



DOJ Called Out For Protecting Corrupt Prosecutors

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The U.S. Department of Justice should end the secrecy surrounding federal prosecutors who commit misconduct and make their names public, a libertarian scholar said in discussing a new documentary screened at the Heritage Foundation on Thursday.

The Heritage Institute, a conservative think tank, convened the panel to weigh in on a new, untitled half-hour documentary by FedSoc Films, a project of the Federalist Society, exploring the views of prosecutors and observers on what can go right and wrong with the degree of power and immunity that prosecutors enjoy.

One of the three panelists, Cato Institute Vice President for Criminal Justice Clark Neily, said one area due for reform is the way findings of prosecutor misconduct are handled at the federal level.

The DOJ doesn't refer misconduct allegations to its Office of Inspector General, as all other federal agencies do, Neily said. Instead, it has a unique Office of Professional Responsibility, whose policy is to withhold information about even prosecutors who have intentionally cheated, he said.

"DOJ doesn't tell us the names of prosecutors against whom it's made these findings. I find that outrageous," Neily said.

He cited one example of a senior DOJ official who recently retired after an internal investigation found he had committed "widespread harassment" and at least one sexual assault.

Although this official was found to have broken the law, and "lacked candor in his statements to the OIG — I don't think I have to translate that for you — they declined to prosecute," Neily said. "His name was not disclosed. He was allowed to retire in anonymity notwithstanding these findings. This is not accountability."

Associate Deputy Attorney General Steve Cook, another member of the panel, didn't respond directly to Neily's point about secrecy but forcefully defended allowing prosecutors to keep the freedom they have to do their jobs, including their complete immunity to civil lawsuits over prosecutions they undertake.

Cook said that there are plenty of checks on prosecutor behavior: Judges can choose to sanction prosecutors who misbehave, and defense lawyers “are professionally obligated to make referrals” to disciplinary bodies if they are aware of prosecutor misconduct.

“Where’s the criticism of the defense bar? I didn’t hear it,” Cook said.

Cook, who was a police officer in Knoxville, Tennessee, before becoming a line prosecutor for 30 years, also noted that a prosecutor’s focus is victims, and he heard little discussion of victims in the room.

The victims’ point of view was also a concern for panelist Shon Hopwood, a professor at Georgetown University Law Center who was once incarcerated for armed robbery. But victims sometimes don’t want the long sentences and total lack of contact with the culprits that are the norm, Hopwood said.

“Victims have not been adequately represented in this discussion,” he said. “But I think, after having talked with a lot of crime victims, that . . . many of them don’t want the long punishments and don’t view that as a solution.”

“Sometimes what they want is a restorative justice model where the person stands before them and apologizes,” Hopwood said.

But instead, excessive prison terms have become a signature outcome in the federal system, Hopwood and Neily said, thanks in part to a Congress that has yielded to the DOJ’s lobbying to institute procedures like mandatory minimum sentencing.

This runaway power to overcharge defendants is often wielded as a coercive method of extracting plea bargains, Neily said.

“There have been regimes that excel in the extraction of confessions from their own citizens. That is not a club you want to be in. We are in that club,” he said.

Neily reminded the audience of Aaron Swartz, the computer programmer and activist who made headlines in January 2013 when he hanged himself as he was facing 35 years in prison for mass-downloading academic articles from the database JSTOR.

“The U.S. attorney’s office’s response in that case was, you know, ‘We offered him six months, so it wasn’t our fault,’” Neily said. “What on earth are you doing threatening a young man with 35 years in prison if you think he only deserved six months?”

Neily told the audience that England’s criminal justice system has a “maximum discount” on the sentence for a plea bargain, set at 30%.

“We should have that, except it should be 10%,” Neily said.

Cook — who acknowledged, like the others, that about 97% of criminal charges are resolved through a plea bargain — said charging severely was “a critical tool in my toolbox.”

A drug dealer facing a 10-year mandatory minimum is incentivized by that minimum to cut ties with the underworld and help the community by cooperating, Cook said.