

HAMMER: In Defense Of Prosecutors

Josh Hammer

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Violent crime in America, despite experiencing an overall dramatic decline since the 1990s, has started to surge back over the past few years. Amidst this distressing social trend, alas, America's erstwhile "law-and-order"/tough-on-crime political party has been ideologically and financially captured by pro-criminal libertarians who ally with the Left to spout hackneyed, outmoded orthodoxies like the alleged (non-)issue of "mass incarceration." The most tangible result of this unholy alliance was the bipartisan 2018 passage of the harrowing First Step Act jailbreak law — a law enactment which President Donald Trump, viewing the murderous early results, apparently already regrets.

Alas, the leftist/libertarian alliance on "criminal justice" issues, just highlighted during last night's Democratic Party presidential primary debate when Sen. Kamala Harris (D-CA) touted her work with Sen. Rand Paul (R-KY) on the crime-abetting issue of "bail reform," continues unabated. Which brings us to prominent libertarian lawyer/legal commentator Clark Neily, who has been on a roll, of late. Neily, who spent years with the rabidly pro-judicial power libertarian legal group Institute for Justice, now works for the equally pro-judicial power libertarian Cato Institute. Neily's title at Cato is "Vice President for Criminal Justice" and, based on his recent musings, he appears to embody the zealous leftist/libertarian jailbreak alliance.

The precise target of Neily's recent ire is the prosecutor. More specifically, Neily is convinced that far too many prosecutors become federal judges — and that not nearly enough criminal defense attorneys become federal judges. In a highly revealing but nonetheless sober-minded recognition of his core readership for such anti-prosecutorial musings, Neily has published on the subject at both Cato and, just this week, at left-wing Slate. The latter piece goes so far as to call for an outright "moratorium" on the nomination of former prosecutors to the federal bench.

I am not a former prosecutor. But I do have the benefit of education at a top law school and the experience of serving as a law clerk for a judge on the U.S. Court of Appeals for the Fifth Circuit. And I believe Neily is severely misguided in his anti-prosecutor crusade.

Crucially, Neily's Cato study makes no attempt whatsoever to control for education, intellect, or legal credentials. To many lay observers, this may seem anodyne — after all, can't former prosecutors and defense attorneys/public defenders, as classes of attorneys, be presumed to have roughly equivalent legal acumens and credentials? Well, no. For generations, gifted law students of all political stripes have seen the prosecutorial career path — be it via the Department of Justice (DOJ), local U.S. attorney's offices, state attorneys general offices, or even local district attorneys — as a prominent avenue for vocational success. The DOJ Honors Program has long

been viewed as one of the most prestigious entry-level attorney tracks in the nation, and scores of lawyers hoping to one day be considered for a federal judgeship have routinely sought U.S. attorney's office experience as a means of padding their resumes and evincing a demonstrable commitment to public service. Again, this holds true for lawyers and judges of all political persuasions and partisan affiliations: As but two prominent examples for those on the Left, 2016 failed Barack Obama U.S. Supreme Court nominee Merrick Garland is a former federal prosecutor and current presidential candidate Sen. Kamala Harris (D-CA) is a former California attorney general.

This is simply not nearly as broadly true for those who pursue careers in the criminal defense bar — be they in private practice or working as public defenders. Leftists and libertarians can gnash their teeth and wail all they'd like, but the reality, as I tweeted last month, is that in no sane world is the median defense lawyer of the same acumen and credentials as the median prosecutor. Representing drug traffickers, gangbangers, and felons in possession of firearms is not a dream job. Again, my claim is that this holds true for prosecutors and the defense bar, viewed *as a class* — obviously, there will be innumerable individual dispensations to such a broad rule, when comparing class sizes of this magnitude. But anecdotally, based on (1) my own personal experience knowing many individuals who have become prosecutors and defense lawyers, (2) my own law clerk experience and thinking back to a comparison of the median prosecutor's brief and oral argument versus the median defense attorney's brief and oral argument, and (3) discussing the issue with other former federal appellate law clerk friends, I feel eminently comfortable making such a claim. We should feel comfortable establishing a rebuttable presumption that prosecutors, considered as a *class*, have superior legal credentials to defense attorneys. Based purely on my own experience, I cannot even begin to count the volume of public defender's office legal briefs I read that were of an immensely shoddy quality.

At a *bare minimum*, libertarians and leftists who would seek to place a *moratorium* on nominating prosecutors to federal judgeships ought to be asked how they can be so sure that they are not sacrificing legal acumen or credentials. I understand that such logic is arguably circular — anti-prosecutor libertarians and leftists could respond that such a moratorium may prophylactically disincentivize smart law school graduates who may aspire for judgeships from pursuing prosecutorial careers. But the salient point is that the general prestige of many prosecutorial career paths is so deeply ingrained in our legal culture. That is not something that can be easily reversed, and I highly suspect the criminal defense bar and its apologists have no particularly compelling argument to offer for how they might be able to do so.

Prosecutors do not write our nation's criminal statutes — they merely enforce them. To the extent leftists and libertarians — hooked as they are on the anachronistic talking points of “mass incarceration” and “low-level non-violent offenders” — have substantive issues with our criminal statutes, they ought to lobby policymakers. By all accounts, considering both state-level initiatives and the aforementioned First Step Act, the pro-jailbreak cabal is quite successful in its lobbying efforts. Pro-jailbreak forces are wrong, on the policy merits, but that is an issue that can be debated in the political space. But it would be dangerous for justice and the rule of law, absent pro-jailbreak forces' ability to overcome the rebuttable presumption about the credentials of

disparate vocational classes, for such forces to also take out their frustrations as part of the judicial nominations process.