but prosecutors' discretion has been limited too.

Now, that does not mean you can be devoid of ethical responsibility. The biggest change in the regulation of ethics of federal prosecutors is that when the voice of God used to speak through Mark, thirty years ago no one questioned that that was the voice of God. Today, the federal prosecutor is fair game for ethical charging, just like every private lawyer.

It used to be, quite frankly, that prosecutors had immunity, *de facto*; they just were not charged. You cannot find reported bar charges against prosecutors going back twenty years ago, except for a very rare case. Today, it is routine to charge ethical violations against prosecutors.

This is where I would take a little bit of spin off the "we have a higher duty" position. It is absolutely true that the government lawyer has a higher duty than the average lawyer. One reason for that is that, constitutionally, they have to be the faithful executors of the law.

Another reason is that they do not have a client. When you ask, "Who is the client?" we used to reply in ethical training at the Department: "Everybody is your client, including the defendant. It is the People of the United States."

When that is true, your duty is higher. But your duty is not higher in the reactive sense. That is the prophylactic sense — what should you train, how should you act? In the reactive sense, which is "what will you charge as misconduct by a prosecutor?" the rules should not be different, unless there is fair notice.

The idea that the judiciary, the state bar, the Attorney General or the Inspector General can create ethical obligations that were not clear before the Assistant acted is an idea that should be very controversial. The idea that not giving a particular type of information in discovery that twenty years ago was not viewed as discoverable — for example, impeachment evidence having to do with

a prior act of discipline by a tangential government agent in the case — is holding prosecutors to a higher standard in a retrospective way that is a dangerous process. I think it violates due process.

PROF. BARRETT: I think there is truth to what each of you has said, but you are skirting the core issue. It is not simply the defense attorney or the adversary process that will get the prosecutor to do justice, and it is not simply some positive system with notice, which is what I think Rory is describing.

It is some internal content in the prosecutor, himself and herself. And that is the hardest topic to talk about, because we do not know how to raise character. We do not know how to train judgment. But we should at least be raising that question explicitly and trying to have that conversation.

I think pieces of building prosecutorial character are all the external things that we have been talking about all day, including the hiring, the training and the teaching; the assignment and rotation system that is in a particular prosecutorial office; the role models, such as what people see when they meet a Bill Tandy as they start to work as a federal prosecutor; and the awards and the recognition that the Department of Justice gives.

But inside all of that is the internal human judgment that we should be talking about here. We should be talking more about things that people have touched on and hinted at. There has been some talk of restraint and some talk of self-control, but I have not heard anybody today use the word “mercy.” I have not heard anybody use the word “compassion.” I have not heard anyone talk about kindness. Obviously, in certain criminal contexts, those are not particularly relevant, a certain quantity of violence and human physical injury makes all the empathy in the world an irrelevant consideration. But in a lot of what federal prosecutors do, we are talking about things that are not quite that stark or quite that injurious.

I think the balance that we really need to think about in terms of doing justice is how we get those human qualities in the prosecutors as they move forward, at least in a public corruption or a white-collar context. Whatever label you want to put on it, that is the question.

MR. BROMWICH: I agree with many of the things that John has just said, and I certainly had the same experience that Mark did when I came into the U.S. Attorney’s Office and was told it was my job to do the right thing and do justice. I took that seriously, and I think most of my colleagues did as well.



What I think the system may lack, particularly in busy urban offices, is a continuing level of oversight and scrutiny over the actions of prosecutors. As I review allegations of certain kinds of misconduct throughout the Department, and during my tenure as a defense lawyer when I was dealing with prosecutors as adversaries, what I have noticed is a lack of monitoring and oversight. Not with respect to new prosecutors, but as to prosecutors who have been in the system for a while and perhaps get a little bit too comfortable about being aggressive in everything that they do.

Keep in mind that when you are a prosecutor there is a tremendous amount of pressure to be aggressive and to push the limit. There is a tremendous amount of pressure that you experience at the hands of investigative agencies. If you have only been a prosecutor for a year or two or three, you really lack the ability to rein in some of the most aggressive instincts you see in the agents that you sometimes have to deal with.

That is why I think that the internal regulation in individual U.S. Attorney's Offices by prosecutors, by Unit Chiefs, by Criminal Division Heads, by United States Attorneys, is absolutely critical to, not only setting, but maintaining, the appropriate ethical tone that you want to be followed by prosecutors.

PROF. GREEN: Let me pick on that and ask the question a little bit more concretely. What, if any, substance is there to the general notion of the duty to seek justice? Let me put this in the context of a contemporary case that people are pretty familiar with in which a prosecutor has been coming under a fair amount of attack for things which, I think, are essentially legal, but people feel involve investigative over-reaching.

The alleged conduct includes putting people in the Grand Jury for long periods of time in order to wear them down, trying to get people to relinquish privileges that they may have, or generally being disrespectful of privileges, and intimidating family members in order to convince witnesses to be cooperative.

Assuming these things are legal, but arguably involve over-reaching, how do individual Assistants or offices think about whether there ought to be some self-restraint in investigations?

PROF. LITTLE: One answer is in response to what Mike said: there is a new ethical duty of supervision for prosecutors. This has been a change within the last fifteen years. It is an ethical duty both to seek supervision and to supervise. And, if you do not do that, you are violating your duty to have a "do justice" mentality.

One way those cases, or those tactics, need to be evaluated is as a group, not individually. The day of the individual "cowboy" Assistant is gone. Assistants, prosecutors in general — all prosecutors, including supervisors and fifteen-year veterans — have the duty to seek out the advice of their elders, to seek out Bill Tandy's advice if he is there; and Bill Tandy, similarly, has a duty to seek out somebody else's advice and determine where these play out.

At some point it becomes case by case. That is, maybe certain tactics may have been fair for Al Capone, but not fair for your average citizen on the street.

PROF. GREEN: As you described it, you are widening the frame from the individual Assistant all the way to the Assistant's supervisor. There may be people who think that other lawyers ought to be let in on this conversation, or maybe the public. Perhaps the discourse about what is an appropriate or inappropriate investigative technique ought to be a discourse that takes place more broadly.

MR. POMERANTZ: But this is not a process that happens only within the prosecutors' office and only in secret. It is a day-to-day part of the process in which the defense bar and the court play vital roles. A large part of the supervisor's job is fielding complaints and appeals from members of the defense bar who do have problems with individual decisions that are made.

Not infrequently, district judges call to alert our office to situations where they think individual prosecutors have over-reached. None of that can substitute for a true and honest self-searching process within the office. When mistakes are made, there is a post mortem that occurs in well-run offices.

But it is a function of a lot of different systems coming together. To leave the defense bar out of it is a big mistake, and to leave the court out of it, or indeed the press, is likewise a mistake. Those are all some of the checks and balances that function.

MR. BROMWICH: Your question is obviously a very timely one. We can anticipate that, in the months and years to come, the tactics that many prosecutors use will be subject to greater scrutiny by the public, by the defense bar, and by judges, than ever before.

So, it is very important that the level of supervision and training that goes on in U.S. Attorney's Offices, in the Department of Justice, and obviously in state and local prosecutors' offices, becomes that much more important, because practices that were followed when little attention was given to them now are matters of wide-

spread public debate and will continue to be matters of public debate.

Getting back to your original question, Bruce, in many cases it comes down to a matter of proportionality: what is it that you are investigating, what are the appropriate tools that you ought to be using, and what are the appropriate lengths to which you ought to go in pursuing justice and in pursuing your investigative objectives?

An individual Assistant cannot do that alone. It has to be done with the aid and the input of both the immediate supervisors and a broader range of supervisors in the office, for a number of reasons. The most notable reason is that if you are focused on your case, you do not have the perspective that you need to have in order to make the appropriate decisions both in devising investigative strategies and in deciding whether to charge.

MR. PRECHT: Bruce, there is another factor that is a danger to prosecutorial decision making, and it is really one that people have been generally speaking in too-favorable terms about, and that is the increasingly close relationship between prosecutors and federal investigative agencies.

I had an opportunity to go into prosecutors' offices during plea negotiations and make my pitches, but invariably there would be a DEA or an FBI agent there. As I was making my pitch, usually the prosecutor and the agent would cast knowing glances at each other, and when I left they stayed behind.

So, we have a problem that simply having the defense lawyer present is not going to be effective. This is an anomaly where we are suggesting that internal safeguards can be an effective regulatory device. In other words, everything in our history about politics indicates the importance of external checks and balances.

I think that has to be addressed because, as Jerry Lynch discussed in his article,<sup>11</sup> prosecutors and federal agents view themselves as a team. Now, what implication does that have for doing justice?

PROF. GREEN: The question of regulation raises two questions. First, is internal regulation adequate? And second, is there any meaningful external regulation?

Let's start with the question of internal regulation. There is an office in the Justice Department called the Office of Professional Responsibility ("OPR"), which is supposed to investigate complaints about federal prosecutors and mete out discipline. Until Ja-

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11. *See id.* at 2128.

net Reno became Attorney General, its investigative reports were never made public. Now, I believe, they are made public sporadically.

I have made a tremendous effort to obtain them, and obtained some, maybe all the ones that are publicly available. That would be an average of about four reports a year since they began to be made public.

If you look at them, they do not look like the kind of investigations that prosecutors conduct of non-lawyers. They look essentially like whitewashes. If you compare the decisions of the district judges or courts of appeals that have referred these cases with the decisions of the Office of Professional Responsibility, the distinction is quite stark.

For example, in the first case that became publicly available, the district court found the government engaged in active misrepresentation to the court regarding the existence of Brady material.<sup>12</sup> The Office of Professional Responsibility found the prosecutor did not intentionally disregard any disclosure obligation.<sup>13</sup>

Another case in which OPR filed a public report involved a money-laundering prosecution. The prosecutor implied in a press conference that the money that the defendant deposited in the bank was ill-gotten gain, when in fact the defendant deposited legitimate income in the bank in small amounts so that his wife did not find out in case of divorce. The district court and the court of appeals found that the prosecutor's statements to the press were "false, misleading, self-serving, unjust, and unprofessional."<sup>14</sup> The Office of Professional Responsibility found that "[t]here was no evidence to the allegation that the prosecutor made inappropriate statements to the press."<sup>15</sup>

I think, in general, the pattern is that the district courts find wrongdoing, but they say it ought to be dealt with internally. They refer the case to the Office of Professional Responsibility, but, at

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12. See *U.S. v. Isgro*, 751 F. Supp. 846, 852 (C.D. Cal. 1990), *rev'd*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 507 U.S. 985 (1993), *appeal after remand*, 43 F.3d 1480 (9th Cir. 1994).

13. OFFICE OF PROF. RESP., PUBLIC REPORT ON INVESTIGATION OF MISCONDUCT ALLEGATIONS IN UNITED STATES V. ISGRO (1994), *discussed in* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 86-87 (1995).

14. *United States v. Aversa*, 99 F.3d 1200, 1222 (1st Cir. 1996) OFFICE OF PROF. RESP., SUMMARY OF THE INVESTIGATION BY THE OFFICE OF PROFESSIONAL RESPONSIBILITY INTO THE CONDUCT OF ASSISTANT UNITED STATES ATTORNEY PATRICK M. WALSH AND FORMER UNITED STATES ATTORNEY JEFFREY R. HOWARD.

15. See *Aversa*, 99 F.3d at 1200, 1222.

least as far as the public record is concerned, there does not seem to be any real meaningful enforcement.

I would start with Mike Bromwich, since you are Inspector General, and then anyone else who wants to pick up on this, and ask about this issue of internal enforcement.

MR. BROMWICH: I certainly am happy to defend the record of my office in individual cases that my office has done. I am obviously not going to address the individual cases that were undertaken by a different office, the Office of Professional Responsibility, the details of which I do not know.

I think it is vital to have internal investigative arms, like the Office of Professional Responsibility and the Office of Inspector General, because I think it is very important for the Department to have the capability — and to be known to have the capability — to do these investigations.

Now, my office is a fairly large office compared to OPR. We have 450 people around the country. We have comparatively limited jurisdiction to do investigations of lawyers, and we do not do the kinds of investigations of courtroom misconduct or Grand Jury misconduct that you are really focusing on.

But for years, the problem for OPR was, and perhaps continues to be, one of resources. They simply could not appropriately handle all the many complaints that were coming in from defense lawyers, and from judges even though there has been an increase in the number of OPR staff over the last several years.<sup>16</sup>

It is obviously important that all kinds of internal affairs offices, both OPR and mine, do a professional and objective job on the investigations that they do undertake.

Let me just say, though, we have had matters that have been referred to us by judges. With all due deference to Judge Martin and some of the other judges who have appeared here, sometimes the judges are just wrong in the findings that they make. We have done investigations. In fact, we did a recent investigation involving a presidential appointee where there were very serious allegations made by a district court judge, and we did a very detailed investigation and we found that those charges were simply not supported by the evidence.

Now, I am not saying that that is the case with respect to the specific investigations that you have been addressing. But I do not

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16. Attorney General Reno has nearly quadrupled the OPR staff in the last six years. See Editorial, *'Win at All Costs': The Justice Department Responds*, PITTSBURGH POST-GAZETTE, Jan. 3, 1999, at B1.

think we should necessarily think that just because there are different results reached by a district court judge after one kind of proceeding and then there is a finding by an internal investigative body finding no blameworthy conduct, that that means necessarily that the internal affairs arm has engaged in a whitewash. It certainly could be the case in some cases, but I do not think just by holding up contrary results you have proved your case.

PROF. GREEN: I would not make the argument one way or the other, but I would ask the question of whether there is not an appearance problem. Doesn't the public need some reason for confidence that prosecutors, of all lawyers, are being effectively regulated?

MR. BROMWICH: Yes, and I think bringing more sunshine into the process is terribly important. You are right, there have been comparatively few OPR summaries that have been released since the process began in 1994. But before that there was no process at all.

Should more be publicized, and should the ones that are publicized be publicized more quickly when there is still some interest in the matter rather than several years later? I would argue that the answer is yes.

PROF. LITTLE: We are seeing change over time in a positive direction. There were not public OPR reports before. They had almost no staff ten years ago. Janet Reno now has a regular defense group that meets with the Main Justice folks once every two months to get the perspective of the other parts of the bar. They can put anything on the agenda they like. There have been improvements.

Also, you need to compare this disciplinary process to the disciplinary process of lawyers in general, which many people have criticized as being a whitewash since you practically cannot get disbarred unless you kill your client, steal from your client, or accidentally put three cents in the wrong account.

I would not for a minute suggest that that is a good reason to close your eyes to problems among prosecutors, but there has been a fair amount of progress.

I would like to say one other thing. Former prosecutors have some obligation, in my opinion, to talk about the system when they leave it, and to be critics to some extent. David Sklansky has a piece coming out, in connection with this Symposium, where he talks about the obligation of former prosecutors who join academia to self-consciously critique it and push it forward. What Bruce is

doing with exposing this sort of inconsistency between judicial opinions and OPR opinions is a very healthy process, and OPR, I predict, will react positively in the future. But it is a slow process.

There is no defense bar OPR. So when prosecutors worry about what the standards are, they are higher in the Department than they are outside, and that is a good thing.

PROF. GREEN: You mentioned lawyer discipline processes as being another example of the fox guarding the henhouse. When the Supreme Court, in *Imbler v. Pachtman*,<sup>17</sup> said that there is absolute immunity of prosecutors from civil liability, they essentially said, "But that is okay because prosecutors are susceptible to lawyer discipline."<sup>18</sup>

And yet, my reading is that there are very few public decisions involving the disciplinary process and federal prosecutors. In those few, federal prosecutors and their offices are kicking and screaming, as in the case in New Mexico, for example, that the disciplinary authorities ought not to have jurisdiction.<sup>19</sup>

Do you think lawyer disciplinary agencies should be encouraged to become a little more involved in overseeing federal prosecutors? Why do government offices resist that?

MR. POMERANTZ: Well, certainly to a degree, outside scrutiny by OPR or by the Inspector General is a good thing. It is a question of degree. They catch cases that are really at the extreme edges of misconduct.

The cases that worry me are not the ones that get referred to OPR or to the Inspector General, or the ones that would be the topic of review by an external disciplinary board. The ones that concern me more are the excesses that are committed, not in the high-profile cases, but those involving a poor mule who has no funds to retain counsel or who may be represented by inept counsel, where the case is not complicated and where the result goes before a judge in a very quick fashion, and whatever over-reaching takes place just kind of gets swept up in the system. It is trying to figure out how to deal with that that I think is a bigger challenge.

The issues involving how to deal with cases involving massive public screw-ups, like the ones that might well get referred to an outside disciplinary committee, can probably be effectively dealt

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17. 424 U.S. 409 (1976).

18. *Id.* at 429 ("[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.").

19. *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992).

with internally within the office or internally within the Department. But I worry more about the ones that come in under the radar.

I am not sure the answer is to try more cases. Trying cases is a wonderful thing for a lot of different reasons, but I am not sure that the main reason is to put the process into the sunlight, because there are many public trials that take place in capital cases, for instance, and the over-reaching by prosecutors or inept defense by defense attorneys take place in full open view of a public court room. It is not necessarily the case that public trials expose the over-reaching that takes place behind the scenes.

MR. BROMWICH: I am not at all sure that giving more power or expecting more of state licensing authorities is a desirable solution. My understanding is that state licensing authorities have tended to be fairly sleepy entities over time, and the concern has been that there is substantial political control that motivates them in what they do. So, for a variety of reasons, we ought to be very careful about wishing to yield more power to state licensing authorities.

I also think the more remote you are from the process, the less effective and meaningful oversight you can provide. That is why I think the most meaningful oversight is within a prosecutor's office. Beyond that, you move on to an internal investigative arm, like OPR or the OIG, for certain kinds of cases. Once you get beyond that, I think the effective oversight that you are actually able to maintain is comparatively slight and we should not delude ourselves into thinking that it is going to be a very substantial one.

MR. PRECHT: Let me suggest, though, a measure that could enhance a safeguard that would be relatively painless, and we do not need to go the full trial route.

In speaking to my former colleagues at the Federal Public Defenders Office here in New York, a recurring complaint is that the U.S. Attorney's Office consistently requires plea agreements in which the defense is prevented from making any argument for a lower sentence than called for by the Sentencing Guidelines.

Freeing up that arena, allowing defense lawyers, on a routine basis, to make downward departure motions could breathe a measure of individual justice into the process and stimulate the adversary process. That would achieve many of the same results, as more formal oversight would. But I do not think the U.S. Attorney's Office is prepared to do that.



PROF. BARRETT: I think Mark Pomerantz is raising an important issue. We need to recognize that the pipeline that ends at OPR or any of these formal internal review and disciplinary processes we are talking about is a very long one. The serious stuff might travel the whole distance, but a lot of other important stuff might be located at earlier points in the pipeline.

How we get at that stuff? What we can do to solve these worries regarding those cases is, however, implicit in the formal review process model. Looking at prosecutorial behavior at earlier points in investigations and cases, demanding explanations at those earlier points, even written explanations, is something that any prosecuting office is free to do with regard to its own personnel.

Bureaucratic requirements and documentation burdens are obviously unattractive to senior prosecutors who administer and supervise these offices. But, if a bold office that wanted to have the reputation of doing justice crafted policy carefully, I think there is room for policy-making that would get Assistants to offer explanations for their various decisions at various moments of discretion. And then you would have something, not only for the office to use internally for self-government, but perhaps, if really brave, for the office to put out on the street.

Now, that may be fodder for defense attorneys: "This guy got mercy because this is how an Assistant viewed those facts. My guy looks the same. My guy needs mercy too." But if the business of prosecuting has all the high components that I believe it does, then maybe that is the way to do it.

If you put it all out on the street, of course that information also becomes fodder for attorney disciplinary proceedings, which brings this back to Bruce Green's question. But the answer is also part of Bruce's question. The "good conduct" bar remains the same for public and private lawyers. I think the specter of aggressive bar prosecution of government attorneys is just not that real. It imagines too much energy in the bar discipline process. They are not going to go after an AUSA disproportionately because they really do not go after any attorney unless he kills and robs his dead client. That is what Professor Green was pointing out.

PROF. LITTLE: Empirically, if you talk to state bar regulators, they will say, not only it is a question of resources and energy, but they also will say, "when we look at the prosecutor's office, we find that it is better than most of the lawyers we are busy disciplining." They are disciplining people who steal from their clients or who lie

in court blatantly. They say, “we do not feel it is a good use of our resources, even if we had it.”

Talking about the changing role of the prosecutor is an interesting change from just a short time ago. Last month, the last day of the congressional session, on a voice vote acclamation, Congress passed the McDade Bill, which says: “All federal prosecutors shall henceforth” — to the extent they thought they were not — “conduct themselves in conformance with the state bar rules.”<sup>20</sup> But that is an explicit congressional statement now, that state bars do have jurisdiction over federal prosecutors.

The question is going to be how will that affect the future. Prosecutors have to adopt a new role, which is ethical standard policy-maker. That is, prosecutors really cannot afford to stand apart from the bar any longer and say, “it’s us, it’s you.” Prosecutors need to be part of the bar process, they need to be on the disciplinary committees, they need to be forming the rules that govern their conduct, or they must accept the consequences, which may be discipline in areas where they never thought they would get it.

PROF. BARRETT: Getting out front also can obviate future legislation like this McDade Bill, which is a disaster, if you have looked at it. It, luckily, does not take effect for six months.<sup>21</sup> But, among other things, on the one hand, Congress is concerned by the *Singleton* decision;<sup>22</sup> on the other hand, it appears to have enacted a species of it by this statute. To the extent that there are anti-gratuity statutes in any state that can be read to prohibit rewarding witnesses who cooperate with the government, those are now imposed on the federal prosecutors in that state by this new law.

Maybe all of this just proves John Lowenstein’s observation,<sup>23</sup> that if they just moved first base a foot closer to home plate, we would not have all those close plays. Legislation that passes on the last day of a Congress is a bad thing.

But if the prosecutors’ offices lead on these issues and have the guts to air out some of these conduct questions, it perhaps keeps the less-competent regulatory reactions from occurring.

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20. Pub. L. No. 105-277, 112 Stat. 2681, § 801 (1998).

21. See, e.g., Otto G. Obermaier & Ronald R. Rossi, *Evaluating the Crime Legislation Passed by the 105th Congress*, N.Y. L.J., Jan. 26, 1999, at 1.

22. *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev’d en banc*, 1999 WL 6469 (10th Cir. Jan. 8, 1999).

23. See, e.g., David Casstevens, *Our Team, Our Park, Our Game*, ARIZONA REPUBLIC, Mar. 29, 1998, at A1.

PROF. GREEN: Does the Act suggest a certain amount of skepticism by Congress? Has anything changed in terms of how Congress views federal prosecutors?

PROF. LITTLE: Judges were surprised by what they viewed as an arrogant assertion of power by federal prosecutors in the Thornburg memo and that whole dispute, which goes back to 1988 at least, in the *Hammad* decision<sup>24</sup> here in New York.

They heard the idea that prosecutors did not have to play by the contacts rule, when they did undercover investigations at least. They heard that as a statement of, "we do not have to pay attention to ethical rules that have been adopted by legislatures or policy-making bodies, democratic bodies." I do not think the Department ever recovered from that assertion of arrogance, which was really not the message the Department intended to send, nor was it an accurate translation.

Congressman McDade himself survived an investigation for criminal conduct, and he had his own interest here.<sup>25</sup> The idea that prosecutors are arrogantly saying, "we do not care what the limits are, we are going to go where we think we should go," is an offensive one to most people.

MR. POMERANTZ: The problem, though, is that the cosmetics have kind of obscured a real substantive issue that lurks behind the controversial *Hammad* decision.<sup>26</sup> The issue ought not be whether prosecutors are subject to the same code of ethics that any other lawyer is subject to is a real substantive issue. Ought a prosecutor be able to contact a represented person in circumstances, for instance, where the prosecutor has reason to believe that the represented person is obstructing justice or committing another crime? That is the substantive issue that needs to be confronted.

It was done, at least cosmetically, in a ham-handed way through the Thornburg Memo, which gave rise to the perception that DOJ thinks its lawyers are above ethics and above the law. When the debate is which laws and ethics should apply to the peculiar situations that affect prosecutors. These situations are simply different from those that affect the private civil disputes that much of the Code of Ethics talks to.

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24. *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988).

25. Congressman McDade was acquitted in 1996 after defending bribery and racketeering charges for eight years. See Elkan Abramowitz, *The Hyde Amendment and Wrongful Federal Prosecutions*, N.Y. L.J., Jan. 6, 1998, at 3.

26. 858 F.2d at 834.

MR. BROMWICH: The problem is that the substantive issues are hard to summarize in a sound bite. What you had on the other side was a concern on the part of members of Congress who were the subject themselves of lengthy criminal investigations — and in some cases, trials — that prosecutors simply had too much power. They obviously had some sway among their colleagues. And some of the subtleties that you are talking about, Mark, which are obviously true, simply cannot get aired out in the time available before they had to pass the law.

PROF. GREEN: I am glad you said the substantive issues are hard to summarize in a sound bite, because Rory and I both have spent numerous pages writing about them.<sup>27</sup>

But there are a lot of questions that are like that, where the distinctive nature of criminal justice and criminal prosecution suggest that the ordinary standards governing lawyers do not apply in the ordinary way to prosecutors. The analogies might be imperfect as far as prosecutors are concerned. For example, lawyers are not supposed to engage in dishonesty, deceit, fraud, or misrepresentation, but nobody would say that a prosecutor cannot instruct the investigative agent to go out and pose as a drug buyer.

Given that there will be arguments on both sides, and it will be hard to figure out exactly how the policy questions that you raise ought to be resolved, by what process and by whom should they be resolved: by the Justice Department by itself, by judges, by the ABA, by some alternative group?

PROF. LITTLE: This is where what Rob was saying makes perfect sense. It has to be a broader process than just the Department, both because of the myopia of a prosecutor's office and because of the need for public acceptance of the goals.

I used to work on this Model Rule 4.2 debate all the time, on contacts.<sup>28</sup> If you say to the average person in a sound bite, "Do you think the government should be allowed to work undercover?" they will say, "Sure." "Do you think they should be allowed to contact a person represented by counsel without telling their lawyer?" "Oh, absolutely not." It has to do with packaging the issues.

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27. See Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors*, 65 *FORDHAM L. REV.* 355 (1996); see also Bruce Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created*, 64 *GEO. WASH. L. REV.* 460 (1996).

28. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1997).

But you cannot form ethical rules without a consensus because, even if you succeed in getting them, when they are applied in hard cases they will not be accepted later. So it has to be a process which involves the defense bar.

That is why I think a new role of prosecutors should be ethical standard and policy-maker. They should attend the bar associations meetings just to get their two cents in. It is important.

PROF. BARRETT: To its great credit, the Department of Justice is now sending its people out to all these professional responsibility, ABA committee drafting sessions. There are too many of them, of course. The "Model Rule 4.2 issue" percolates currently in about ten different fora. But the Department is now there, and I think that is a good thing.

PROF. GREEN: A number of years ago, before he was a judge, Jed Rakoff wrote an article saying that the prevailing attitude of federal prosecutors toward criminal defense counsel was expressed by a federal prosecutor who in the course of a rebuttal summation implied that defense lawyers were professional prostitutes.<sup>29</sup> I do not know if that is the prevailing attitude.

What *is* the attitude of prosecutors toward the defense bar? What, if any, impediments are there toward bringing all these people to the table — prosecutors, defense lawyers, other lawyers — and trying to achieve some consensus on what the professional norms ought to be?

PROF. LITTLE: Here is a good thing for Mark to add to his first-day lectures. It is probably already part of the first-day lecture. You say to the new Assistant, "The defense lawyer is your friend."

Honestly, as a prosecutor, the most effective and helpful thing you can have is a talented defense lawyer on the other side, even if they are beating your brains in on occasion, because if they beat your brains in a case before trial, you are better off having it happen then than at trial or post-trial, in my view.

So I do think there has been a hostility, a "we/they" mentality, but it is not a healthy mentality. It is not effective in terms of achieving the justice standards that, if you get them away from the heat of the moment, most prosecutors really want to achieve.

MR. POMERANTZ: I dissent to a small degree. I do not think that the degree of hostility between prosecutors and defense attorneys has grown substantially. Sometimes prosecutors do need to

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29. Jed. S. Rakoff, *How Can You Defend Those Crooks*, N.Y. L.J., Sept. 25, 1990, at 3 n.3 (citing *United States v. Friedman*, 909 F.2d 705 (2d Cir. 1990)).

be reminded — and they are reminded — that the defense attorney is not the client and the sins of the client are not attributable to the defense attorney. That is a dialogue that happens all the time.

But in terms of collegiality, of the ability of adversaries to work together, the ability of prosecutors and defense attorneys to speak the same language and to have dialogue vastly exceeds the ability of civil adversaries to talk to each other without yelling, screaming, and cursing. In part because it is a much smaller bar, in part perhaps because I know, as a defense attorney for many years, there was always the sense that when you walked into the U.S. Attorney's Office you were kind of walking into the lion's mouth and you want to behave yourself. But, for whatever reason, I do not have the sense that relations between prosecutors and defense attorneys are anything near an all-time low.

MR. BROMWICH: I think one of the things that can prevent a deterioration of relations between prosecutors and defense bars is when you have people like a Mark Pomerantz or a Mary Jo White, who have been defense lawyers and who are now prosecutors. I think they do bring a perspective to their jobs that is different from someone who has been a prosecutor all the way throughout his career. I think it helps, almost subconsciously, build respect for the vocation of being a defense lawyer in the eyes of many younger prosecutors who are on the staff of such an office.

So, it makes a difference both in terms of the values that get filtered down to the individual Assistant U.S. Attorneys, and also in terms of the decisions that are made at the top that will, in fact, affect those relations between prosecutors and members of the defense bar.

PROF. GREEN: I wanted to return to a point that Mark raised about post mortems. I have children and I teach them to learn from their mistakes. To what extent do prosecutors, federal prosecutors in particular, learn from their mistakes?

Recently, there was a very high-profile case in New York where a criminal defendant was convicted of murder, but it turned out he was innocent and he was released after eight years in prison.<sup>30</sup> The prosecutor, an Assistant District Attorney, was asked, "What do you say to this gentleman?"<sup>31</sup>

This was his answer: "We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is

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30. See Jim Yardley, *Man is Cleared in Murder Case After Eight Years*, N.Y. TIMES, Oct. 24, 1998, at B1.

31. See *id.*

to poke holes in it. In a sense, the system worked, although it took some time."<sup>32</sup>

Is that generally a sufficient answer, or should prosecutors do more to learn from their mistakes in cases that result in Rule 29 motions,<sup>33</sup> acquittals, and so forth?

MR. BROMWICH: That is clearly not an adequate answer.

But to address your broader question, I do not think there are enough post mortems that are done in U.S. Attorney's Offices or other prosecutors' offices. I think there is a real urge and a tendency, particularly in busy offices, to put the mistake behind you, to try to console the individual prosecutor who made the mistake or who got the bad outcome, and there is not enough of an ethic and a culture of learning from one's mistakes by focusing on them.

I run an office that lives off other people's mistakes. I think we would have less work to do if there were more of a culture, not only in prosecutors' offices, but throughout the Department of Justice, that encourages figuring out what went wrong yourself before some external body comes in. More importantly, this feature of organizational culture would be useful not just to ward off the intrusion of an external body, but as a way of learning from mistakes and of improving the quality of the work that is done in a particular office.

MR. PRECHT: How are you going to catch mistakes? If you have a regime where ninety-three percent of the cases are disposed by guilty pleas,<sup>34</sup> in which there is usually minimal court involvement, and minimal investigation, how are you going to have the generation of Brady material that we see in trials?

MR. POMERANTZ: You are going to catch mistakes in various ways. You are going to catch mistakes if a case is Rule 29'ed, you are going to catch mistakes that result in acquittals, and you are going to catch mistakes because hard-charging defense lawyers are going to bring them to your attention.

PROF. GREEN: What is the alternative, Rob? What would you rather have — a system where there are no pleas?

MR. PRECHT: No. We cannot have that system, even if I want it.

But let me give a situation in the World Trade Center case in which, had it not been for the trial — and I think Michael can

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32. *See id.*

33. FED. R. CRIM. P. 29.

34. *See* U.S. Dep't of Justice, *Source Book of Criminal Justice Statistics*, (visited Jan. 19, 1999) <[http://www.albany.edu/source\\_book/1995/pdf](http://www.albany.edu/source_book/1995/pdf)>.

speak to this more authoritatively than I can — very serious allegations regarding FBI misconduct would not have come to light.

Midway during the trial, there was still an important gap in the government's case: they could not prove the actual contents of the bomb. This was of some import because certain locations in Jersey City had chemicals, but the government really could not connect them up to the exact contents of the bomb. We hired a British expert, who said it was impossible to find this because of the ambiguous evidence.

But then, as the government was about to call its chemical expert as a witness, a man named Fred Whitehurst stepped forward with a letter in which he detailed very serious allegations, including the fact that the principal examiner in the lab, who was responsible for summarizing the dictation and preparing the scientific report in that final case, pressured Whitehurst and other chemists in the lab to slant their findings to favor the prosecution.

Now, not all those allegations were borne out, but I do not think that they would have ever been revealed had it not been for the trial. I think Fred Whitehurst, when he was about to take that stand, there was a solemnity about being in a court room that prompted him to really risk his career in coming forward.

I think we lose something very substantial when we go to an administrative system that essentially hides these things.

MR. POMERANTZ: I am not going to comment on that particular case.

I will say, however, that it is certainly true that sometimes the trial process exposes mistakes. But it is important to remember also that it is the mistakes that go to trial. The fact that there are so few cases that are tried is not a manifestation of the fact that thousands of innocent people are being convicted without a struggle.

It happens to be because most prosecutors' offices do a pretty good job of weeding out the guilty from the innocent. When that does not happen, or when mistakes are made, certainly trials expose them, and one does try to ask questions after the fact. We try to do it also, not just in the trial context.

Whenever a *nolle prosequi*<sup>35</sup> is filed in our office, we try to look at it and understand whether a mistake was made, and if it is a

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35. "A formal entry upon the record, by the plaintiff in a civil suit, or, more commonly, by the prosecuting attorney in a criminal action, by which he declares that he 'will no further prosecute the case, either as to some of the defendants, or altogether.'" BLACK'S LAW DICTIONARY 1048 (6th ed. 1990).



nolle because of insufficient evidence, at some point we try to ask the question whether that case should have been indicted in the first place, how it got indicted, and what mistake was made.

If it looks like a systemic situation, we will try to correct it on a broader basis, perhaps, as we did recently, sending around something like an e-mail saying "be particularly careful when indicting cases just on the basis of voice identification off wiretapped evidence because that is not an infallible means of identifying who is speaking."

It is a constant process of looking at the work of the office and trying to figure out how you can do it better. Having said that, it is something perhaps we do not do as much of as we should, and I agree with Mike about that.

PROF. GREEN: What would you suggest that U.S. Attorney's Offices do in addition to what they are doing?

MR. BROMWICH: I think making it a priority of the office to in fact have an effective system of supervision so it is a defined part of a supervisor's job, going all the way up the supervisory chain, to provide post-mortem criticism and to engage in discussions with Assistants when they have bad outcomes in their cases.

I think it partly is a function of time limitations, but I think a concerted effort has to be made to focus on it as a priority and to make the time to do it, because it is a very important thing.

PROF. LITTLE: You are not going to get approval for that sort of thing until you give them immunity for their internal investigations. I mean, one problem U.S. Attorneys' Offices have is that the minute they do a post mortem that focuses, say, on one of their Assistants, they are afraid that file will go to the Inspector General or to OPR and then be used as a club.

It seems to me you have to work out a system that says if the office takes certain disciplinary steps or does a post mortem, they can somehow do this freely.

MR. BROMWICH: Rory, I think they have that freedom right now. I think that what we are talking about primarily are not allegations of misconduct, per se, but failures and deficiencies, or seeming failures and deficiencies, in performance, things that need explanation, rather than allegations of misconduct. Those matters U.S. Attorney's Offices, prosecutors' offices more generally, have full authority to handle without referring them to one of the internal affairs components. So I do not think that is an adequate answer. I understand there may be that concern, but I think it is largely groundless.

PROF. GREEN: On a slightly different topic — we mentioned the World Trade Center bombing case, a fairly high-profile case — a question might be asked about how the media has affected the role of federal prosecutors.

Some might suggest, with all the press conferences and arguable leaks and so forth, that prosecutors have been seduced a bit by the opportunity of being in the media. I would ask whether there have been changes in that respect, where are we now, and how does that affect the prosecutors' ethical role?

PROF. LITTLE: You actually see more internal discipline now for talking to the press than you ever did before. That is one problem, or one development.

MR. PRECHT: In the World Trade Center case, I very foolishly appealed a gag order that Judge Duffy imposed. Looking back on things, I think my ego got the better of me and I would have been much better advised had I not opposed that.

But the issue in that case was not so much prosecutors and their relationship to the media — and by that I mean leaking evidence — because basically in the World Trade Center case pretty much the government's entire case was leaked to the media before jury selection. But it was not coming from prosecutors; it was coming from FBI agents or other Agency personnel.

Actually, we have a very stunning recent example of that. Basically, during the World Trade Center case, one of the defendants, who chose to speak to the prosecutors without a lawyer — it was his decision — made a statement which incriminated one of the pending defendants in the Embassy bombing, who is now under arrest and awaiting trial, in a proffer session where prosecutors and agents were present.

Now, the substance of that entire proffer session, which was a secret, supposedly confidential session, was leaked to *The New York Times* and appeared in the October 22nd story.<sup>36</sup> We have the spectacle of a World Trade Center defendant, who will probably never testify, never be subjected to cross-examination, incriminating another defendant who is now awaiting trial, and the substance of that incriminating statement appeared in the media.

Now, I have no doubt in my mind that it was not the prosecutors. This goes back, I think, to the problem of the extraordinarily close relationship between prosecutors and law enforcement.

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36. See Benjamin Weiser & Susan Sachs, *U.S. Sees Brooklyn Link to World Terror Network*, N.Y. TIMES, Oct. 22, 1998, at A1.

So the real question is not so much — because I think the U.S. Attorney's Office has been very responsible — how do we rein in prosecutors, but how do we help prosecutors police that relationship with federal law enforcement?

MR. BROMWICH: Well, it is a huge and old conundrum. I mean, leaks have been around for a long time. I do not disagree with you, Rob, that the leaks now are probably worse than they have ever been.

As someone who has been responsible for conducting lots of leaks investigations, they are horribly difficult to do. They are incredibly resource-intensive, and you very rarely find the person who did it, certainly not with the level of proof that even approaches a preponderance of the evidence.

So it really is a difficult battle. It is, obviously, one that continues to need to be fought. People at the highest levels of our law enforcement agencies, including the FBI Director and the Attorney General, need to keep making the point that leaks are unacceptable.

But I find this a very frustrating area because leaks continue to happen. They seem, if anything, as I said, to get worse. And yet, leaks investigations are horribly difficult to run and they rarely succeed.

MR. POMERANTZ: Michael is completely right. They are a source of never-ending frustration. In part, the difficulty is caused by the extent to which — again without commenting on any particular case — but they are compounded by the extent to which difficult, large prosecutions are prosecuted by combined forces of many, many different federal, state and local agencies.

Where our office might have some success is in dealing with the FBI, where there has been a leak that we might suspect has come from the FBI. It is vastly more difficult to clamp down on an agency with which we do not have regular contact. We deal with the FBI day-in and day-out. A different agency, which we may see intensively only on a particular case, is just a much more difficult problem to deal with.

MR. BROMWICH: The other point that we need to keep in mind is that we have done a balancing of different values. The fact is that we generally carve out fifty percent of the universe of people who might be interviewed from our scrutiny, and that is the reporters and the people who work for broadcast and print media.

We in our leaks investigations will contact reporters and hope to get voluntary statements, but I can tell you — and it will not sur-

prise you — that we are seldom successful in getting them to say anything to us. And so, what we have is our investigative energies only focusing on one side of the street.

The Department, and I think our society in general, has made the judgment that allowing that information to get to reporters is a better thing, all things considered, than cutting it off. And so, we do not apply the same investigative tools to members of the Fourth Estate that we do to our own personnel. That dooms you to fail in most of these leaks investigations.

PROF. GREEN: Why is that? Prosecutors do not exercise a great deal of investigative restraint in investigating drug dealers. Does the prosecutor's duty to do justice require going easy on the Fourth Estate?

MR. BROMWICH: No. There are rules in the Department that essentially prohibit you from subpoenaing reporters. I do not remember what level it has to go to. I think it has to be approved by the Attorney General, or somebody just below the level of the Attorney General. So the Department has made a judgment — and it is not a fresh judgment; it is a judgment that has been around for a while — that it is not something that the Department wants to get into the business of doing.

PROF. GREEN: That is a choice.

PROF. LITTLE: That goes to First Amendment values. It really is a balancing act.

MR. PRECHT: But it also goes to the difficulty, I think, of challenging federal law enforcement. I mean, how are you going to do that? How are you going to go after valued investigators if it is found that they have leaked evidence? I think this really goes to the difficulty that you have in which prosecutors and law enforcement see themselves as a team and how difficult, as Judge Martin noted, it is for a prosecutor to disagree with law enforcement personnel, to turn that person in.

I think this goes back again to the lack of external safeguards. Internal safeguards will get you only so far. It is the lack of checks and balances that I think creates the real problems.

PROF. LITTLE: That is why you have an Inspector General or an Office of Professional Responsibility that works. Mike Bromwich has the hardest job in the world because no one thinks he is their friend — except maybe a few people in New York socially. But the positive value of that is that I do not have any doubt that if the Inspector General actually identifies a leaker, if it was

inside the FBI, they would do their best to discipline, or even prosecute, that person.

MR. POMERANTZ: The closeness between the prosecutors and the agencies can also be overstated. In contexts other than leaks, the government and U.S. Attorneys prosecute agents and police officers all the time, notwithstanding the fact that one has to work with the same agencies and the same police departments on a regular basis.

The problem is not that you do not want to prosecute an agent who is working for you. The problem is you just cannot find out who it is.

MR. BROMWICH: I would dissent a little bit from that, Mark. I do think, particularly among newer prosecutors, rookie prosecutors, there is a real eagerness to be part of the law enforcement community and part of the law enforcement team.

I think there is a lack of skepticism, if you will. Lawyers are trained to be skeptics. I think it is fair to say, as I think Rob has suggested, that there is a failure to use that skepticism in challenging some things that law enforcement people do that might raise questions in your mind.

I was guilty, frankly, of that kind of naïveté when I was a prosecutor. I do not know what all the reasons were, but I think that there were some hard questions that I probably did not ask in certain cases that, in retrospect and with a decade or more of additional experience, I probably would have asked.

PROF. GREEN: Let me ask one last question, just to tie this back to the theme of the day. When Mike and I were in the U.S. Attorney's Office in Manhattan, Bill Tandy was exceptional for a number of reasons, one of which was that he was one of the few career prosecutors in that office.

Are people staying longer in the U.S. Attorney's Offices? Are there more career prosecutors? How, if at all, does that affect the issue of prosecutors' ethics and the other issues we have been addressing?

MR. BROMWICH: My sense is that federal prosecutors are staying longer than they ever used to, both at the line assistant level and at the supervisory level.

PROF. LITTLE: And does it have an impact on ethics? It does in my experience, and this is reflective of what Michael said as well. I have advocated for a long time that anybody who stays longer than five years should go back and take a refresher course on the *U.S. Attorney's Manual* and trial ethics and strategies, and even

technology. You have people who either believe they are too experienced to require that training, or they get lazy in their job.

You know, what happened in 1991 is that United States Attorneys became Civil Service protected and cannot be fired except for cause. In San Francisco, it used to be the case that when a new U.S. Attorney came in, most of the office left and they brought in their own people. That does not happen anymore.

So I think it has a serious effect on the ethics of the office, not to mention the fact that the world changes, and unless the older Assistants change with it, they can just be stuck in a different time.

PROF. BARRETT: That is right, but longevity only begins as a danger. To close on an upbeat note, another way to view it is as an opportunity. A pattern of attorney rotations would ensure that people do not become entrenched in particular responsibilities. And, if you can have a system of good CLE for prosecutors, then perhaps a longer duration in an office gets the kind of expertise, leadership and role models that are solutions for many of the problems we have been talking about. The long-time prosecutors who I worked with in the government were the people I learned the most from — and not just in terms of nuts and bolts, but in terms of the judgment issues that we are talking about. That just comes with their age.

PROF. GREEN: On that upbeat note, let me close this panel by thanking the panelists. We have benefited from an insightful, as well as candid and civil discussion.

