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Foreword

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FOREWORD

*Daniel C. Richman**

There is a degree of irony in calling this a Symposium on “The Changing Role of the Federal Prosecutor.” In perhaps its most important aspect, the role of the federal prosecutor has not changed at all — or, at least, we do not want it to change. At its core, the prosecutor’s job always has been to mediate between spectacularly broad legislative pronouncements and the equities of individual cases, giving due attention to the public interest and such technical matters as evidentiary sufficiency.¹ This continues to be true. Indeed, the full title of the Symposium celebrates our hope for continuity in this regard by paying tribute to William M. Tandy.

The world through which Bill Tandy cut such a wide swarth during his long career at the Southern District of New York U.S. Attorney’s Office (between 1957 and 1986) differed in a number of significant ways from the one federal prosecutors now inhabit. Federal enforcers used to have little interest in violent street crime, unless it could be linked to La Cosa Nostra. Cross-border crime and cooperation were quite foreign indeed. Sentencing was mostly a matter of judicial discretion, and plea discussions about sentencing were bedeviled by vague (and often futile) speculation about what the judge might do. Few, if any, would dream of suggesting that a federal prosecutor could be called to account by a state disciplinary body. And the line between the Civil Division and the Criminal Division, and between civil and criminal matters, was as bright as could be. For all these differences, however, the qualities of Bill Tandy that this Symposium celebrates are as important now as ever — if not more so, because of the increase in prosecutors’ discretionary power. There simply is no substitute for good judgment, which, in addition to legal acumen and street smarts, requires a sense of restraint and plain humanity.

If we could just distill these qualities and have our prosecutors imbibe the admixture, this would not be a particularly interesting Symposium. We cannot, though, and the issue of how to promote, and even institutionalize, good judgment appropriately dominates these proceedings. That institutional settings indeed have a critical role to play in this process was dramatized by the timing of this

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1. See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 958 (1997).

Symposium. Although Bill Tandy occupied center stage as the ur-prosecutor, a number of participants gave an important supporting role to someone not even mentioned in the playbill — Independent Counsel Kenneth Starr — and to the consequences of a prosecutor's removal from the institutional matrix within which every regular member of the Department of Justice works.

The distinguished authors and panelists in this Symposium address a broad range of issues. Some reflect comparatively recent political and legal developments: What kind of guidelines, review mechanisms, and exhortations are necessary to ensure that prosecutors seek the federal death penalty only in the "right" cases?² Can rules ever be promulgated that give prosecutors appropriate guidance about when to sign a criminal defendant up as a "cooperating witness"?³ When should a criminal prosecution be brought in an area that is customarily governed by a regulatory process?⁴ When, if at all, should federal prosecutors, empowered by an increasing number of legislative initiatives, pursue a case that would ordinarily be handled by state and local enforcers?⁵ To what extent should prosecutors take on a discretionary role in sentencing under the Federal Sentencing Guidelines?⁶ Other issues are more timeless: To what extent do prosecutors need their judgments tested in trials?⁷ To whom should prosecutors be accountable, and by what mechanisms?⁸ What should the relationship be between an individual U.S. Attorney's Office and Washington? Are prosecutors bound to "seek justice," and, if they are, what specific obligations flow from this general duty?⁹ Can good judgment be taught, and, if so, how?¹⁰

2. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999).

3. See David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509 (1999).

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

5. See Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L.J. 573 (1999); *Panel Discussion: The Prosecutor's Role in Light of Expanding Federal Criminal Jurisdiction*, 26 FORDHAM URB. L.J. 657 (1999).

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

7. See Robert E. Precht, *We Have Met the Enemy: Scenes From a Trial*, 26 FORDHAM URB. L.J. 539 (1999).

8. See *Panel Discussion: The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 737 (1999).

9. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553 (1999); Sklansky, *supra* note 3.

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

Obviously, these are questions more to be explored than to be resolved. But the occasions on which experienced and thoughtful prosecutors, judges, and academics join together to share their insights on these issues are all too rare. We are very grateful for the efforts of all of the panelists, as we are for the willingness of Mayor Rudolph W. Giuliani and FBI Director Louis Freeh to share their memories of Bill Tandy, and their thoughts on the role of the federal prosecutor. Among the participants in this Symposium's four panels were three federal judges, three high-ranking officials in the Department of Justice, two United States attorneys, and a number of distinguished former officials. Each of the academic panelists — several of whom wrote pieces for this issue — could also draw on considerable prosecutorial experience. As we had hoped, the common prosecutorial experience of the panelists, far from promoting unanimity, in fact sharpened the exchange of views. We hope that the publication of these proceedings will continue the conversation.