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**PANEL DISCUSSION:
THE EXPANDING PROSECUTORIAL
ROLE FROM TRIAL COUNSEL
TO INVESTIGATOR
AND ADMINISTRATOR**

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PANELISTS
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Honorable John S. Martin, Jr.†
Julie R. O'Sullivan††
Mary Lee Warren†††
Mary Jo White‡

PROF. RICHMAN: Good morning. I am Dan Richman. I teach here at Fordham. This panel is entitled "The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator."

To put that in perspective, in the last panel discussion we heard about some particular choices that prosecutors have been making, both in the U.S. Attorney's Office and in the Justice Department as a whole, with regard to concurrent jurisdiction cases.

What I would like to focus on now is not a particular kind of a decision, but the whole idea of prosecutors making decisions with regard to investigative priorities and with regard to how cases should be handled once a particular case is selected.

For this purpose we have a phenomenal panel that encompasses experience both in the federal system and a decent number of aca-

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demics who, notwithstanding the critique about academics, actually know something about the federal criminal justice system as well.

We have with us, starting on my left, Mary Jo White, the United States Attorney for the Southern District of New York. She was also an Assistant United States Attorney in 1978 through 1981, and ended up as Chief Appellate Attorney from 1980 to 1981.

Next to her is Mary Lee Warren, who is now the Deputy Assistant Attorney General who has overall responsibility for the Narcotics and Money Laundering Sections in the Department of Justice. But notwithstanding her place in Justice now, she did have a phenomenal career in the United States Attorney's Office for the Southern District of New York, where she was an Assistant from 1980 through 1991, and was a legendary Chief of their Narcotics Unit.

Next to her is Julie O'Sullivan, who is now a Professor at Georgetown Law Center. She served as an Assistant United States Attorney in the Southern District between 1991 and 1994, and thereafter worked in the Whitewater investigation under Independent Counsel Robert Fiske.

Next to me is Judge John Martin, who now is a District Judge in the Southern District of New York, but he started as an Assistant in the Southern District from 1962 through 1966. He also served as Chief Appellate Attorney in that office. After his time in the United States Attorney's Office, he went to the Solicitor General's Office from 1967 through 1969. After a time in private practice, he returned as the United States Attorney for the Southern District of New York in 1980 and served until 1983.

Next to him is Jerry Lynch, Professor and former Vice Dean at Columbia Law School. He had two stints in the United States Attorney's Office for the Southern District. From 1980 to 1983, he was an Assistant and ended up as Chief Appellate Attorney. From 1990 to 1992, he returned to head the Criminal Division. In between, he was an Associate Counsel in Independent Counsel Walsh's office while he was also teaching at Columbia.

Next to him is Laurie Levenson, Associate Dean for Academic Affairs and a Professor at Loyola Law School in Los Angeles. She is the imported talent on the panel, coming all the way from a career in the United States Attorney's Office in Los Angeles. She was there from 1981 through 1989, and headed both the Training and the Appellate Sections.

Just to set up the discussion here, no doubt Bill Tandy would disagree with any generalizations I make, but the traditional model

that was the perceived wisdom for some time is that prosecutors prosecute and investigators investigate. After choosing cases within the agency, agents would develop a case, bring it to the United States Attorney's Office, where an Assistant would make a discretionary decision about whether to go forward; should he decide to go forward, the contours of the case would largely reflect the investigation that the agency had conducted.

This model to some extent probably still describes a great many cases prosecuted in the federal system, but not the ones that people focus on. Increasingly, the model seems to be that Assistants are developing cases in tandem with agents; they are making investigative choices; they are selecting what kinds of cases ought to be prosecuted, making those points clear to the agencies. At the Washington level, where Mary Lee Warren is, prosecutors are increasingly playing a large role in steering agencies at the macro level as to what kinds of cases they should take.

This raises some interesting questions. One is institutional competence. Are prosecutors trained to be doing these sorts of things? Are they trained to conduct investigations or to decide what kinds of cases should be developed?

It also raises some questions when you see this trend in parallel with a separate trend. There are a number of developments, particularly in the Sentencing Guidelines,¹ that have given prosecutors an immense amount of power in how cases get disposed, with regard to sentencing in particular. One of the justifications — or at least explanations — given for why we should not feel so bad with regard to the power that prosecutors are given in the Sentencing Guidelines system is this: Prosecutors are increasingly seeing themselves — and should be seen — as neutral magistrates in a way, as people who are able to decide not just what will lead to the largest sentence, but what disposition is most appropriate.

One big question that hangs over the system now is, to what extent are these two developments in tension? Can a prosecutor who really sees himself as a partner of the agents in developing a case at some point later step back and make the kinds of decisions about, not just what is winnable, but what is right and appropriate in a particular case? Are prosecutors trained to be able to conduct themselves in this very challenging environment? And, what role

1. See generally U.S. SENTENCING COMM'N, UNITED STATES SENTENCING GUIDELINES MANUAL (1998) [hereinafter GUIDELINES MANUAL]; Symposium, *The Federal Sentencing Guidelines: Ten Years Later*, 91 NW. U. L. REV. 1231 (1997).

should Main Justice play in structuring the kind of rules that guide prosecutors in the U.S. Attorney's Offices?

What I would like to do, just to start the discussion, is turn to Jerry Lynch, who wrote a provocative article that conceives of the Sentencing Guidelines system as an opportunity for prosecutors to act in this neutral role, to really dispense justice based on the particular circumstances of the case.² The question I will start with to Jerry is, to what extent can we really resolve the tension between the role that you would like prosecutors to play under the Sentencing Guidelines and the role that they play as partners of agents?

PROF. LYNCH: I think what is hard about the problem is that prosecutors have come to play virtually every role in the criminal justice system, and, to some extent, one could make the case that they have taken over all of those roles.

In a certain sense, Congress has delegated the task of making substantive criminal law to federal prosecutors. Congress's policy — not just as we saw earlier in federalism issues, but across-the-board — seems to follow the policy of the somewhat cruel Vietnam-era joke, "Kill them all and let God sort them out."³ Congress has cast the federal prosecutor in the role of God. It has criminalized everything and lets prosecutors decide what we really want to prosecute.⁴

You can see this play out even with the President of the United States. Is perjury in a civil case about a private sexual matter a crime? Well, any first-year law student can answer that question as a matter of law. But, of course, the newspapers have been full of prosecutors debating what the "real" law is. Is the "real" law that this is the kind of matter that would never — or should never — be

2. See generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) [hereinafter Lynch, *Administrative System*] (asserting that the adversarial/inquisitorial distinction in the American justice system is less opposing in theory than in practice).

3. See, e.g., FULL METAL JACKET (Warner Bros. 1987). But see Douglas L. Trees, *History Lesson: Ward's Words are Medieval*, NEWSDAY (New York), May 24, 1998, at 65 (attributing remark to papal representative during the Albigensian Crusade of 1209).

4. See Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 920-21 (1998) (examines the costs, benefits and effectiveness of the current federalization of the current law and suggests a more comprehensive approach utilizing all three branches of government); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1311-13 (1997) (arguing for meaningful judicial review of federal prosecutors unchecked discretion in making their charging decisions because of the constitutional rights at issue).

investigated, and therefore should be effectively legalized; or is the “real” law that this kind of case is not really a crime unless it is done sort of blatantly by someone who is prominent in the community; or maybe it’s not a “real” crime unless it is done by the President of the United States or someone else who is responsible for law enforcement?

I am not interested here in what is the right answer to that question; what is surprising and interesting is that there is so much debate about the question. You can find out the answer to the legal question by looking at a book and seeing what Congress passed. But the question of what is the real practice, are people really being prosecuted for this sort of thing or not, *should* they be prosecuted or not, turns out to be rather hard to find out, because some prosecutors think one thing, some think a different thing.

In a certain sense, we all agree that the “real” law is up to the prosecutors. But there has not really been a lot of self-conscious debate among prosecutors, so there is no consensus. It may turn out that in one office a case like this would never be brought, but in another office it might be a kind of case that would be.

You see a similar problem with Racketeer Influenced and Corrupt Organizations Act (“RICO”).⁵ As the law is written, practically every mail fraud case could be prosecuted under RICO, with enhanced penalties — most significant frauds involve multiple mailings over time, and usually involve some corporate entity or other enterprise. Moreover, the civil dockets of the district courts are filled with civil RICO cases most of them involving facts no prosecutor would think of indicting criminally at all.⁶ But every time a judge refuses to dismiss a civil RICO complaint, she is holding that the complaint charges a criminal offense punishable by twenty years in jail.

What is the real crime? What are the real criteria for RICO violations? Only the prosecutors know. But once again, it is not clear that even they have any consistent criteria. There is not a lot of self-conscious debate about this subject either.

5. The Racketeer Influenced and Corrupt Organizations Act was enacted as Title IX of the Organized Crime Act of 1970. See Pub. L. No. 91-452, 84 Stat. 922, 941 (1970) [hereinafter RICO]; see generally GREGORY P. JOSEPH, *CIVIL RICO: A DEFINITIVE GUIDE* (1992).

6. See generally Gerard E. Lynch, Symposium, *How Useful is Civil RICO in the Enforcement of Criminal Law?*, 35 VILL. L. REV. 929 (1990) [hereinafter Lynch, *Civil RICO*] (arguing that if the judgement of prosecutors is sound in determining what cases merit criminal prosecution, civil RICO suits may do more harm than good for basic purposes of criminal law).

In addition to the substantive criminal law, prosecutors also make the procedural rules. Is it okay to bring a witness to the Grand Jury eight or ten times? Well, I never did it. I cannot remember anybody I had in the Grand Jury as many as four times. But it is legal.⁷

Is it okay to call a subject's mother to the Grand Jury to testify about her daughter's sexual confidences? The law says it is okay.⁸ A lot of prosecutors think it is not okay, think they would not do something like that. What gives prosecutors the authority to decide that there should be a kind of quasi-privilege there? Some prosecutors think there is. Others might think there is not.

Prosecutors are the judges. They decide who is guilty. We should make no bones about that. Ninety-three percent of federal cases in 1996 were disposed of without any kind of trial, either by guilty pleas or by dismissal of the case before trial.⁹

Who decided that those people were guilty? Not the judge, who does a five-minute interview of the person, under Rule 11,¹⁰ getting a kind of half-hearted, scripted confession as part of the guilty plea process. Not a jury, which never sees the case. The prosecutor decides whether the person was really guilty.

What procedures do they use? What burden of proof do they apply? Is it good enough that the person would be convicted at trial, or does the prosecutor have to believe himself or herself that the defendant is guilty beyond a reasonable doubt? There is not a lot of self-conscious debate about that. Each prosecutor is left to make up his or her own rules.

Who sentences? Here again, not the judge most of the time. Rather, it is the prosecutor who performs this function. Sophisticated defense counsel know it. Sophisticated defense counsel know that their opportunity to argue innocence or their opportunity to argue leniency is not primarily before Judge Martin; it is primarily before Mary Jo [White]. Actually, we do not even get to

7. See *In re Pantojas*, 639 F.2d 822, 824 (1st Cir. 1980) (stating that "grand juries have the power to subpoena witnesses on more than one occasion").

8. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-23.211 (Aspen Law 1987) [hereinafter DEP'T OF JUSTICE MANUAL]. A copy of the *Manual* is also available online, and is updated regularly. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (updated Jan. 8, 1999) <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/> [hereinafter UNITED STATES ATTORNEYS' MANUAL].

9. See U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* (visited Jan. 19, 1999) <<http://www.albany.edu/sourcebook/1995/pdf/t521.pdf>> [hereinafter *Sourcebook*].

10. See FED. R. CRIM. P. 11(e).

see Mary Jo. We may get to see Mark Pomerantz if we are lucky. More likely, we see some line assistant, who looks younger and younger to me every year, who is deciding what the appropriate sentence is.

My article is an effort to kind of take a different tack. This sort of presentation makes it sound like, "Oh my God, this is terrible, the prosecutors are running the show," which is the way this usually sounds when you lay it out.

But my point is less to criticize than to insist that this really is our system of justice. It is inevitably going to be the system in a regime in which the resources are not there to try more than seven percent of the cases. This is true in state courts as well as in federal courts. The problem is, can we devise procedures, can we devise attitudes on the part of prosecutors, can we devise training for prosecutors, that will assist them in performing this role?

When I first started as a prosecutor, I remember thinking that in every case they handed me, my job was to get the guy convicted — because otherwise why would they have given me the case? — and if I couldn't find enough evidence, I must be doing something wrong, I must be failing in my job. After a few years, I realized that was not necessarily the job. Maybe we want people being told at the start that their job is rather broader than simply to make the cases.

So, to me, this question of self-conscious debate is what is really critical. It is vital that prosecutors realize the extraordinary power that they have as *de facto* law makers and adjudicators, and that they start to engage in discussion, among themselves and with other citizens, of how they should exercise that power.

This does not necessarily mean formal guidance from the Justice Department. No one who worked in the Southern District of New York likes to think that the answer is to have someone in Washington tell local prosecutors what to do. But whether through formal guidelines, or some other means, can there be some process for thinking through this system, so that it can become a system in which there are established practices, established rules, publicly available knowledge about how the system works, so that prosecutors can fairly, effectively, and with some measure of awareness and consistency serve the many functions we entrust to them? Can we develop a system where lawyers are trained to work in the real criminal justice system dominated by prosecutors, and not continue to pretend that the sort of phantom appellate review process that

goes on at our occasional trials in court constitutes our real system of adjudication?

PROF. RICHMAN: I think we should turn next to Judge Martin. I am not sure anyone on the panel would radically disagree with the description that Jerry has given, so far as it goes, about the system we have now. Let us turn to how to judge the result. It sounds like you have been cut out of the action to some extent, Judge Martin.

The question is, besides the fact that a twenty-nine-year-old is doing the job that somebody over the age of forty could do, is there anything about the result, anything about the process, that should make us particularly disturbed about the way power has been transferred?

JUDGE MARTIN: I was thinking, when you started out by saying "looking at the traditional role as the investigators investigate and the prosecutors prosecute," that you forgot to mention "and the judge decides what sentence any person should get."

We have now walked away from that. That is a very disturbing development, because when you put into the hands of one person the decision of what crime to investigate, who to prosecute, and what the sentence should be, you have taken out of the system any check or balance.

Let me give you a true example. A somewhat-distant relative came to see me. He had taken a job, by answering an ad in the paper for a financial analyst, and went to work for a venture capital company. After a while there he realized that a lot of people were paying the fees and not getting much by the way of capital. He became disturbed, started to look around, and ultimately left. An investigation starts, and he goes in and tells his story.

Ultimately, the Assistant U.S. Attorney says to him: "You've got a choice: if you want to plead guilty, we will limit your offense conduct to one transaction in which you were involved, your Guidelines range will be zero to six months; or, if you do not want to plead, then we are going to charge you with all of the fraud committed by this company and your Guidelines range will be thirty-three months."

Now, fortunately, this kid said, "Hey, I didn't do anything wrong," and told his lawyer, "I am not pleading." It turned out to be a bluff and he was not indicted.

But that is the power that is there. And not only is it there, but it is done in secret. This is not public sentencing. And I am having a running debate with Mary Jo on their refusal to make recommen-

dations in very serious cases, because I think that part of the process of sentencing should be a public exposure of all of the considerations that go into the decisions.

I have recently written to the Advisory Committee on the Federal Rules of Criminal Procedure suggesting that we make public the pre-sentence reports, so that the public can fairly judge what sentences are being imposed.

I have had numerous cooperator cases where the U.S. Attorney wants me to impose a sentence that the public will think is irrational, but will not go on the line and say, "That is really what we want you to do."

But the problem with the Guidelines is really their secret nature, the totally non-public, non-reviewable discretion that is in fact given to some people who are as old as twenty-nine.

I think, as a judge, I am a firm believer in departure from the Sentencing Guidelines.¹¹ I think that the judges really are going to have to seize on departure to take control back in the situation where you get a totally inappropriate sentence.

I have done it both ways. Mary Jo confessed error to me when I increased a sentence over the sentence that had been worked out by the government in one of their secret deals.

Was that enough to stir the water?

MS. WHITE: I think I get to respond. Just to disagree with a couple of the premises, first. I do not think things are so different, except for — and it is a huge "except" — the Federal Sentencing Guidelines and what that does to the judge's discretion, or lack thereof, in imposing sentence. I think we have for many years, certainly in New York and elsewhere, investigated along with the investigative agencies, as well as prosecuting. But the Sentencing Guidelines do introduce another element of discretion for prosecutors:

I was about to ask Jerry who hired him and who trained him if he did not know what his job was and thought his job was "I am failing if I don't get enough evidence to convict," because I think — and I mean this very seriously — prosecutors don't think that is their job — they think it is to do justice and the right thing.

JUDGE MARTIN: That is a subtle attack on me, since I hired him.

MS. WHITE: I know that, but I wasn't going to say that, John. You see how you get these Freudian slips?

11. See GUIDELINES MANUAL, *supra* note 1, § 5K1.

But seriously, we do deal effectively with a lot of these problems. There is no question there is tremendous discretion. If it is not exercised wisely, if it is abused one iota, it is the worst thing there can be in our system. I also believe that giving prosecutors discretion is very important to the public good, however.

First of all, when I hire people, to every single applicant I see, I make this speech — and I mean it. I think the public has unfortunately become very cynical about it — but the job of a prosecutor really is to do justice. I do not know about an independent, neutral magistrate. That is a little different job than we have. But we are here to do justice.

We talk a lot about that objective in the hiring process. We do a lot of due diligence about how is this person with this stellar résumé, often a relatively young person, going to be able to handle the job of doing justice the day they walk in the door and are given tremendous powers. And even more powers today, because of the Federal Sentencing Guidelines. We do not hire people, despite those stellar résumés, whom we have a concern about. That does not mean you always make perfect hiring decisions.

My colleague, Mark Pomerantz, meets with the new Assistants the first day they come in and gives the same speech. You must reinforce that, because that really is the nature of being a prosecutor. Now, is that troubling? I mean, obviously it is troubling if it miscarries, and so the training is extremely important.

The Federal Sentencing Guidelines, attempt to ensure that the Assistant is doing what the Assistant is supposed to be doing — and we get criticized for this. He or she is supposed to be pleading out a case at the highest readily provable offense, not “bargain basementing” it as a way of leveraging a better plea.¹²

Our running debate on this issue that John is mentioning now I find very ironic — and we have had this debate back and forth, and we have it coming up again I think, so we will see how it comes out. But the judges complain, “We have lost our discretion to you.”

In our office — and we get beat up by the defense attorneys about this, too — we have the cooperators plead to the full range of their criminal conduct, and we think we should do that. You also hear the criticism that the government “makes sweetheart deals with the Devil.” The judge should have the full range of discretion to sentence every cooperator for whatever he or she has

12. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 8, § 9-27.300.

done, even if we did not know about that conduct when they came in the door.

We do not, by the terms of cooperation agreements, make sentencing recommendations. It has been that way in the office for many years. We have returned the sentencing discretion to the judges on cooperators that they have otherwise been deprived of having under the Guidelines. They apparently do not wish to have it.

JUDGE MARTIN: I want to keep it. I just want you to go on record to tell the public, when I sentence somebody who has committed five murders to seven years in jail, that that is exactly the sentence you wanted.

MS. WHITE: And you would have wanted us to do that in the pre-Guidelines era.

JUDGE MARTIN: Absolutely.

MS. WHITE: But we did not under some U.S. Attorney — I do not know who it was.

JUDGE MARTIN: Morgenthau.

MS. WHITE: Morgenthau, right. Not Martin, certainly.

Anyway, I do not think things are so bad or so different. That is the bottom line.

PROF. LYNCH: Well, in one way they are different. Once you start to think of the power of the prosecutor in a more systematic way, you start to look at something like the Guidelines even more dramatically. It is not just how it affects sentencing as such.

From 1986 to 1996, that disposition rate that I mentioned went up from about eighty-five percent to close to ninety-five percent.¹³ Now, I do not know what the right number is or how many trials you need to keep prosecutors honest, but once you start thinking of the prosecutors as the primary dispensers of justice, then you start to think of trials in a different way. It is not just a matter of adjudicating some particular case. It is also that the trials are what tell prosecutors how cases are likely to come out, so that they can start to apply those rules, the outcomes that are predicted by the trial system, in the cases where there is not going to be a trial.

The fewer trials there are, the greater the disparity between the kind of sentence that you can expect to get if you plead guilty and the kind of sentence that you are going to get if you are prosecuted at trial. The broader the laws are, the fewer the defenses, the more a defendant is relegated to arguing points of justice, not as matters

13. See *Sourcebook*, *supra* note 9.

of law, but as issues of prosecutorial discretion or mercy: "Well yes, under the law it is strict liability, and I should be convicted; but is it really fair to prosecute me?"

The more that argument has to be made to the prosecutor and the less ability there is to say, "I do not like your judgment, Mr. Prosecutor or Ms. Prosecutor; I am going to court and I am going to fight the case" — as the stakes become too high for defendants to do that, as the trial rate goes down, the prosecutor's power increases and the checks on the prosecutor's power are reduced — not just about the sentence, but about the issue of guilt or innocence as well.

PROF. LEVENSON: There is another problem. We all agree that you need to have training of prosecutors, but that sounds a lot easier than it is. One of the things you think about is the range of types of training that you have to give prosecutors, given the various roles that Jerry mentioned.

You know, prosecutors now have to learn, as suggested by our prior panel, about the nature of local crime and street gangs. They are going to have to learn about new technology, they have to learn about international crimes; they have to learn about Guidelines, some of them have to learn how to deal with the media, they have to learn a great deal about the negotiation process, and even less so now about the trial process.

This is a wide range of training. If you think about how long that takes, most offices cannot accomplish it in the time allocated for training. Typically, although it depends on the office, training may be the first six months, the first year, and then it slacks off to a less formal type of training with the supervisors. And yet, all of us in this room would agree you could not possibly get all that training in such a short time.

The other thing is while you are training these people the rules often change. A great deal of wisdom that was in the U.S. Attorney's Office went out the window when the Guidelines came in, because even the old prosecutors were not quite sure how to operate under these Guidelines. And yet, we know that if we are going to have the type of training that it sounds like we want, we are going to want to keep prosecutors in the office longer than they traditionally stay because of the revolving door.

So it is just too much of an out to say "give them the training and that will take care of all the problems with broad discretion that they have." I am not sure that a prosecutor could get trained

before the time he leaves with everything he needs to do and still exercise that discretion.

MS. WARREN: I definitely agree with the last point, that the training goes on throughout the whole period of time that they are there. I see it as some formal training, after a good decision on who you are choosing to come in, with particular emphasis on judgment.

Prior U.S. Attorneys used to require an inordinate number of years between graduation from law school and beginning at the U.S. Attorney's Office, just for some measure of judgment, one would hope, to come with the ticking of the clock.

But there will be specific training on what new rules or procedures that an Assistant needs to learn, particularly one who has no day-to-day training or has not had a view of the criminal law. But the real training, I think, is with your peers and with your supervisors that continues throughout. The best U.S. Attorney's Offices are those with those doors open all the time.

Washington runs lots of training in specialized areas. But in terms of judgment and sounding out what is an appropriate exercise of discretion here, I think that happens every day.

I do not think things are so different today. I certainly believe training is important, but I think we need to give credit for the informal training that happens forever.

PROF. LEVENSON: I will give credit for that. But I do think adding the Guidelines was a substantial new responsibility. Prosecutors traditionally trained — and I did the training — when they came in, for how to present a case at trial, and then they moved on to how to supervise an investigation. But this is a whole new world. What I hear judges complaining about seems to be mostly on that end, whether prosecutors are getting that type of training or judgment with regard to the Guidelines.

PROF. RICHMAN: I guess one perspective to get is that of the line assistant. Since I am the moderator, I do not have to speak about it, but I can turn to Julie O'Sullivan, who was a line assistant with me. We got some training.

PROF. O'SULLIVAN: I remember getting actually a lot of training on Guidelines materials and a lot of memos about the "highest readily provable count" requirement and the like. Actually, the memos we got were much clearer than the actual DOJ Guidelines, if you read them. The Southern District had distilled it down to something that seemed to make sense.

I would just throw out a thought here. My own feeling is that there has been probably too much emphasis on the extent to which prosecutors' discretion has been enhanced, and not enough on whether judges are actually performing their responsibilities under Chapter 6 of the Guidelines.¹⁴

The studies show that three-quarters of the judges — and I know the empirical evidence is really soft because it is very hard to regulate this kind of thing — do not wait for the pre-sentence report before accepting or rejecting a plea agreement.¹⁵ The theory is that at a minimum, you have to do this in order to find out whether the parties are complying with the Guidelines.

And two-thirds of the judges feel that it is inappropriate for them to reject a charge bargain,¹⁶ even though the Guidelines clearly contemplate that that should be the case. The judges do it for reasons that certainly one is sympathetic to; that is, they think the Guidelines are too harsh in a particular case, they are uncomfortable constitutionally with rejecting a prosecutor's preferred charge, and also, are uncomfortable with the visibility (they are the ones who are essentially saying, "No, this is not harsh enough.").

So what I think is interesting is the extent to which judges are not using their Chapter 6 powers to say to prosecutors, for example, "Have the parties been engaging in fact-or-factor bargaining?" or "Has the prosecutor agreed to leave off twenty grams of crack in return for a plea?" The judge could ask, "Are these facts in this stipulation true, counsel?" because, obviously, it is a totally ethical violation to lie in presenting these facts.¹⁷

The judge also could ask, "Is this the highest readily provable count?" It is not up to judges to enforce that DOJ policy, but the Guidelines track that policy.

So in looking at prosecutorial discretion, we not only need to look at trial as a means of constraining discretion, but also potentially at sentencing proceedings to see how judges perhaps more effectively could constrain prosecutors.

PROF. RICHMAN: I guess that would lead to a question for Judge Martin. What happens when you have two parties before

14. See GUIDELINES MANUAL, *supra* note 1, §§ 6B1.1-6B1.3.

15. See U.S. SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 24 (1991).

16. See *id.*

17. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1997); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1997).

you, the government and defense counsel, who are quite adamant that this fraud involved \$1.2 million, who say "We have worked this out, and no will tell you otherwise?" Will you pursue this, given the possibility that this really is a \$4 million fraud?

JUDGE MARTIN: Probably not, because I have a problem with the concept that you should not be able to bargain over a sentencing dispute. After all, if the government has a fifty-percent chance of convicting somebody of a \$4 million fraud and the person will plead to a \$2 million fraud, isn't that what justice would demand as a rational result? I mean, all plea bargains ultimately are a reflection of that. So I do not have a problem with that.

I have problems when I see them being applied inconsistently, and I have called them on that a couple of times, at least called them to explain why it is in this case it seems that everybody that went to trial had more than minimal planning when anybody who didn't did not. Those things come up.

PROF. LYNCH: Well, I think it is a little naive to talk about what is "really" a \$4 million fraud. What does "really" mean there? You have these drug cases where the evidence is a scrap of paper on which somebody wrote "José 4," and a DEA expert will then come in and testify that means José got four kilograms of heroin a week for five years. But when the person pleads guilty and becomes a cooperator, it turns out that, once you get the benefit of his "truthful" testimony, then you know that "José 4" actually meant that José got four grams of cocaine once.

Of course, what we have really is proof beyond a reasonable doubt that someone was a drug dealer and a highly disputable issue about what that scrap of paper means, and someone has to make a decision about what is an appropriate sentence for this defendant. It seems to me a rather strange notion, a very naive notion, of the way the world works to say that this guy has to be forced to plead to some extraordinary Guidelines level because the highest readily provable offense is four kilograms times fifty-two weeks times five years.

No prosecutor really thinks that way, and so there is a lot of backing off from these Guidelines. It is sometimes not quite as stark as "the fix is in" and the prosecutor hides the "real" facts, but other times the prosecutor tells the judge what the "real" facts are. The real facts are in dispute, and that is why there is litigation.

And, just as the real facts about guilt are sometimes so much in dispute that there's a chance that at a trial the defendant might get acquitted altogether, sometimes the facts are in dispute about these

sentencing factors. The natural tendency in litigation in that circumstance is to settle. The natural tendency is to decide something is acceptable to both sides.

What does it mean to say that the judge should go behind that agreement and get the "real" facts? Where are the "real" facts? In practice, the fantasy that someone has the real facts leads to the police. The agent has the real facts because he investigated the case, and he will tell you that José is a terrible guy who got four kilograms — and probably more — every week. And somehow that is supposed to be the "real" facts? Why should that version be canonized, rather than the stipulation based on what the lawyers thought could actually be proved?

MS. WHITE: Well, Judge Martin has gone behind the stipulations and he has actually brought that to my attention, when his distinct impression is that the parties have stipulated below what seems to be obviously the highest readily provable offense, or even a level below that. That should not be happening. I am not saying it does not happen.

One of the problems with the Guidelines, I think, across the board — in the appellate and district courts, and the prosecutors' offices, and among defense attorneys — is we are not intellectually honest with them as much as we should be.

We do have a policy that really limits discretion, but nobody really likes us to follow that policy, which is you plead to the highest readily provable offense, because typically if you are using your discretion, you are coming down, you are being more lenient, you are not going the other way. We are not supposed to be going down or up from what the charging policy dictates.

So I do not think the whole problem is discretion. There is no question the Guidelines have injected more discretionary issues, but part of what they have injected is everybody twisting and contorting, frankly, to do justice, including I think, judges as well as prosecutors and defense attorneys. Maybe that isn't so bad and the problem is being exaggerated.

JUDGE MARTIN: Can I go back from the Guidelines, as much as I like to beat up on the Guidelines, to something that was said, that things have not really changed in the role of the U.S. Attorneys? Professor Richman asked me if I would be the old man on the panel. Since I accept senior citizen discounts, I guess I cannot deny that.

But the role really has changed dramatically. I became an Assistant U.S. Attorney in 1962. And yes, you had a Securities Fraud

Unit that did investigations, but to a much lesser extent than today. You had an Organized Crime Unit just starting up. But, by and large, we sat there and waited for the agencies to come and bring cases to us.

I think Jerry in his article underscores some of the problem with that. Among other things, you are losing a step of discretion; you are losing the step where somebody takes an independent look at something and says, "This is the right thing to do here."

We are honoring Bill Tandy today,¹⁸ and I think of a time I went to him. I was investigating and I said, "Look, I got this guy and he is willing to become an informant. What do you think?"

Bill said to me, "No. You should let him plead. He is a kid now who, if he pleads today, can get youthful offender treatment. If you make him an informant, he is going to be too old by the time he comes to plead to get youthful offender treatment. If he gets youthful offender treatment, his record can be wiped out and he will end up with a clean record."

Now, that was a tremendous insight. But it was somebody who was detached from the process who could come in and make that judgment. When you are intimately involved in the investigation, that step is missing.

I think we are a nation, in many respects, that abhors discretion. Just try and fire a government employee for this, that, and the other thing.

But in the decision whether to indict somebody for a crime, whether the charge should be with a maximum exposure of a year or twenty, there is no process.

MS. WHITE: But, John, you know of case after case where the Assistants — and I do think the Assistants, at least since the 1970s, have been very active, before the Guidelines kicked in — where they, unlike their agency counterparts — I am not saying it happens all the time, and I understand exactly the point you are making — but the Assistants will investigate and say, "No, we are not going to do this. It's not strong enough." Whereas, sometimes when the investigation comes in packaged by zealous agents, they also should be saying, "No," once they review it, but the lack of familiarity with the facts may make it more likely that a case is prosecuted when it shouldn't be.

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

But I do think they exercise their discretion as part of the investigative team in ways that are very often very helpful to the defendants and not going forward with prosecutions.

JUDGE MARTIN: But I think it is also important that you have the U.S. Attorney's Office review processes. The fact is that any lawyer can come in and say "I would like this reviewed by your superior," but I think part of the problem is the bar does not know that.

MS. WHITE: Unless they hire Jerry.

JUDGE MARTIN: That is right. But I remember Ron Fischetti¹⁹ came to me in a case — unsuccessfully, but he came anyhow — with another very experienced lawyer who did heavier criminal-type work than many people sitting here. He looked around and said, "I have never been here before." They never think about that.

I think it is very important that the bar know that there is a chain of command that you should pursue if you think it appropriate — because this is where it is going to be decided.

PROF. LYNCH: The role of defense counsel is something that needs to be discussed. We have too many prosecutors and ex-prosecutors on the panel, and not enough defense lawyers, and especially defense lawyers who are not former prosecutors, because the role of defense counsel is very important here.

De facto, in the real criminal justice system that operates in the U.S. Attorney's Office, there is not a presumption of innocence, there is a presumption of guilt. When the agents bring somebody in — and there is the evidence right there in the complaint that the agents swore to — the guy is guilty, right? The prosecutor is not going to call in all of those witnesses to have them testify first-hand in the Grand Jury, the way Zach was talking about in the state court,²⁰ or even interviewing them himself or herself.

The agent says, "This is what the proof is," and that is the proof until and unless an activist defense lawyer comes in and gives the prosecutor a reason to think that the case needs to be investigated more deeply. Here I am talking more about the cases that are reactive, where the agents bring them in.

19. Ronald P. Fischetti is a solo practitioner based in New York City, specializing in criminal defense. See *Today's News*, N.Y. L.J., Dec. 12, 1997, at 1.

20. See *Panel Discussion: The Prosecutor's Role in Light of Expanding Federal Criminal Jurisdiction*, 26 *FORDHAM URB. L.J.* 657 (1999) [hereinafter *Expanding Federal Criminal Jurisdiction*].

In long-term investigations, the situation may be a bit different. On one hand, maybe the prosecutor is more partisan, because she sees herself as part of the investigative team. On the other hand, because the prosecutor is more involved from the start, the prosecutor has a deeper knowledge of the facts, has personally examined witnesses and documents, and so is maybe in a better position to make judgments about guilt or innocence than in the reactive case.

Defense lawyers have to come in and make those arguments and go over the head of the individual prosecutor, if necessary, and work out what is not so much a deal as a verdict or judgment about the case. Plea bargaining is not so much about haggling; plea bargaining is about making arguments on the merits, the same arguments that might be made to a jury or to a judge, but being made to the prosecutor.

So defense lawyers play, or could play, a very important role in this system. But, as John says, many practitioners are not very aware of that, precisely because the education and training of lawyers is not about this phantom accusatory system in which everybody is going to go to trial, and everything important happens in court.

MS. WHITE: Much of the defense bar in New York are alumni of our offices, which I think is a very healthy thing and a good thing for defendants. I totally agree that the whole bar should know about the process and it should be a very activist one, because there is an open-door policy at the U.S. Attorney's Office, even my door. No one wants to go through it, though, when they can get to talk to Mark Pomerantz instead of me.

But everybody really is trying to do the right thing. That does not mean you do not get an overly zealous view of a case from time to time, and then you've got to take it up.

JUDGE MARTIN: That is true in New York. Is it true everywhere?

MS. WARREN: I would say, judging from the bottom ranks — I never reached these exalted realms — that my view is that was certainly true. I was also a defense lawyer for five years, I should probably fully disclose that.

My view is that, at least for the smaller general crimes and smaller major crimes, that was not the process. That was the process in big cases. I am not sure why that was, but a lot of times things just stopped with the Assistant.

It also seemed to me that a lot of the Assistants really did have the sense that they were supposed to do justice and they were supposed to take a step back and at least attempt to be impartial.

But there was a sense that, because you were actively involved in a case, it is hard to step back and say, "They are not guilty" or "You should not go forward."

I also think that what should be explored a little bit more in light of Jerry's article is the issue of resources as affecting prosecutors' discretionary decisions about what kinds of deals to cut.²¹ But it seemed to me resources affected prosecutors' identification of themselves — that they were thinking of themselves not as administrators doing justice, that their primary allegiance was not to do justice in, say, November, because funding is dependent on numbers. There was a push. There was a real mixed message that people were receiving in these circumstances.

PROF. LEVENSON: I agree with Julie on the last point. When you put the prosecutor in the role of a leader of sorts in an investigation, that by itself is not necessarily bad. In fact, I would say that prosecutors could do a pretty good job, if you look at them as coordinators, peacemakers — because you often have agencies that would tear each other apart if you did not have somebody in the middle — a team leader.

But the big problem is who is setting the priorities, and that gets into a whole other issue of whether those priorities are set by that particular prosecutor, by the head of that office, or by Mary Lee Warren and the people in the Justice Department, and how in fact that affects the relationship.

If you are a prosecutor and you are trying to coordinate an investigation, but you have been given marching orders, it will be harder to keep an open mind because you know you have someone looking over your shoulder.

PROF. RICHMAN: Mary Lee, where should policy be made with regard to the selection of cases? I think the Southern District has its view.

MS. WARREN: I think it is a shared responsibility, and, hopefully, it is a responsibility where various sides can live together. More and more offices are doing strategic plans of their own — for example, what is the threat assessment of the crime in the area — and working with the state and local prosecutors that [Zachary

21. See Lynch, *Administrative System*, *supra* note 2, at 2140.

Carter] spoke about,²² but also in terms of what is new or what is the largest threat in this area and trying to divvy up their resources based on that.

In addition, in Washington we try and look at it on a national scale. That may not be the impact in one particular office, but an importance that we can see sometimes through glasses that we have wiped off ahead of time, that is going to affect many districts.

I am thinking particularly in the narcotics area recently, the emergence of methamphetamine. We could watch it grow and grow and grow on the West Coast, but we could also watch the meth as it moved towards the Midwest. We have an important role there in trying to alert the U.S. Attorney's Offices, as well as the law enforcement agencies, that they are going to have to devote more resources and be more vigilant to this emerging area.

Sometimes the policy or the strategy is set for a national impact. For example, indicting a single telemarketing case might not have the same impact as many districts indicting the same day on similar schemes, giving notice to those who would venture in this area that the Federal Government will proceed against them with some sternness.

So there is some give-and-take in this equation, and sometimes Washington is accused of an initiative or a "priority *de jour*," but we have so many. For the most part, I think it sifts out to a fairly agreeable relationship.

PROF. RICHMAN: You identify a problem, you tell the U.S. Attorney's Offices to keep track of it and do it where appropriate. Most of the U.S. Attorney's Offices are headed by people who have their own political agenda. They all say, "This is terribly interesting, we will talk to you, get in line."

What are you going to do next? Are you going to cut funding, are you going to do anything that involves your muscle, or is this just a working relationship?

MS. WARREN: Usually it is a working relationship, but sometimes it is an exercise of pumping iron from Washington. If a large metropolitan district has a major narcotics problem that the Mayor, and even the President of our country, are complaining about, and that particular U.S. Attorney's Office is doing very few narcotics cases of any worth, then there is a problem and we do intercede there.

22. See *Expanding Federal Criminal Jurisdiction*, *supra* note 20, at 660-75 (statements of Zachary W. Carter).

For instance, there are Assistants assigned across the nation to the Organized Crime Drug Enforcement Task Force ("OCDEF").²³ That original allocation was made in 1982. It does not make a lot of sense today.

We really need to look at the allocation of those resources. If they are not being well used in some districts, then they might have fewer in the next year.

I was talking to some Assistants from San Juan who are here. That island has grown exponentially in its violence problem, and most of it attributed to narcotics. They have four OCDEF attorneys in that office and 1.8 Assistants. That is an allocation from 1982 that makes no sense today. That is the way we can exercise that discretion.

PROF. RICHMAN: Let's get a foreign perspective. We should ask Laurie Levenson from outside the Southern District to what extent Washington played a part in her life or her office's life.

PROF. LEVENSON: I think things have gotten better. That is the way I will put it.

MS. WARREN: It is the new personalities.

PROF. LEVENSON: Exactly. Really, there was at one point — I will not say under which U.S. Attorney — a view that Washington was the enemy. Especially when you are far away geographically, it is hard to believe that officials in Washington really have a feel for the community needs.

There also was a complaint about the lack of resources. The saying was "the closer you were to the Beltway, the more resources you would have." I think that has balanced out, by and large.

But there is still the question remaining, who is in the best situation to assess the needs of the community? Washington is helpful, in that it can see national patterns. But we all know that in our individual communities, being a local person and having those contacts with, for example, local FBI agents, really cannot be replaced. I see this as an area where some of the conflicts will come up.

23. The U.S. Department of Justice's Organized Crime Drug Enforcement Task Force program was initiated in 1982. The program funds and operates task forces in thirteen cities that target high-level drug traffickers and money laundering organizations. These task forces include state and local law enforcement, as well as federal investigative agencies, and are coordinated by the U.S. Attorney's offices in those cities. See Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1183 (1995) (describing multi-jurisdictional drug control initiatives in which federal officials make the final decisions on priorities and policies, while non-federal agents provide input and manpower).

I am not sure what the answer is. I do not know that the “weed and seed” program alone or going out and telling school kids “do not commit federal crimes” is going to get the necessary impact. It is also unclear how you go out and put together a group of liaisons with the various leaders of your community.

Part of this, I think, is the tension in what a federal prosecutor’s office does. Does it serve the needs of its district, or is it just an arm of federal law enforcement? That, I think, has been a continuing tension since I was in the office.

PROF. RICHMAN: I think one interesting perspective on the work between agents and investigators can come from Julie O’Sullivan, who saw it in two very different contexts, both in the Southern District of New York and in the Whitewater investigation. I was curious to what extent being in that different circumstance, without talking about the role of Independent Counsel (“IC”), can inform our discussion of how prosecutors do interact with agents in the selection of targets, or at least in decisions about how to allocate resources.

PROF. O’SULLIVAN: I was in Little Rock for over eight months with Bob Fiske. I should also say I worked for Ken Starr for a couple of months, just to be sure everybody knows where I am talking from.

Actually, it was really interesting because there was a completely different feeling in the IC context. First of all, in the IC situation, lawyers are defining your jurisdiction, and so lawyers are from the beginning, from the inception of the case, defining the investigatory priorities and how you are going to proceed, even picking the agents — I mean, it is really very different. It starts off differently and proceeds forward.

What was also interesting was the differences in culture. I was not working with the U.S. Attorney’s Office there, but certainly we heard a lot about it from the agents, and I actually talked to some of the Assistants on other cases. What was interesting is that they had a completely different way of doing cases. The agents came to them with completed cases ready to be indicted. They took the old model very seriously. The agents investigated, the prosecutors prosecuted. There were some exceptions, but overall that was definitely the model.

As a result, between local agents and a lot of Southern District-trained Assistants — I was not the only Southern District person down there — there was some tension in the beginning, because we

not only wanted to attend witness interviews, we actually wanted to conduct them, which seemed very foreign to the agents.

It was unfortunate because I think the local agents undervalued our expertise as far as the law was concerned, and we definitely undervalued the agents' expertise. Essentially, by requiring them to just sit there and be scribes, we were losing a lot of value. I think both the lawyers and agents came to recognize this, and over time it became a much more cooperative enterprise. But it was a very striking difference.

MS. WARREN: Could I comment there on an even more foreign perspective that I have now? The Department works with many other justice ministries around the world, particularly in Latin America now.²⁴ Many of those countries are in this enormous transition from a civil code country, an inquisitorial system, to a more accusatory, adversarial system.²⁵

We are in the particular role now of encouraging them to include the investigative agencies in the investigations. Because it is so foreign to them—it really should be a “task force approach”—there is a lot to be learned. It has really led to a greater appreciation on my part, as I have argued this role of why they need to have the investigators inside as well.

Let me share one particular insight I got from the Honduras Justice Minister. There, and not just because they are a civil code country, but because of excesses of police and the military in the past, all the discretion and all the investigative function rested with a prosecutor/investigating magistrate role and no evidence was accepted that was not directed by that person, including, on a search warrant, that the prosecutor was the first through the door. I explained “not for us,” that there is a better sort of allocation of roles.

It is interesting now to look at what we have taken for granted.

PROF. LYNCH: Bob Litt ended the first panel by asking whether we were being parochial in a time sense,²⁶ that is, is the federalism problem that they talked about a long-term trend to-

24. See, e.g., Janet Reno Urges Law-Enforcement Cooperation with Mexico, Dow Jones News Service, Nov. 9, 1998.

25. See, e.g., Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT'L & COMP. L. REV. 59, 68 (1995) (“Probably the most significant provision effecting the judiciary is the shifting from a system in which judges brought charges against defendants, the so-called inquisitorial system, to a prosecutorial system modeled on the common law adversarial system in the United States where charges are brought by a government prosecutor.”).

26. See *Expanding Federal Criminal Jurisdiction*, *supra* note 20, at 676.

ward federalization of criminal law, or is that just a transitory phenomenon, an artifact of the time?

I suppose I would like to ask, are we being parochial geographically when we talk about this aggressive role of prosecutors as investigators, about the way prosecutors handle their roles as judge and jury and executioner? Is the kind of sensible exercise of discretion, the kind of open-door policy, the kind of role for defense lawyers that Mary Jo and others have talked about, limited to New York, Los Angeles, Chicago, Washington, a few big-city, sophisticated U.S. Attorney's Offices that have a particular kind of practice, that do a lot of big investigations, exercise a lot of discretion; or is that a national phenomenon? How is prosecutorial discretion being exercised across the country?

It is fine to say: "Well, you know, we've got good training programs, and we pick people very carefully, and we tell them about the traditions of Bob Fiske and Bill Tandy and John Martin, and this is the way justice is supposed to be done by prosecutors." Is that how it is in Little Rock? Is that how it is in Nashville? Is that how it is with independent prosecutors?

You know, this resource question is a very important one. A lot of the real check on what a prosecutor does is simply that there is just not enough money to do certain kinds of abuses in a routine case.

If your mandate is, find the truth, leave no stone unturned, and you have an unlimited budget for a single case, the prosecutor's power is vastly magnified. A lot of prosecutors might have said, "You know, you can't prosecute these perjury cases about 'he said, she said' and sexual behavior, because how are you ever going to prove the truth?" That might be true on a limited budget, but if you have no constraints maybe not. You can dig up Jefferson and check his DNA; why not?

If you look at everybody's book purchases and interrogate everybody's mother, and you look at everybody's dresses and you go through the contents of everyone's closets and do DNA testing on everything that comes out of their underwear drawer, maybe we can prove these things. The law lets prosecutors do all these things. But, realistically, most prosecutors cannot and would not do them in this kind of case, because they've got something else on the table, and not enough money to do all of those things in every case. The budget requires you to have a sense of proportion.

Unleash a prosecutor with the powers that we have been talking about, the discretion that we have been talking about, give him an

unlimited budget, and instructions to go find the truth at any cost to any other priority, and you've got an incredible potential for abuse.

JUDGE MARTIN: If anyone has read the book *Blood Sport*, that is exactly the speech that Bernard Nussbaum made to President Clinton when he said he should not appoint a Special Prosecutor.²⁷

MS. WHITE: To answer your question directly, I think there are tremendous variations across the country. Zach has sat on the Attorney General's Advisory Committee, as have I, where you have fifteen or twenty U.S. Attorneys from around the country. You sit there and you realize in about ten minutes that you are all talking about very, very different worlds.

It is not always, though, I think, in the direction of more discretion, unbridled discretion. In fact, it may be the opposite. I think you do have a lot of offices, unlike the ones we are talking about, where the agents do investigate, the prosecutors do prosecute, where you never see anybody contorting over the Guidelines stipulation is it the highest readily provable offense, and there are no 5K1s,²⁸ or one or two, where there is less discretion being exercised too. But I think the point is very well taken. I think it is very different.

PROF. LEVENSON: And I think different models are not necessarily bad. I mean, this is healthy. One size does not fit all. Whereas we can get information from Washington, direction from Washington, resources from Washington, assistance from Washington, there are still all the individual U.S. Attorney's Offices. I, for one, would not like to see them as just branches of the Washington office.

PROF. RICHMAN: I will not go down the dangerous path of suggesting that New York is not the center of the world.

I think we should end this panel discussion. I thank the panelists very much. It was a fascinating discussion.

27. See JAMES B. STEWART, *BLOOD SPORT: THE PRESIDENT AND HIS ADVERSARIES* 374 (1996).

28. See *GUIDELINES MANUAL*, *supra* note 1, § 5K1.