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PROSECUTORIAL MISCONDUCT AND ABUSES

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P R O C E E D I N G S

MR. NIVOLA: I think we should probably get started since it's moving up to 10 past 9:00, and we're very punctual here at Brookings.

I'm Pietro Nivola, the Director of Governance Studies at Brookings, and I want to welcome you to the first of this fall's Judicial Issues Forums. We've done lots of these, but this is the first one of this fall.

I want to say, by the way, we're very honored to have Judge David Tatel in the audience today, of the United States Court of Appeals for the District of Columbia Circuit.

Thank you for coming, Judge Tatel.

The topic of today's discussion is Prosecutorial Misconduct or, in a sense, more broadly, Prosecutorial Excess, and we have an extremely distinguished and very nicely balanced panel to take up this topic, this hot potato, if you will, today.

Among the many important questions that I hope this panel will take up, and I don't know if these are the questions that you will be discussing, Ben, but I thought they might be useful. One is basically how pervasive is the problem of prosecutorial misconduct, the kind of mess that took place, for instance, at Duke, and what is it like for defendants with lesser means than perhaps the families of the Duke Lacrosse players?

How do the problems of prosecutorial abuse differ between the state and federal levels? I think this kind of question is particularly interesting to political

scientists.

Is it a good thing or a bad thing to elect district attorneys? Does it make them more accountable or perhaps paradoxically less accountable?

Finally, of course, what could or should be done to rein in runaway prosecutors?

So to ponder these critical matters, here's our cast of characters:

On my left here is my old friend, Stuart Taylor, of the *National Journal* and *Newsweek* and Brookings. He's the co-author of the recently acclaimed book, *Until Proven Innocent*, about the Duke case. He's one of the nation's top legal journalists if not the top legal journalist in the United States.

Now let's go to the other end here of the table. James Comey is former Deputy U.S. Attorney General. Jim Comey doesn't need much introduction. He's kind of a household name after the battle that he and other Justice Department lawyers waged with the White House over parts of the NSA warrantless surveillance program and then the now famous, of course, incident that took place at John Ashcroft's bedside in the hospital.

Mr. Comey is presently General Counsel and Senior Vice President of Lockheed Martin, but his participation here, of course, is has no bearing on his current affiliation.

I was particularly struck in Jim Comey's long bio here. I didn't realize that you, Jim, were the Assistant United States Attorney in the Eastern District of

Virginia that had handled the Cobar Towers terrorist bombing case in whenever it was, June, 1996, which was the U.S. Military barracks in Saudi Arabia where about 19 or 20 U.S. Airmen were killed.

So, thanks for coming, Mr. Comey. We really appreciate your taking the time to be with us.

Next to him is Steven Benjamin. Steve is a criminal defense attorney in Richmond, Virginia. He's the Secretary of the National Association of Criminal Defense Lawyers and a Fellow of the American Board of Criminal Lawyers.

Finally, when I get out of this chair, my colleague, Ben Wittes, will moderate this discussion. Ben was formerly with the *Washington Post* editorial staff. He's the author of an extremely important book called the *Confirmation Wars* about the complex over Supreme Court appointments. His title in my department now, he's a Fellow at Brookings and his title is Fellow and Research Director in Public Law.

So, with that, Ben, it's yours. Thanks.

MR. WITTES: So, at the risk of duplicative introductions, this panel is actually one of particular salience, emotional salience amongst other things to me, and I wanted to say just a few words about the panelists.

Stuart and I have known each other since I was really just out of college, a young reporter at *Legal Times*, and has been something of a mentor to me over the years. He was, when he met, a kind of grinch in the back of the *Legal Times*

office. He would sit there, writing his column, and he would write these long pieces every few months for the *American Lawyer* for which he would pull these all-nighters and come in with this huge briefcase and this kind of wild look in his eyes.

He was, all jokes aside, the sort of model of what legal journalism is and can be and had just an uncommon passion for law and writing and reporting and justice, and all of that is just incredibly on display in this latest book with K.C. Johnson, *Until Proven Innocent*, which I really commend to you, and I think is really worth taking the time. It is a complete page-turner.

Our other two panelists, the connection may seem a little bit tenuous. I wanted to explain it a little bit.

A few years ago, I came across quite randomly actually, Steve Benjamin. I was looking at criminal justice issues in Virginia, and I had the sense that there were problems in the state justice system. I was mucking my way around the various prosecutorial and defense bars, and I ran into Steve who runs a small law firm in Richmond that consists of himself, his partner, Betty Layne DesPortes, and no one else, no secretaries, paralegals, no one.

Steve alerted me to this case that he was working on of a young man who was coincidentally exactly my age and was, as Pietro described, of lesser means certainly than the Duke Lacrosse defendants. He was an air conditioning repair salesman who had spent the last 11 years in prison for a murder that was, by that

time, almost transparently obvious that he had had nothing to do with. The only people who cared, it seemed, were the most peculiar coalition I had ever seen of a couple of defense lawyers, the FBI and the U.S. Attorney's Office in which our third panelist was then serving and, in fact, running.

Jeff eventually got out, thanks to the combined efforts of this group of people, and I think this case raises a lot of the issues that we're going to talk about today in ways that are somewhat more subtle than the ways that the very dramatic Duke Lacrosse situation does. It was a case that was out of the political eye, and I think left a big impression on everybody who worked in connection with it in various capacities from the prosecutorial capacity to the defense capacity to, in my case, the journalistic capacity. So that is what brings this group of people together.

I, without further ado, will turn it over to Stuart to give us a little sense of and to key up the issue.

MR. TAYLOR: Thanks to Ben and to Pietro and to all of you and my fellow panelists for being here.

I think why are we are talking about prosecutorial misconduct now? It is always an important and interesting subject, but I think the Duke Lacrosse case has focused more attention on it than usual, and any time one has an excuse to focus on an important issue because of something that's going on in the news, I think it's a good opportunity to do it.

This case is of course, no longer a controversial proposition. The district attorney, Mike Nifong of Durham, was guilty of egregious misconduct in this case. He has been disbarred. He spent 24 hours in jail. He could spend a lot longer in jail if anyone decided to prosecute him for the civil rights violations that he and the City of Durham are now being sued for civilly by the three wrongly accused defendants.

It's an interesting question whether he is a total aberration who has little to teach us about other prosecutors at other places at other times or whether there are general problems here, and I'm somewhat mixed on that, but I'll start with a recap of the facts I think that bear on just how egregious this misconduct was and the extent to which perhaps it shares some traits with other cases.

From the police eye-view of what happened here -- I won't go back to the events of the famous stripper party and so forth -- it begins in the early hours of March 14th of 2006, and all the dates I'll talk about almost are 2006, when a very impaired woman is brought to the police. The police are brought to her. She won't get out of the car.

She and the other stripper had left the party together. She won't get out of the car. The police have to pull her out of the car. The other stripper wants to be rid of her. She won't talk. She has no ID. She won't tell them who she is, where she lives.

So they decide to commit her for 24-hourr observation and possible future

transportation to a state mental hospital as a danger to herself or others, and they take her to something called Durham Access to be in this process. This is the first time after an hour and a half of meeting and talking to three police officers, a security guard and the other stripper that she said she had been raped. As I think she anticipated, she had been civilly committed before. She didn't want it to happen again. This was her ticket out of confinement.

As soon as she was out and over to the Duke hospital for a rape victim workup, she told Sergeant John Shelton, the same sergeant who had had to pull her out of the car, well, she hadn't been raped. I just got an email yesterday. Things keep pouring in. Shelton told somebody he met at a workout club, who reported it to me, that she was all over the lot on whether she had been raped, but the only time she ever looked at me in the eye, said Shelton, she said very clearly she had not been raped.

Shelton is calling into his watch commander, well, she has recanted. Somebody taps him on the shoulder and says, hold on a minute, she's re-recanted. She's telling the nurses and the doctors that she was raped, and so it goes for several hours. She said she was raped by 20 men, by 5 men, by 3 men. She told wild and crazy stories to a succession of police officers and a succession of hospital personnel.

At the end of the day, two things were clear. None of the police officers at the hospital believed her, and none of the medical records that were made at the

hospital supported her story. There were no physical injuries consisting with the violent rape she'd described.

There was, however, one sexual assault nurse trainee named Tara Levicy who believed her because, as she later reported to the defense lawyer, she had never disbelieved any rape plaintiff. Now this may seem a little far from Nifong, but I'm trying to set up what is presented to him.

Over the course of the succeeding days, a detective named Sergeant Mark Gottlieb, who has a history of abusing Duke students and apparently hated Duke students, took over the case and had a very different view of it from all those who had been at the hospital in part perhaps because he had talked to this nurse, Levicy. He went after the case as though he thought there was a rape, and he was going to work it up.

Nifong comes into the case only about 10 days later. At that point, a subordinate in his office had obtained an order to get DNA from all the lacrosse players to see whether they matched any signs on the alleged victim, and the order seeking DNA said, "that the DNA requested will immediately rule out any innocent persons." This is the district attorney's office, this piece of paper on March 24th or 23rd.

Four days later, Nifong comes into it, and he is briefed by the police officers on all of the events I've described and more which include the total inability of the supposed victim to describe who had done what to her and the

consistency of every description she had given. Nifong looks at the detectives who are telling him all this, and he says, you know we're screwed, to the detectives. He used a more graphic word, but that was the sense of what he said.

Within an hour or two after saying that, he went out to talk to the media, and in the next week he went through an extraordinary succession of media appearances, interviews, TV, national and local, in which he said there was a clearly a rape. The hospital evidence quite clearly proves it, he said, which was false. They were racist. They pelted her with racial epithets, which was false, and on and on, false, false, false, false, false.

The lacrosse players were not cooperating, false. When they had done a search of the house, the three people who had lived there had gone and told the police everything they wanted to know, volunteered to take polygraphs, given DNA -- a succession of outrageous, false statements that would have been clear violations of prosecutorial and legal ethics even if they had been true, but of course they were false. Prosecutors aren't supposed to try their cases in the newspapers, at least not to that extent.

Over the next few days, Nifong, the DA, is told that the DNA tests were all negative. Case closed, right? His own office had said that would be the end of it.

Well, that wasn't the end of it. This was not yet public. He immediately started saying, well, DNA doesn't prove anything. If it turns out there is no DNA, maybe they used condoms, false. The accuser had said they had not used

condoms. So, on he goes.

Why is he behaving in this fashion? He was in the middle of an election campaign, and when this case came along it was quite clear he was about to lose to a woman named Freda Black who it was quite clear would fire him since they hated each other -- they had formerly been assistants together -- when she won.

His major concern about that, according to his campaign manager, Jackie Brown, who has later reported what he said, it was not so much that he wouldn't get to be big-shot politician. It was that his pension as a career person in the office would be cut short by having been fired with only 26, 27 years.

As time passes, it becomes clear not only that there probably was no rape but that it's utterly clear that this woman can't identify anybody as a rapist. She had looked at the pictures of the people who were later accused. Of one of them, Reade Seligmann, she said, oh, I'm 70 percent sure he was there, but I don't remember what he was doing at the party, as in he certainly wasn't raping me. Well, later she was certain he had raped her.

David Evans, she looked at and she said, well. The first time she saw his picture, she said, no, I've never seen him before. Later, she said, well, I'm 90 percent sure that he's one of the guys that raped me, but he had a mustache. He's never had a mustache. He offered to prove this.

Defense lawyers offered to tell Nifong their side of the story. They have photographs, cell phone records that were taken at the party, and show that this

couldn't have happened. Nifong refuses to speak to them which is unheard of. There is no good reason ever for a prosecutor to refuse to hear whatever evidence a defense lawyer might want to tell him, and there are a lot of good reasons to do it.

Finally, on April 4th, he rigs a lineup designed for the purpose. It's not a lineup actually. It's a display of photos of all 46 lacrosse players. Don't worry, he said to Crystal Mangum, the accuser, the only people we are going to show you photographs of were lacrosse players who were at the party, so basically pick three, any three. You can't be wrong. She picked some.

The DNA becomes public on April 10th. Defense lawyers announce it. What they didn't know is that Nifong had obtained a second DNA lab to try and do more tests after the state's lab tests had been negative. The very morning that they were announcing the negative tests from the state lab, he was being told by the private lab, not only that their tests were negative too -- no sign of any lacrosse players' DNA anywhere on or in this woman -- but that the DNA of four unidentified males had turned up in the various places, showing that she had sex with these men.

Did I say unidentified women? Unidentified men.

And it goes on and on through indictments by grand jury who heard only the two dishonest cops, heard no testimony from any real player on the scene. There was no transcript. There was, as is usual, no right for the defense to go into

the grand jury and present exculpatory evidence.

On May 2nd, the purpose of this whole operation is fulfilled. Nifong wins his primary election, and the way he won the primary election was by inflaming the black vote, by lying to the voters essentially to get them to think that he's the defender of the poor black woman being raped by the privileged white Duke students, and he had accomplices in all this.

I'll quickly wrap up and then we'll pass to whether this is a generalizable thing.

Among the accomplices, the lawsuit that has now been filed by the three wrongly accused young men names 10 individual police officers, Gottlieb and others, up to including the chief of police plus two people at the private DNA lab, plus the City of Durham.

They allege the following. I'll read it because I know they can prove it all and it's a pretty nice encapsulation of what happened here. Also, it shows it's not just about Nifong, 10 individual police officer defendants plus the entire of City of Durham government establishment as a kind of enabler.

"Defendants knew that these charges were completely and utterly unsupported by probable cause and a total fabrication by a mentally troubled, drug-prone exotic dancer whose claims time and time again were contradicted by physical evidence, documentary evidence, other witnesses…"

I forgot to mention that the other stripper told police that this story of being

raped was a crock, that she had been with the accuser almost the entire time except five minutes.

"…other witnesses, even the accuser herself.

"In the rush to accuse, defendants willfully ignored and were deliberately indifferent to overwhelming evidence of plaintiffs' actual innocence."

This went on for many, many months. One of the extraordinary things, as I watched it unfold, was how a rogue prosecutor could keep something like this alive in the face of evidence of innocence pouring into the public record and at a time when his own public actions were transparently unethical.

It was a real education in the power that a local prosecutor, in particular, has. He has power over the defense lawyers, who are out of business if you won't plea bargain with them, and so there were defense lawyers, not the good ones who represented the wrongly accused young men, but others in Durham who spoke favorably to the media about Nifong. Why would they do that? Their business depends on him.

He had power over the judges because he had the power to schedule when cases would be tried. If Judge X looks like he's not going to be friendly to the prosecutor, he can delay it until it's Judge Y's turn to try the case.

He had accomplices not only in the police department and the city government but also at Duke University, and I won't go into that in detail now, and in the media.

Is this at all generalizable? I think I've gone on a little long enough now, so I won't go into that in any great detail, but just to begin. My fellow panelists know more about these things than I do but just a couple of general points.

I think it's clear most prosecutors are admirable public servants, and in that sense who are doing the best they can, who never would prosecute someone they thought was innocent. In that sense, Nifong is indeed an aberration.

I also think that some of the patterns that we saw here: jumping to conclusions based on very partial evidence; a nurse who turns out to be an ideologue, saying, oh, I think she was raped even though the physical evidence contradicts her; a bad cop, Sergeant Gottlieb, who has a grudge against Dukies, encouraging the DA to believe it; the convenience to somebody who has an election campaign to run of believing these unreliable sources at first rather than doing a rigorous analysis of whether the evidence supported them; and then once he's in so deep in terms of making public statements to suggest this is a big scandal and he's going to do something about it, the impossibility to pull back as the evidence pours out that he's wrong.

This is giving him the benefit of the doubt that he ever believed it, but he got himself into a position where if he suddenly saw evidence where he thought to himself, oh, my gosh, they're innocent, his choice at that point was to go charging ahead even though he knew they were innocent and try to convict them or to lose the election that he was so desperate to win, and we've seen what he did.

I think there is a general problem not in most cases but in enough cases so that we need to think about reforms: grand jury process reforms, reforms in lineup and identification procedures, stronger sanctions for manipulation or distortion of evidence by prosecutors and police officers.

I think it's impossible to quantify how widespread this kind of misconduct is or lesser forms of misconduct.

I think what is clear is that there is enough of it so that if there were reforms we can engineer that would minimize the chance of people's rights being abused, as the rights of these young men were abused, we ought to do them.

Thanks.

MR. WITTES: Steve, do you want to pick up from there?

MR. BENJAMIN: Well, you've just heard the optimistic assessment of the criminal justice system, but this is not an unfamiliar role for me. I had a flurry of thoughts as Stuart was closing because he said that most prosecutors are admirable public servants. I thought, well, fair enough, I think that probably is true, but I think that confuses the question because the prosecutorial misconduct that is rampant in this country is not necessarily the product of a lack of integrity.

So I think you can maintain, inaccurately so, that prosecutors, by and large, are admirable public servants in the sense that I don't think they wake up every day and go out to convict innocent people or to frustrate justice. They do it, nonetheless, but it's not a question of integrity. It's a product of a number of

factors that I think we're going to talk about today, one of those being a misunderstanding of their duty under the law to disclose exculpatory evidence. It borders on just sheer delusion, and that's being kind.

It's also a lack of zeal or effort on the part of prosecutors, generally, with some exceptions, to question their own case, to be skeptical of the suspect or the accused whom the police bring to them, to do what is essential to any lawyer's task. That is to pay attention to details and to question everything. There's a marked reluctance to do that. Where questions or problems in a case become evident, there's also a hesitancy, again I'm being kind, to disclose these problems to the defense.

The reality is, and this is not anything new. The only thing new is that we are now starting to acknowledge this in the popular media. The reality of the criminal justice system is that it is hopelessly broken in the sense that it is no longer, and has not been for a long time, a reliable and accurate determinator or mechanism for the determination of the truth of any given accusation.

Here's why I say that, and please don't misunderstand me. The problems in the Duke case are not an aberration. On the contrary, they are so pervasive that they are the reality of virtually every criminal prosecution in this country, state or federal.

Let's start with the Cox case, and I speak not only from my own experience -- and I'm going to give some illustrative examples -- but also the shared

experience of the defense bar. I was at the annual meeting of the Board of Criminal Lawyers this past weekend, and I raised this very question, was Duke an aberration or not, and got polite laughter. I mean there's just no question about it, and I think it's perhaps intentionally naïve that the question is even posed today.

The Cox case: Jeff Cox was 20 when he was arrested. He had never been in trouble in his life. He was an apprentice air conditioner mechanic in a rural jurisdiction outside of Richmond when he was arrested and accused of the horrific abduction in the middle of the night of Eloise Cooper, an elderly woman who was taken from her one-room apartment, in front of her disabled husband who hobbled after her and her abductor with his walker, calling out to stop as his wife of 30, 50 years disappeared into the night. He never saw her again. She was discovered the next day, stabbed multiple times and assaulted in a nearby park. It was a brutal, horrific murder, and Jeff Cox was accused of this.

But Jeff, during the months leading up to his trial, was always hopeful because Jeff believed that in this country, if you did nothing wrong, you had nothing to fear. That's how he had been raised. Jeff knew that he was innocent, and so he waited. He actually waited anxiously for his day, for his trial to begin because he knew at the end of that trial, his innocence would prevail and he would finally leave the Richmond city jail.

The trial date came, and Jeff sat there, hopefully, during you know what a major criminal trial entails. It's jury selection in a very publicized case, opening

statements, the prosecution's case, the motions, the defense's case, the closing argument, the instructions, the jury deliberation. He waited through all of that and, at the end of it, the jury returned and found him guilty and sentenced him to life plus 50 years.

What you should know is that all of this took place in one day, and it's a good thing it did because his defense lawyer had taken a day-long recess from an ongoing federal trial to defend this case.

Well, the case came to us years later because his mother wandered into the office and spoke to my law partner, Betty Layne DesPortes. She came to me after the mother had left and said that she wanted to look into the case. She did that. After she looked into it, she came back and said that we were going to take it because she had discovered, as she expected to find, as we find in every case, that there had been prosecutorial misconduct. Important information had not been disclosed, and prosecutorial witnesses had lied about certain material things.

I asked, how could they possibly afford us? She said, well, they can't, but we're taking this anyway. What Betty Layne says is what goes in our office. So we did this, and we began a four-year adventure which I thought would never end well.

What we discovered was there were two eyewitnesses, supposedly. The first one lied about the nature and extent of his own criminal record. Not long after that, he was successfully prosecuted by the U.S. Attorney's Office as a

kingpin, a federal drug kingpin, but he lied about that during the trial.

Eyewitness number two not only contradicted herself multiple times, but this was my favorite, and this is what you find when liars become involved in the criminal justice system. They are really quite adept at lying. The only hope you have against them is the fact that they will willfully just plant details, willy-nilly, in their testimony.

She was one. She was asked why were you awake at 3:00 in the morning, a fair question, but she had a terrific response. She said she was just home with a newborn baby, and the crying baby was keeping her up. The problem, as we discovered when we began our investigation, was that the newborn baby was not born until several months after this particular event, you see.

But it sounded good, and certainly the prosecution knew about it because when they arrived at the home to investigate this, their star eyewitness was very, very pregnant and delivered. They had to continue the hearing, so she could deliver months later. This was never mentioned to the defense. Instead, she was allowed to get away with it, probably because her testimony was absolutely essential.

I never thought, because of the law of post-conviction remedy, that we would ever get Jeff out, and I thought that he would die in prison, an innocent man, but he would never be released. That's the reality of post-conviction jurisprudence.

But a number of individuals got involved. FBI Agent Frank Stokes was troubled by this, probably had zero jurisdiction to investigate this, but it was wrong and he investigated.

Jim Comey got involved and authorized a federal grand jury. Again, I'd love to know what jurisdiction the feds had in this case. I'm certain they had it. I certainly wasn't complaining. Without Jim's efforts, Jeff would probably still be in prison, and I'll tell you why.

The search for the truth was difficult and tortured, and I was maintaining a state action, a post-conviction action, and time was about to run out because of the limits of Virginia law. I had precisely one day left to work a miracle or to further stall this case so that we could somehow discover the truth. I knew that Jim's office was investigating, and so I called Jim and got him on the phone.

I said, look, I know that you're governed by the laws of grand jury secrecy, but I've got one day left. If there's anything that you have discovered in your investigation that would represent newly discovered evidence, favorable evidence, then please I hope you will find some way to disclose that.

Well, because the circumstances of Jeff's identification had been at issue and because the witnesses had claimed only one composite drawing had been produced, Jim asked if the existence of a second composite drawing would be sufficiently material, and I said, absolutely. It came over the fax. I rushed up to the judge. We got the delay we needed.

One thing led to another. Jim's office actually found the true killer. He was indicted. He was prosecuted and convicted. His conviction was affirmed, and Jeff was released very soon after that.

That's just one example. We took that case because we felt that Jeff was innocent. We knew we would find prosecutorial misconduct. But it wasn't just that case.

In another case, also a murder case, we have in Virginia a fascinating set of procedural rules whereby the prosecution is under no obligation to disclose the identity of their witnesses. So, during the midst of a murder trial in state court, the prosecutor called for the next witness, and it was a name that I did not recognize. I felt pretty confident about the case because quite frankly they had nothing on my client, but this was a name I did not recognize.

The fellow, the next witness, was led in from the back which told me that he was incarcerated. I asked my client, who is this? He said, oh, don't worry. That's some guy I shared a cell with down at the city jail.

He didn't understand what that meant. So this guy, of course, took the stand and, as jailhouse informants will do, gave a complete, described a complete, lurid confession by my client.

I asked for a recess because I didn't know anything about this guy, and that recess was not granted. So I stalled for as long as I could until I wore everyone out, got a recess, got on the phone and called the public defender's office to find

out who this guy was. Luckily, I talked to the attorney who was representing, and she told me some interesting things. So I went back into court.

Generally, the question on cross-examination, what is your name, really gets you nowhere. Few people have trouble with their own name. You know. That's a fairly safe harbor. He said his name. It was the same name he had given. It was Kenneth Creepier. I had him spell it, and he spelled it.

Then I asked him, well, who is Daniel Sidow?

He said, oh, well, that's my real name.

So I asked, well, how did you decide, coming to court here today, which name you were going to use? Did you ask somebody? Do you flip a coin?

He said, well, I asked the prosecutor.

I said, and the prosecutor told you to use your alias name.

He said, yes.

It went downhill from there. It turned out he had an extensive felony record of theft, fraud and deception. He was mentally ill. He had heard voices, for example. We ultimately got his mental health records.

Well, actually, in that case, Brown was convicted of murder and sentenced to life. It took the Virginia Supreme Court reversing that conviction for various reasons, and we were able to really go to town on Mr. Sidow. He suffered from mental illness. We found letters he had written to other lawyers, threatening them, signing them Louis Cipher. Lucifer, you see. All this was terrific fodder

because generally when you have a witness who goes by the alias, Lucifer, you've got something to work with. But all of this, of course, was known to the prosecution and it was not disclosed.

Jim Comey and I, karma keeps bringing us together. I don't know what that portends for the future.

MR. COMEY: No good for you, I'll tell you.

MR. BENJAMIN: I'm done talking now. Thank you very much.

One of his assistants got excited about a bank robbery case and charged my client and others with about 23 separate bank robberies, all in one indictment. Now, any one of those bank robberies undoubtedly would absolutely have ended in a conviction and an appropriate sentence, but this guy thought that he had solved every bank robbery in Virginia and put them all in one indictment. He had a lot to work with because as good and professional as these robbers were, one guy -- I think it was my guy -- left a ski mask behind and the FBI was able to extract DNA which matched my guy.

Because the prosecutor, not Mr. Comey but one of the assistants, screwed around with getting the results to me, ultimately, the Federal District Court Judge excluded the DNA evidence from the trial. I had mixed feelings about that because eventually we had gotten the whole packet of materials from the FBI. It took a very tortured battle. In those materials, I found the FBI report that included my client as the contributor of the DNA, but I also found a report from

the FBI that excluded my client as the contributor of the DNA.

I couldn't wait to hear the explanation for these inconsistent reports, but the judge threw the DNA out. That still left the usual cooperating co-defendant testimony and some other circumstances. But, suffice to say, that the assistant so failed and failed so fundamentally in his disclosure of exculpatory evidence. By exculpatory evidence, I mean a number of these bank robberies had been linked to another bank robbery gang. Witnesses had identified other robbers as having committed some of these subject robberies, which was very material to the whole thing.

We ran around with this in battle after battle until finally Mr. Comey appeared in court himself and voluntarily took a dismissal which was absolutely the right thing to do, and it was obviously to be a hallmark of his career as a prosecutor.

Is this pervasive? Right now, we are handling an appeal that has been granted by the Virginia Supreme Court. This is a case that we took after conviction, after verdict. When I talk to prosecutors, I tell them, you are your own worst enemy because when I am called in after verdict, after things have gone wrong in a trial, I know. I mean it is a given that I will find that you have withheld information and evidence that you are required by law and the constitution to turn over. I know that. I will find it, and it's going to be very easy to find.

This case, Jamal Staton, was exactly that same sort of thing. This is an instance of the sort of willful blindness that Stuart documents in his book on Duke Lacrosse. This was a murder case, and a cigarette was found in the blood flowing from the murder victim. The prosecutor had it sent to the state laboratory for DNA extraction. They found a mixture of DNA. It included not only the victim's DNA, obviously -- it was laying in his blood -- but the DNA also of some unknown individual.

So the prosecutor, of course, ran that DNA against not my client but the defendant's own DNA and there was no match. He did report that fact. But what he also did is he halted any further Virginia DNA databank search. He did not take the reasonable and expected next step to find out, well, whose DNA is on the cigarette that was in the blood of the victim. He halted that. He also slowed down other forensic tests and didn't produce other forensic reports.

This was compounded by the fact that he -- again, this comes right out of the Duke case -- misrepresented to the court full disclosure of all exculpatory evidence. To the jury, he represented that the investigation for a second suspect -- there were two people -- was an active and ongoing investigation. Here's why I say he misrepresented that. He halted the DNA databank search until after this guy's conviction.

Then he resumed the investigation. He didn't want his case complicated by the facts that might be disclosed by further investigative effort until after he got a

conviction. Once he resumed his search, what he found was that the girlfriend, another occupant of the apartment, it was her DNA on the cigarette, which was completely inconsistent with her account.

We also found out post-verdict that there was gunshot residue on her hands, and we found out that contrary to what the prosecution had said, she did in fact have a criminal record, and in fact there were material discrepancies between her initial report and her trial testimony. That's now on appeal.

In October of 2006, when perhaps people should have known better or known that there were risks associated with nondisclosure, I tried a murder case in Richmond. It really was going nowhere until the star eyewitness testified, and the star eyewitness was someone who was portrayed by the prosecution as one of the noble homeless. That is someone who is homeless and lived on the street but had no lack of integrity about his character. This was how he chose to live, and so this was a troubling and difficult witness.

I began my cross-examination and after I felt I had done all that I needed to factually, I bore in on exactly what was going on here. I said, now you were interviewed by some investigators in this case.

He said, yes.

I said, and you told them everything you knew about this case.

He said, yes, I did.

I said, well, but one thing you didn't tell them was about the reconstituted

woman.

He said, no, I did not.

Now, let me pause because I was maintaining eye contact with him because that was essential to what I was doing. If you're wondering what a reconstituted woman is, I can tell you that everyone in the court room was wondering what a reconstituted woman is, but he and I knew it. Well, he knew what I was talking about, and he admitted, no, he had not divulged to the investigators the fact of the reconstituted woman.

The reason was because he was under contract with the National Security Agency, you see, and by the terms of that contract, because they were at war with the CIA, he was not allowed to divulge this information. He was also the Messiah returned to Earth to deliver peace and good will to all mankind and so on and so forth. He was hopelessly psychotic.

This was an inconvenient fact, you see, for the prosecution. The clients were also absolutely innocent, and the judge threw out the case. It didn't even go to the jury.

Then, is this coincidental? I think not. Several weeks ago, I tried a murder case, another murder case, which was I think an excellent example of a willingness by the prosecution, a pervasive willingness, because now we're in September of 2007. This book has been released. Everybody knows about Duke Lacrosse.

Several weeks ago, I go to trial. It's a two-week trial. The prosecution was so willing to shut their eyes to the problems of their own experts, and their case relied, absolutely relied on the testimony of a medical examiner who they had to import from Arizona because the Virginia chief medical examiner would not agree with the prosecution's theory of the death nor would the Baltimore medical examiner to whom the prosecutor went for an objective second opinion, and so the prosecutor had to rely on someone the family had found in Arizona, the widow.

Having found this expert, the prosecution was quite willing to shut his eyes to the problems associated with this person or, at best, to peek through their fingers at him and so failed to discover and, of course, to disclose to me what I was able to learn. This highly credentialed individual was just recently forced to resign from the county where he had been chief medical examiner for quite some time, and in exchange for his immediate resignation the county agreed that they would halt all investigation into his misconduct, that they would delete the contents of his hard drive at work and return his thumb pin drive from some forensic computer expert. He was really quite in trouble.

Their blood spatter expert who also was instrumental to their case, we learned on cross-examination, that the spatter from which he drew great incriminating significance, he didn't know if it was blood or not, having failed to test it. He had never had a college course in mathematics, biology, chemistry or

physics, could not explain the scientific method and, in one of his exhibits, he had labeled as tissue, several particles on the underside of a boot, very impressive and consistent with his theory. But because I knew that generally what I get from the prosecution in cases is false or fraudulent, I asked for a court order to have this tested, and of course it came back that there was nothing organic at all on the bottom of the boot. It was just that easy.

And so, I'm here today, I am somewhat sorry to have to tell you this, but the reality is that in virtually every case I get, I don't have to look very hard at all to find favorable evidence that the prosecution has either decided not to learn about or has failed to disclose.

MR. WITTES: Jim, I'm sure you agree with all of that, right?

MR. BENJAMIN: Let me start by making sure you understand, I have successfully prosecuted a lot of guilty people. I don't want to be known just for the cases that I tanked and the things that I didn't do.

I have a different view of the criminal justice system than Steve, but in some respects I share some of his core concerns. Let me start by disagreeing with one of his central premises and that is I do believe that prosecutors are honorable people and are dedicated public servants. I also believe something that was said to me by one of the defense lawyers in the Cox case, who said 99 percent of my clients are guilty. This one keeps me up at night.

I think that's probably about right. I think about 99 percent, maybe higher,

of the people charged in the criminal justice system are guilty. That's an amazing accuracy rate for a human endeavor, but that leaves a discernible percentage of real people who may not be guilty with which they're charged.

I think the Nifong case is an outlier. It doesn't teach me much. I don't think it teaches you much. I think you're talking about someone who is a rogue prosecutor in that circumstance.

I think the challenge that we all face in trying to push that 99 percent to 100 is much more difficult and involves much more subtlety and involves good people. Prosecutors are people. People, everybody in this room, I would suggest, people are deeply flawed in that they are at their most dangerous when they believe their cause is just and they are certain they are right.

That's true not just of prosecutors. It's true of journalists. It's true of defense lawyers. It's true of everybody. You are at your most dangerous when you believe you are on a high horse with a white hat, doing something important and that you have it right.

In my experience, the challenges for the criminal justice system arise not in the run of the mill case but in the most difficult cases: the police murders, all murders, the rapes; the brutality that everybody in the criminal justice system encounters. It is in the case where the harm is so significant and becomes such a passion to do justice for everybody on the government side that the risks are the highest, the risks that you will fall in love with your own facts, with your own

theory, that you will be convinced that you are doing the right thing and that will affect your judgment. Not that you will do something intentionally wrong but that things will happen that will cause you to drift in a direction where you not only focus on someone who didn't do it, but you don't focus on who did it, which is the flipside of this awful problem for the criminal justice system.

I think the Cox case illustrates it, and I want to tell you a little bit more about the Cox case that I hope illustrates what I'm talking about.

Two white guys went to an apartment row in the near west side of Richmond late, late one night. One got out of the car with a knife and tried to enter one address, tried to pry the door open to that address. He actually had the wrong address, couldn't get in there. He walks around a little bit on the street and then goes into the apartment next door, goes upstairs and grabs Eloise Cooper, drags her out as Steve said, awful circumstance, in front of her invalid husband.

He pushes her in a car, a small red car driven by the other white guy. Eloise Cooper is an African American. They drive off.

There were two people there that night, two witnesses: one, the woman that Steve described, African American woman, pregnant, and then a man, unconnected to the woman, also African American. This was a black neighborhood. Those two people see the guy who got out, the white guy with the knife, tries to get in next door, then goes up and drags the elderly woman out.

The police jump on this. It is highly publicized in Richmond. Long story,

short, they get photos that involve Jeff Cox and they show in a suggestive photo identification procedure to these two witnesses, pictures that involve Jeff Cox, and they identify him as the guy who had the knife, trying to get in the car. They misidentify them.

Those two people, I interviewed both of them, absolutely certain that they got it, absolutely certain that they had the right person. The police officers involved in the case, I still believe because I think they hate all of us who were involved in it because they think that we freed someone who had done a killing, absolutely certain that they had the right guy.

The genesis of the crime was a drug dispute. Two white guys from the county had bought marijuana from a black drug dealer and he had not returned. He had beat them basically on the last transaction they engaged in, took their money and drove off. A series of tit-for-tats followed. They stole his bicycle, believe it or not, and he stole it back. They finally decide that they're going to get even with him for good. They believe he lives at this address. They believe the older woman is his grandmother or his mother, so they grab her.

You can see the dynamic at work in a city like Richmond. It's actually the photo negative, in a way, of the Durham situation because you have a high profile killing of an elderly black woman by a white guy, very highly publicized and driven hard by the prosecution, and they came to believe they had the right guy to the end, as I said. I've spoken to all of them.

What the prosecutor believed was going to happen was that this fellow, Jeff Cox, was going to flip and give him the other guy. They thought they had identified the guy who was with him. It never happened because Jeff Cox didn't know who had done it.

The most powerful moment in this case was when the FBI agent, Frank Stokes, who deserves the credit for all of this, came to us and said, I'm a hard guy, and I've interviewed a lot of criminals in jail, and almost all of them belong there despite their protestations. This one, I can't get over. I talk to this kid, and I cannot shake the feeling that he's the wrong kid for this homicide.

So, as Steve said and Steve has helped a lot of other people, the case was made against a real killer so that the State of Virginia would free him.

Now why do I tell you this story? So you can understand some of the complexities behind the Cox case but also see what happens in real life is not bad cops, bad prosecutors, bad participants set out to frame somebody.

Instead, what happens is they believe they have the right person, so they overlook what we might see looking at it afresh in the identification procedure or maybe more commonly, in my experience, a prosecutor who believes he has it right, does not notice or, if he notices, does not resist the drift in a witness' statement. Particularly when you interview people who are looking to get credit, cooperating witnesses or informants, whatever you want to call them, there will be a moment when that testimony, that interview starts to drift. It starts to get a

little better. He saw a little bit more than maybe he told you he saw the first time.

It is really, really hard, especially in the hardest cases, to resist that, to be the prosecutor that says, now wait a minute. Yesterday, you told me. What's up with this?

I'm sure you all have in your sense of mind what happens to real people who care about getting it right. There is that drift.

What's the answer to that? I don't have a great answer. I think it's important. I'm on the Board of the American Prosecutors Research Institute which sponsors training for America's local prosecutors. I think one of the answers is constantly reinforcing, obviously, the lessons of the Nifong situation.

But I worry about too much focus on that because that will miss the real challenge for all of us, the focus on this risk in the hardest cases, of that drift, of that suggestive procedure of getting it wrong, of not wanting to tell Steve Benjamin something about your case because you know you've got the bad guy. You know this guy is guilty. If I tell him this, he's just going to muck it all up.

Constant reinforcement that you have to resist that, policing by judges and by state bar associations, but where the rubber hits the road is with that trial judge, very intense focus on the discovery obligations of prosecutors and appropriate discipline and messages of deterrence when it goes wrong. Prosecutors are good people. They are extremely sensitive like all good people to their reputations. There is an opportunity not just to train them but an appropriate way to send

messages of deterrence to try to get them to focus.

I think that the criminal justice system is essentially fair. Someone once said to me, likening it to what has been said about our democratic system, it's the worst system in the world except for all the others.

Maybe we'll have time to talk about specific ideas for changing it. I don't know of a way to fundamentally change it and make it more fair than it is. Ninety-nine percent of the people charged are guilty as heck. What I worry about are those hardest cases where there is that risk that good people will fall in love with their own facts and with their own cause.

Thanks.

MR. WITTES: Thank you.

I want to start with your empirical contention. Jim says 99 percent of the people prosecuted in the criminal justice system are guilty. What, in the two of your judgments, is the real number?

MR. TAYLOR: I don't know the real number, but there has been some research that suggests it's higher, that 99 percent is kind of optimistic, and chapter 23 of our Duke book goes into some of this. Professor Samuel Gross of the University of Michigan has done more and more rigorous studies, and he calculates that 2.3 percent of all prisoners sentenced to death between 1973 and 1989 have been exonerated and freed. Professor Michael Risinger of Seton Hall Law School has a somewhat higher estimate.

Now these are estimates one can argue with because, well, what's exonerated exactly? Does that mean that there was a reasonable doubt? Does that mean it was clear they didn't do it?

I think in a way it doesn't matter how we ultimately resolve the question you raise, Ben, as long as we can agree that there is enough of a problem so that we should look to see how to solve it. On that front, just a few factoids, I think it begins with police. Remember, prosecutors almost always come into cases after police have been in them, and police and prosecutors are from different backgrounds.

The Mollen Commission in the early 1990s in New York City studied the problem of what's called testilying -- Alan Dershowitz helped popularize the term -- by police officers and concluded that many otherwise honest police officers "commit falsification to serve what they perceive to be legitimate law enforcement ends. In their view, regardless of the legality of the arrest, the defendant is, in fact, guilty and ought to be arrested," and there are a litany of manufactured tales.

Joseph McNamara, former police chief of San Jose and Kansas City said he had "come to believe that hundreds of thousands of law enforcement officers commit felony perjury every year, testifying about drug arrests."

Now these aren't people who set out to frame innocent defendants, but they are people who don't mind manipulating the truth some to get at people they think

are guilty and, in the process, get some innocent people.

In a way, I think part of the problem is our defense lawyer culture. I talk to prosecutors who say, basically, you know that in every case the defense lawyers are going to not only say their clients are innocent but are going to accuse us of all sorts of terrible misconduct and that are going to seize on everything we give them and that therefore there is something of a temptation to fight back in kind.

I think this may help explain why, as Steve says, the problem of prosecutors playing games with the law to withhold exculpatory evidence from the defense is rampant. I think this happens in I don't know what percentage of cases, but it's very common. I've seen it very often. The rationale is, well, you could always argue about whether the Supreme Court case law, the Brady decision or whichever means that this one is exculpatory or not, and people draw some ridiculous distinctions.

There are reforms we can do, and I won't detail them, but grand jury reforms, requiring grand juries to hear exculpatory evidence, for example; requiring the prosecution to allow defendants to testify to grand juries if they so choose as is done in New York; sanctions to prevent the manipulation of DNA evidence by allowing defense lawyers to be present whenever prosecutors meet with their DNA experts.

Did you know that the FBI has a policy against ever recording witness interviews? Why would they have a policy like that? What could be more

reliable than a tape recording?

Well, the FBI might tell you the reason for the policy is it's inconvenient to have a tape recorder sometimes. Fine, you can have an exception. But I think the real reason is that it's easier to pretend that what was said is a little different than what would be on a tape recording if there is no tape recording. I think there is something to be said for laws requiring the tape recording of witness statements when feasible.

There are a lot of other reforms that I think could be done that would minimize the problem, whether it's 1 percent innocent, whatever the percentage is, that don't really carry very high costs. Obviously, there are some reforms you could have that would really inhibit the ability of prosecutors to do their jobs, but there are a lot of others that I think are relatively cost-free that would make it a more honest system that would protect innocent defendants.

I'd focus there rather than on trying to figure out, rather than say averaging the views of our two other panelists as to how common misconduct is.

Thanks.

MR. WITTES: Steve, I'm curious for your answer on the numerical. You said that prosecutorial misconduct is more the norm than the exception. The consequences of it are what?

Is it that as a result of misconduct a certain number of convictions are easier than they should be but the people are still guilty or is it that a large number of

cases, a larger number than 1 percent or a large number objectively are people who shouldn't be in prison at all?

Your cases, every time I call you, you've got a new outrageous case, and I look at the transcripts of them and they are outrageous. But I suspect that you get an atypical collection of cases because people know who you are and they know that you're the guy that can undo big problems. So I'm curious, how representative are the percentage of innocent people that you come to represent?

MR. BENJAMIN: Was that one question, Ben?

MR. WITTES: Well, it was about five but thematically linked.

MR. BENJAMIN: Your first question, what are the consequences?

MR. WITTES: No, numerically, the consequences. I mean is it 1 percent? Is it 5 percent? Is it 60 percent, people who are in prison who shouldn't be there because of this problem?

MR. BENJAMIN: Before I deal with that, I want to say that perhaps the most important consequence is when you have prosecutorial conduct, when you have misconduct by the police, when the police lie and people know that they lie, when innocent people are convicted, when you have this sort of situation, the consequence and the most important consequence is distrust, the creation, the establishment of distrust of the criminal justice system.

This distrust is nothing new in certain subpopulations of this country where people fear the police, run from the police and, if they sit on juries, will never

believe a police officer. This is a very ingrained, institutionalized distrust.

The lesson of Nifong and Duke Lacrosse is that if it can happen to these people, these Duke Lacrosse players, these stellar model citizens from these fine families, then certainly it can and certainly it does happen to everyone else, and so when you have distrust.

The criminal justice system requires trust. It requires and relies upon our trusting it so that we don't take the law into our own hands, so that we cooperate with the authorities, so that we buy into the presumption of innocence and the determination of guilt. So that's the biggest problem.

The reason that's the biggest problem is because the answer, the quantification of the consequences is absolutely impossible, absolutely impossible. It will always be completely unknowable, how many innocent people are convicted. Is it a small number? I don't know. Is it a large number? I don't know, and we will never know.

Until 1989, when DNA came into the court room, it was a joke that there were innocent in prisons. You know that was always just a snide remark often made to judges and juries or to appellate courts about the prisons being populated by innocent people until the work of Barry Scheck and the National Association of Criminal Defense Lawyers and the establishment of the Innocence Project. We discovered, in fact, that there are innocent people in prison.

That fact alone should be alarming. I think trying to quantify is a hopeless

and misleading endeavor because we know that the existence of human biological material, at the present time, that's DNA -- we're limited to DNA -- does not exist in any dispositive way in very many cases at all. DNA, of course, is left everywhere, but rarely is it situated in a case that it can help determine guilt or innocence. But in those few cases where it is dispositive and where it has been preserved and can be tested, we find that there are a disturbing number of people who are absolutely innocent, and that quite frankly, I think, is enough beyond quantifying.

I agree really with everything that Jim says, but that leads me in a different direction. People are human. They will make mistakes. They can be very dangerous.

Although, ideally, justice is a result, it is the accurate determination of guilt and an appropriate punishment, because justice is and will always be administered by human beings, there will always be mistakes. So that's why our concept of justice must include the process, and so it must be a mechanism, a reliable mechanism. That's what justice must include. It can't just be result-oriented. It has to be this reliable mechanism. Because we are a people governed by principles of fairness and constitutional constraints, it also must be fair.

My concept of justice in every case is the fair and the reliable determination of guilt or innocence. If you accept that, if prosecutors and defense lawyers alike can accept that and not be so result-oriented, then I think our chances of making

grave and perhaps fatal mistakes will decrease.

Jim talks about prosecutors, and he gives examples of prosecutors and police who are absolutely convinced that they have the right person, and so they do what they must in order to obtain justice. That's the wrong kind of justice because that's these people, who are human, substituting their belief for the process that best ensures justice, and that's where you get willful blindness.

Where you have a concluding thought on this is that we can't let our belief in our own correctness blind us to the facts and prevent us from doing an exacting investigation and questioning every aspect of our case. We can't afford that because we'll make mistakes.

If we get in that position where, as a prosecutor, we think I know I have the serial rapist. This is the guy, and he's dangerous. If he gets off, he's going to rape and kill again. I can't give this information to the defense because he'll muck it up.

The problem is if you find something troubling in your case, the law already provides the remedy. There is no ambiguity under the law. You must disclose it to the defense, and then we leave it. Once we have the facts on the table, shared and proved and known by everyone, then the adversary system can take over once the facts are on the table. All the facts are on the table, all of the facts. Either the truth will be obvious or it will be the product of fair and reasonable inference influenced by a presumption of innocence.

MR. WITTES: Please.

MR. COMEY: What I struggle with, I think we agree, maybe with different assessments of its magnitude, that there's a problem. The statistic that 2.3 percent of people sentenced to death were exonerated doesn't shock me. In fact, it's because I've spent so much of my life in the criminal justice system that I have concerns about the death penalty because there's no undoing it.

The challenge is what do you do? Okay, you're a police officer or a prosecutor working on case. A six-year-old child has been kidnapped, raped and brutally murdered. The police arrest a suspect based on a tip from a neighbor, and they bring that person in.

You can hope. You can put yourself in that room as the prosecutor and think about what's happening to you in ways you don't even notice. This guy killed this kid. I have to make sure he doesn't kill another child. You can feel the rock resting on that prosecutor.

I think one of the things that we ought to think seriously about in this country and I know a lot of people are already talking about is making our identification procedures better, introducing, which I find very interesting, the sequential lineup. There's a big difference. There are experts at this table but none in the room.

One of the problems of the typical six headshot photo spread is that the witness again knows that they are there in connection with someone who killed a

child. The pressure is excruciating on that person to pick one of those six and say they did it. Try to put yourself in that witness' position, looking at that card, saying no, it's not any of them.

How do you resist that? One of the ways you help people resist it is you show them a stack of photos one at a time, so they are not looking at a group, knowing the killer is one of these six. Instead, they're shown a set.

The second technique that may be very, very important to identification procedures is double-blind, having the police officer who's showing that stack of photos be uninvolved in the case and not know who the suspect is because that police officer who is showing that photo spread has children and he wants that guy in jail. As good as he may be, there's going to be a risk that even when he does a stack, he holds that one photo a little longer and shows it to the witness or when she or he misses it, he says, are you sure about this, and then puts it back.

Is he evil? No. He's a person like we are, and he's trying to do the right thing.

So I think we need to think about individual things we can do to reduce that risk. We are never going to get out of the criminal justice system the risk of innocents being punished. We are just not gonna.

MR. WITTES: I'm curious specifically for your thoughts on Stuart's ideas of having rules requiring presentation of exculpatory material to the grand jury and potentially also a right of defendant testimony before the grand jury or pre-

investigative target testimony.

There is a sort of cultural gulf between prosecutors and defense lawyers on ideas like this. To what extent are they viable and if they're not, what's the problem with them?

MR. COMEY: I'm not sure that requiring the presentation of exculpatory evidence to the grand jury solves your problem. It simply moves the problem that Steve has talked about a little earlier in the process. The pressures are still going to be there, maybe more intense at that point, to not do it or not do it as completely as possible.

I think the answer, and it's not a perfect answer, is to strictly enforce and send messages of deterrence the obligation that they have at the trial phase and the discovery phase. Again, it's something I don't know a whole lot about. I think the federal grand jury system is very different from a lot of state systems, but that's my reaction to it.

QUESTIONER: How about getting us in the act here. We're chomping at the bit here.

MR. WITTES: Let's do that. Let's do that without further ado.

QUESTIONER: Can I start? My name is Bruce Smith, and my experience is as a father of a prosecutor.

My son is a little bit like Gary Cooper. I can't really extract much out of him, so I draw lessons from here when I'm visiting him. He's on the phone, and a

cop calls, well, can we charge him with this category or that category or the next category?

I extract this kind of thing, and the picture I come out with is more on the humdrum level of justice. You start with the notion that the DA, and I'll try to be quick. I don't want to go on too long here.

The DA is elected in this county. What's good about it is that this guy is totally unpolitical. It's a Republican county, but he's made clear to all of his staff, no politics. That's good. What's bad is that he said, we prosecute everything.

I told my son I worked for Bob Morgenthau one time, and Bob never prosecutes anything unless he's going to win. In this county, they prosecute anything. So don't get in any trouble.

Now they prosecute a lot of stuff which amazes me. Why are they prosecuting it?

One time, my son did a lot of sex cases. Some grandfather touched the genitals of his grand-daughter, and the family got mad at him, and they threw it into court. They prosecute everything. My God, this wasn't a rape. This wasn't abuse. Why are you prosecuting?

Because it's the law. There are too many laws. Everything is illegal in this country. We have an unbelievable number of laws. They have to prosecute, so they prosecute it.

How does the whole thing work? The only thing that makes it work is that

my son negotiates everything out with the appointed defense counsel. If they had a guy like Steve, I don't know if the system would work. But he and the defense counsel, who's court-appointed because they're all poor people who are there, they decide, well, let's make this plea this degree of severity, and that's what they come out with.

If they go to trial, it becomes tough. It's almost impossible ever to convict anyone because the juries want to have cold case evidence. They want DNA or something, and in this county you don't have DNA. So it's hard to get juries really to convict even though they want to convict everybody. That's the humdrum level of justice.

MR. WITTES: It raises an important question. Plea bargains, do they mitigate the problem or do they accentuate the problem?

Is this a situation where you're under so much pressure to protect your client from the worst that the system can deliver, that you're forced into a plea irrespective of failures of disclosure or the merits of the case or is this a situation where it can be a way to back people out of that situation?

MR. COMEY: I don't know that they're part of the problem. I really do think the problem is at the margins, incredibly important margins and, as I said, in the most difficult cases.

I once had a police officer friend of mine say, look, I don't have time to pursue the innocent. I got so many guilty people to deal with.

I don't think, and maybe I'm wrong and Steve will take a different position. I don't think that there's any kind of systemic problem in the dozens and dozens of small drug cases, of purse snatches, of credit card fraud, of these kinds of things.

I think the issues are -- I know it's the high end or the low end -- those where the stakes are highest and the pressures on the participants the greatest, and those tend to be the most horrific crimes which, thank God, are a small proportion but an incredibly important proportion.

MR. WITTES: But they're also the cases where because the potential state sentencing lines are so high, the defense has a huge incentive to plea if you could.

MR. COMEY: Right.

MR. WITTES: I'm wondering, from your perspective, Steve, is the availability of plea as an option, does that cause a lot of prosecutorial excess to disappear because you guys have so much pressure to plea that it disappears beneath the plea?

MR. BENJAMIN: Generally, plea bargains are an absolutely necessary and appropriate aspect of the criminal justice system. This is why I always return to the essential role of facts in any criminal case because the facts will determine the outcome of a case as they should. This is very elementary.

That's all I want to know in a case is what are the facts. My client will be one source of the facts, and I hope he will be truthful with me. But I want to

know the facts, and the facts will dictate the outcome. Many, many times, that outcome will be a negotiated resolution, and so that's a very appropriate way for the criminal justice system to proceed.

It can be perverted, however, in this sense. In Virginia -- this is unique to Virginia -- if you take a jury trial, the jury does the sentencing. That means if they convict, a jury, unlike a sentencing judge in Virginia, is required to impose a minimum range of punishment. If you take a judge, he doesn't have the minimum range of punishment. And so, there is an incentive there to either relinquish your right to a trial by jury or to plea bargain.

In the federal system, the federal system, I think, works better than certainly the system in Virginia because you are not forced by sentencing disparities to take a judge over a jury, but the consequences of exercising your right to go to trial can be so severe that plea bargains are more the norm than they might be. But, overall, I don't think that plea bargains are part of the problem, no.

QUESTIONER: Basic understanding of the crime, there has to be an understanding of what you're about to do is common knowledge that it is criminal to do it and to do it anyway. That's kind of my understanding of the situation, but laws change.

For instance, there was never a category for rape called date rape until the last few years. Thirty-five years ago, I had a date, and I had reason to believe that the girl complained and that later she took her own life. I think that that denied

me a chance for a trial.

So since then, they've changed the laws, and I've had my house arsoned. I've had drugs planted on me. I've had numerous things like this happen to let me know that circumstances are not right. I even had a ruse marriage and the attempt to take it towards, well, in any case.

I'm not able to get an attorney. They all turn their back on me. I never deceived anybody. I never had any unfair advantage. The law was never written that way.

Today, the women are getting into the prosecutional side of the equation in big numbers, and the key word to them is safe. I have to feel 100 percent safe, and I'm really responsible in any way for my behaviors.

MR. WITTES: Is there a question coming?

QUESTIONER: Well, just, I guess more of a statement, and I may be responsible in some way for this Duke situation but not intentionally.

MR. WITTES: Yes. Do you want to?

QUESTIONER: Let me make a couple observations based on three and a half years directing the Innocence Project in North Carolina before I came to Washington.

One is that is a part of the problem a lack of any kind of effective oversight on the prosecutorial and, in effect, the judicial system and a lack of checks and balances built into the system itself, which we have working and at play in our

government generally?

As an example, I read one study of prosecutorial misconduct. In all of the reversals of cases based on that by higher courts, not a single prosecutor was ever named in one of the documents, not one of the court documents reflecting on prosecutorial misconduct.

Another was in looking at many, many cases -- and I disagree, Jim, with you on this -- I think the greatest abuses may be in the very marginal cases, the cases where people have no money; they have no clout; they have no influence in the system whatsoever. They are, in fact, given defender systems of some kind, court-appointed attorneys.

There is almost, in those cases, no investigation of any kind whatsoever of the facts of the case, no independent investigation of the facts of the case. There's no opportunity to discover those undiscovered things or those things that are not turned over. That is, I think, a check not built into the system, a lack of oversight in the system where you, in fact, have an effective defense coming into the process and looking at whether there is any evidence that is not being put forward.

MR. WITTES: Stuart?

MR. TAYLOR: Those are very good observations. One thought they bring to mind, there was one good law going on actually in North Carolina in the Nifong case. It's thought of as a case where everything went wrong. One thing went right. North Carolina had passed a law called an Open File Discovery Law

as a result of other cases of prosecutorial misconduct. I think they passed it in 2004.

What it basically says is on top of the federal constitutional right for the defense to see all exculpatory evidence, and we've talked about how prosecutors can play games with that, North Carolina law requires the prosecution to hand over every piece of paper in their file, all of it to the defense so that there isn't any game-playing about what's exculpatory, what's not exculpatory and also there's not the ability for prosecutors to bluff that they have a smoking gun up their sleeve when they've really got nothing and maybe extort a plea bargain based on that kind of a bluff.

That law had a lot to do with why this case turned out right. It was actually what gave me confidence early on when I got access to this file, the prosecutor's, that they really did have nothing.

Jim mentions on grand jury reform, that it may just displace the problem of what's the prosecutor to disclose later in the process. I would submit that there's a lot of value in bringing earlier, as early as possible into the criminal process, some check on the prosecution when prosecutors do go bad or when they're just overzealous.

It's amazing from the Duke case how you can ride this all the way up to a trial and then maybe through a trial if you're willing to poison the jury pool with a lot of bad publicity, if you're willing to cheat at the trial. But in the Duke case,

the evidence of the defendants was apparent to me almost a year before the case was over, and the prosecutor was able to keep it alive for almost all of that time.

One reason he was able to keep it alive was the grand jury was a rubber stamp. If the grand jury had known everything that I knew at the time the grand jury passed the indictments, there probably wouldn't have been any indictments.

Thanks.

MR. WITTES: Let's go to Clive and then Bill.

QUESTIONER: Just a brief foreign perspective if you might find that interesting, I'd be interested to hear how you respond to it.

One of the things that surprised me as a Brit moving to the U.S. and beginning to read about these criminal cases is the reliance on plea bargains. I was a bit surprised to hear Steve say that he thought that was a vital and indispensable part of the criminal justice system.

There are no plea bargains in the British criminal justice system. Let me just say we've had many huge miscarriages of justice, especially in terrorist trials. So I'm not saying our system is better, but I am questioning the observation that you can't get by without plea bargains. The British system does.

Moreover, given the savagery of the sentences available to courts in the U.S. for, as it were, maximally prosecuted cases, it seems to me that the plea bargain regime gives prosecutors incredible power to get people in prison one way or another even if they can't prove the case they first thought of.

Two other very fast observations and then I'll shut up. Recording of witness statements has been required in Britain I think now for 20 years. So I think that is something that is a relatively straightforward reform and would be very desirable under Steve's list of just equipping the defense with information.

The other thing that shocked me in listening today, I don't know how widespread this is, but to hear that in Virginia at least the prosecution doesn't have to disclose its witness list to the defense. That's extraordinary.

MR. WITTES: Or anything else, actually.

QUESTIONER: I mean what possible rationale is there for that?

MR. BENJAMIN: I still don't have the Cox file. After all of this, I still don't know the original police report. I mean that's the law in Virginia, the exact opposite of North Carolina. They are not required to give us anything, and that is a very serious problem.

MR. WITTES: But I'm curious, actually, to put a question back to you. If you don't have a regime in which you can plea bargain, what is the mechanism either for the authorities to flip a defendant in a situation in which there are multiples?

Like in a terrorist trial, you get one. You cut one a deal, and you get a lot of information about the others. What's the mechanism for that?

Also, how do you avoid a situation in which every indictment goes to trial? At least in the context of this country, it would be intensively resource-

consumptive.

QUESTIONER: Well, the prosecutors have to make a decision whether to press a charge, and sometimes they decide not to. Sometimes they decide not to proceed with a case.

But if they decide to proceed with a case, they make that charge and then they have to make it stick. There's no process of negotiation with the defense and no brokered agreement involving the judge in the case. The CPS, the Crown Prosecution Service, has to make a charge, and then that's it. They press that case, and it's win or lose.

QUESTIONER: If you're elected, it's a little hard not to prosecute because your opponent will say you're soft on crime.

MR. TAYLOR: I'd be interested, Clive, in one other aspect of the British system. I've been struck and was struck when I was practicing law a long time at how system lends itself to manipulation of facts and truth by such mechanisms as so-called preparation of witnesses which often has a little flavor of supporting perjury.

I've been told a long time ago -- maybe it's not still true -- that when British lawyers hear about how we prepare witnesses to testify in this country, they're shocked and that, in general, the British system is less adversarial and more truth-focused than ours is. My impression is if that's true, that's a good thing. Am I on the right track here?

QUESTIONER: I think you are. The curious thing is that Brits think of their system as highly adversarial, right. The Brits compare their system to the French system which is inquisitorial and has a very, very suppressed adversarial element. We think of our system as adversarial, but it's nothing compared with the U.S. system.

There's no grooming of witnesses in the British system. The police conduct the interviews. They're required to give all the information that's disclosed in their investigation to both sides, and the witnesses are examined for the first time by the prosecution and defense attorneys in the court room, in the trial.

MR. WITTES: Bill?

QUESTIONER: Well, I have a question for Stuart, but let me preface it with a statement.

Mr. Comey, you're pretty close to my ideal of a public servant, and you said something in your opening statement that was so important that I wrote it down verbatim, and I'd just like to play it back.

MR. COMEY: We shouldn't tape these things.

QUESTIONER: It's of wider significance. You said, and I think I quote: "Human beings are at their most dangerous when they are sure that their cause is just and that their facts are right."

That's important in considering the criminal justice system. I would

suggest that it's equally important in considering our constitutional system as a whole and the making of policy, domestic and foreign. It goes pretty close to the heart of the way we ought to be thinking about our institutions more generally, and it illuminates some important contemporary debates in my opinion.

I'll just leave that there. Now, here's my question for Stuart.

Stuart, as you know, while I'm now a Senior Fellow in Governance Studies at Brookings, in my previous life, I was a university professor, for a while a dean, and I now sit on the board of something called the Kenan Institute for Ethics at Duke University which focuses on institutional ethics.

The story that you and others have told raises questions not only for the criminal justice system but also for other citizens and responsible officials who have to orient themselves vis-à-vis the ongoing criminal justice process and frequently make decisions, statements, take actions in response to that.

What does your story and the other stories that we've heard suggest to you about the responsibilities of university administrators and also, if you care to comment, the media in the face of the vagaries of the prosecutorial system that you and others have been talking about?

MR. TAYLOR: Good question.

First, this isn't our focus today, but the book, I think, documents outrageous behavior on the part of most people in media who covered this case in the earliest stages, ignoring evidence of innocence, rushing to judgment on guilt; and

outrageous behavior on the part of dozens of extreme left -- I don't call them liberals, I call them extreme left -- Duke professors, of whom there are many, in terms of rushing to judgment, forming essentially a lynch mob motivated more by class hatred of the lacrosse players than by evidence and continuing to act as a lynch mob after the evidence of innocence poured out; plus, in my view, cowardly behavior by the Duke administration for fear of crossing these far left professors or also for fear of perhaps a riot or other violence in the community.

So this was an extraordinary case. I think one obvious thing is don't take what prosecutors say at face value necessarily.

One thing Duke did was they suspended the students from Duke after they were indicted for rape. Some people say isn't that outrageous and violates the presumption of innocence? I don't say that. I can understand why they felt they needed to suspend the students, why they felt that women on campus might not feel safe otherwise.

Some people say, why didn't they rush to the defense of their students? Well, I don't say that. I think they were entitled to let the process.

But what I do fault them for, the administration in particular, was first they stood by silently and watched outrageous misconduct by the prosecution against their students happening right in front of them and said nothing by way of objection. They watched outrageous violations of due process and said nothing, and they piled on. They smeared their own students with misleading statements

about the lacrosse team and they did it, I submit, to kowtow to the mob, not for any better reason.

There is a danger of overreaction. I was talking to a friend who is a general counsel of a major company after our touch football game last weekend, and he had a different attitude. He said, this case ruins lots of things. For example, when we have people who work for us, who get involved in misconduct, get criminally charged, and we want to fire them. Now they can say, but it may be a Nifong. You can't fire me.

And so, the presumption of innocence is a complicated thing. I think Chief Justice Rehnquist once said, well, it's a just a rule of evidence, and there's something to that.

I think there isn't any easy formula. You don't really treat everybody as innocent for all purposes until the day they're convicted and it's affirmed. You can't run a society that way, but we've been way too quick, and the Duke case illustrates that people are way too quick to give an unjustified presumption of correctness to prosecutorial and police charges.

MR. BENJAMIN: Can I add something? I just want to provide maybe a little balance to some of the things that have been said in the room.

We can't forget that there are real predators out there who scare a lot of good people. One of the real challenges of being a local district attorney is getting that lady who lives on the corner, with the two kids, to testify about the

drug dealers who shot her dog because she's afraid of them in a whole lot more serious circumstances. One of the reasons that prosecutors are very concerned about turning over witness lists and witness statements is that lady and her kids.

How do we get people to come forward and testify about the real predators? We have an orders of magnitude for different predators in this country than you do in Great Britain.

How do we run the system that way?

The devil is really in the details, and serious people need to drill into those details. It's very easy to talk at the 40,000 foot level, but when you get down there with the lady living with the two kids on the corner, how do we strike the balance between having the fairest system in the world and making sure the guy who scares her to death is taken off the street without her losing her life or her children's lives? That's really, really important.

Another small detail, I'll just throw out at you. When the FBI did the 9/11 investigation, they interviewed thousands of people. Which ones do you want taped? Do you want them all taped?

Sometimes in a white collar case, they'll interview somebody five times. Do you want all of those taped?

You might say no, just when people are confessing. Well, how do you know when they're about to confess?

This is really hard stuff. If you want rules, you need to drill in and think.

Again, how do we allow law enforcement to do what we want them to do and, at the same time, achieve some of the broader goals that people here care about?

MR. WITTES: Jonathan?

QUESTIONER: Thank you. This is fascinating. I have a question for Mr. Comey. I'm Jonathan Rauch, a colleague of Stuart's at *National Journal*.

I've occasionally sniffed a little bit around the criminal justice process in writing articles. I want to throw a hypothesis at you and see if you think it's true, false and, if it's true, what to do about it.

That is the problem, to the extent there is one, is not primarily individuals. The quality is pretty good. Nor is it integrity. Most of that is pretty high. It's incentives.

If you're a working prosecutor, day after day, the incentive is to rack up successful convictions. There's overwhelming pressure to protect those convictions but virtually not incentives to admit to a mistake if you think you've made one. In fact, if anything, you're likely to be condemned for that or even thrown out of office if you're elected.

Is there an imbalance of incentives and, if so, what to do about it?

MR. COMEY: That's a fair comment. I guess I don't know for sure. I think there is a strong case to be made that there are a lack of counter-incentives. That's why I said I think it's important that judges enforce this, the disclosure rules, the obligations of the prosecutor and that people's names go on opinions, if

misconduct is found, to send those messages.

I think what's more likely in real life is not that people are focused on the embarrassment of tanking a case but that when you're a prosecutor, you start to think everybody is guilty because everybody is in your life. I don't mean that literally.

If you're a prosecutor, remember, you come up through the ranks, and it's just case after case after case after case. It's probably a little bit of what afflicts Steve. I think you do have a very important niche practice. You've got a lot of innocent people coming to you for help.

The prosecutors, growing up, it starts to warp your view of the world, and it becomes harder for those inferences of innocence to enter your consciousness. Again, add to that, as you grow up as a prosecutor, the pressures of the big cases.

I don't know what the answer is, but I think part of it is training which I talked about and using some of the existing mechanisms of the criminal justice system to send counter-incentives.

MR. WITTES: But there is one big incentive that's out there for the overwhelming majority of prosecutors in the United States, at least the overwhelming heads of prosecutorial offices, which is electoral pressures, which we don't have in the federal system and I think speaks exactly to Jonathan's point. How big a problem is it that even the average good DA does have to think about it's going to play in November?

You wrote, Stuart, about Nifong's incredible abuse in that area, but to what extent does Jonathan's point about effects on a much more average group of prosecutors at the level of the most basic incentives that they have?

MR. TAYLOR: I can address that.

MR. WITTES: Yes, please.

MR. TAYLOR: I think Jon is absolutely right, that there's an imbalance of incentives. It begins, first, with the fact that concealing the troubling aspects of your case as a prosecutor increases the likelihood of a conviction. Obtaining convictions, especially of people who are perceived, maybe correctly, maybe not, as very dangerous, bad people results in public acclaim, promotion within your office or continued election to office, perhaps then to a judgeship. So there are great incentives to obtaining convictions, and those convictions are easier to obtain if you keep the blemishes of your case to yourself. That's number one.

Number two, discovery of favorable information that you withhold is really very unlikely. If you, as a prosecutor, decide to conceal exculpatory information, then discovery of that fact is unlikely because the law charges you, the prosecutor, with the duty to determine if something is truly exculpatory or not. If you decide, no, it isn't exculpatory. I've decided it's not exculpatory, so I therefore have no duty to disclose.

Then there's no reasonable likelihood that anyone is going to find out that you withheld this, and that's because of privacy rules that increase each year with

legislation, ensuring greater privacy of records, perhaps appropriately so, but that's a barrier to determining what was withheld. Discovery rules that limit access to police records such as we've alluded to in Virginia, and so discovery is unlikely.

Also discovery, when it does occur that material has been improperly withheld, is generally meaningless and that's because of the jurisprudence that governs post-conviction remedies. The mere fact of nondisclosure of favorable information to the defense is not in itself sufficient to invoke a remedy. Instead, it must be material. It must be of such substantial weight relative to everything else that it would have resulted in a different outcome had it been known.

What all this means is that it's really a very safe gamble for the prosecutor. There's an incentive, and it's a safe gamble that you'll never be discovered or even if discovered, that the results will not change.

MR. WITTES: In that account of the incentive structure, actually, electoral pressures barely figure into it.

MR. TAYLOR: Well, it's part of the encouragement. You are not encouraged by the electoral system, by even the appointed system, in the U.S. Attorney system or by any fact of the criminal justice system. You get greater acclaim through convictions. There's just no doubt about that. That's your job. That's perceived as your job.

I wish, you don't know how much I wish we had more Jim Comeys as

prosecutors, but we don't and why is that?

MR. BENJAMIN: Look at how well I've done, just pulling the plug on case after case.

MR. TAYLOR: If the prosecutorial system were serviced by Jim Comeys and people who believe and act as he does, we would not have these problems.

MR. COMEY: Tone at the top matters in all organizations.

MR. TAYLOR: Absolutely.

MR. COMEY: I was trained in the U.S. Attorney's Office in the Southern District of New York, and it was beaten into me as a young prosecutor that we would rather walk from 10 cases than risk you bringing a case that is not righteous. That was the term they used when I was a young prosecutor. It was just beaten into you. That's who we are. That's our culture. You will damage this institution if you ever. That's a special place to grow up as a prosecutor and made a big difference in my life.

I think it's really important for all prosecutors to send those messages because, you're right, nobody gets elected pulling the plug on cases. People get elected by protecting the community, and there is a real need -- wee can't ever forget that -- a real need to protect the community.

You do need to send messages to your troops like wise Toyota, the greatest motor company in the world, because they celebrate someone who raises their hand and finds a mistake. They hug them. Bless you, you found a mistake. Let's

get it out of the system. That's the kind of attitude leaders and prosecutors' offices need to have. We will celebrate those who raise their hand and express a doubt.

MR. WITTES: Yes.

QUESTIONER: My name is Kathleen Brandon.

MR. COMEY: I have to go in a minute.

MR. WITTES: We'll make this the last question.

QUESTIONER: I am a prosecutor for the last 21 years in the U.S. Attorney's Office in Washington, D.C., and in that capacity I served in a number of different sections including prosecuting sex offenders for four years, civil rights cases which include excessive force cases against police officers for six years. Most recently, I'm on a detail for the Office of Professional Responsibility where I investigate prosecutors against whom allegations have been made around the country for the Department of Justice.

You had asked a question about whether it would help to let defendants speak and testify in the grand jury and also produce exculpatory evidence to the grand jury.

Within the Department of Justice, the policy is that you do produce exculpatory evidence to the grand juries. You do. You also hope, actually, that a defendant will come and testify before the grand jury. In fact, any prosecutor worth their salt is going to want the defendant to testify before the grand jury so

that you have the opportunity to find out what the defendant is going to say and what evidence, what the defendant's testimony is going to be and what evidence they may be producing.

The requirement to produce exculpatory evidence is actually included in the U.S. Attorney's Handbook unless that's been recently changed. I know it may not be like that for states.

MR. TAYLOR: Yes, it's very different in a lot of states.

QUESTIONER: There was another comment I wanted to make. Oh, I disagree, at least in Washington, D.C. and U.S. Attorney's Offices around the country, that prosecutorial misconduct is pervasive. It's been my experience that while there may be certain individuals who may, as Mr. Comey said, be convinced of the guilt of the defendant or, as the other speaker noted, be ambitious and make their reputation on the number of wins.

It's been my experience that actually the predominant value of the Assistant United States Attorneys whom I've encountered, that value has been to see that justice is done and the truth comes out, which is in keeping with the oath that you take. I do recognize, in all honesty, that there are exceptions to that rule, but I don't find it at all pervasive in the federal system.

MR. WITTES: Let's actually end with that question. Is the federal system different from states systems? Does it function better than state systems on these questions or is it, as Steve said at the beginning, just as much a problem in the

federal system as in the state system?

I'll let you each address that briefly, and then we'll wrap up.

MR. COMEY: Do you want to start with me?

MR. WITTES: Sure.

MR. COMEY: It's hard for me to say. The federal system is entirely different from the state system. There's virtually no mandatory jurisdiction except in D.C. U.S. Attorneys can pick their cases in a way that a state prosecutor can't in many senses. One of the great strengths, though, of the federal system is that the prosecutors and the investigators work together from the very beginning.

It is very different in most state systems. In most state systems, the police officer takes the case the first 50 yards and hands it to the prosecutor at the 50-yard line. The prosecutor then carries it the rest of the way.

In the federal system, as the FBI used to like to say, you people want to be in the end zone with us and travel the whole distance. That's a strength because a case is investigated not only with an eye towards presenting it at trial, but there's another set, a unique set of interests that come into play, the ethical considerations of a lawyer, the disclosure obligations of a lawyer, and that -- infects is the wrong word -- suffuses all over that case. I think that's a strength.

I think federal prosecutors tend to encounter far fewer of the hardest cases. Again, the sexual assaults, the murders, the child murders, things like this, very few of those are done in federal court. So I think that's an important difference.

MR. WITTES: Steve?

MR. BENJAMIN: I think it's impossible to say because state laws vary so dramatically and state systems from state to state as they're designed to in the federal system.

I think also, as Jim alludes to, the federal authorities have greater resources and fewer cases. They are not as inundated as our state and local prosecutors and police forces are with the huge amount of crime and the caseload challenges.

So my answer is I really can't say, and I don't know that we ever can. My own experience is that the federal rules of discovery are fairer and accord greater disclosure of the facts to the participants than the rules that exist currently at least in Virginia but, as I say, it's going to vary. So I really can't say.

MR. WITTES: Stuart, Nifong presumably not imaginable in the federal system? How much lower do you have to go or maybe I should say how much higher do you have to go before you could imagine some level of abuse in the federal system?

MR. TAYLOR: I think there have been some serious abuses, but certainly Nifong's whole need to be elected wouldn't have existed in the federal system. It's not the politics. There are those that think Rudy Giuliani behaved badly in order to raise his profile when he was U.S. Attorney for the Southern District of New York, and I've seen cases that I think add something to that.

I have two closing remarks. Jim Comey raises two very valid objections to

reforms that I suggested. Open file discovery, Jim points out there's a witness intimidation problem. He's right, and I think it's a matter of fine-tuning. I think you need an open file discovery law that has an exception for witness intimidation issues.

How many interviews do you want to record? Do you really have to? Does every police officer have to turn on a tape recorder every time he ever talks to anybody? Well, of course, but I'd love to see a rule where whenever he's recording something that's critical to a criminal case or not recording it, the judge says, did you tape record it and, if not, why not? I'd like to see that question answered in every case.

It's a matter of fine-tuning, and I think we'll never reach a consensus on how big the problems are, how many the problems are, but I think there are some issues on which we probably could reach consensus about how to try and minimize the risks.

MR. WITTES: Thank you all very much for coming.

(Applause)