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“The Local Mindset”

transcribed remarks of
THE HONORABLE D. LOWELL JENSEN*

I started out as a California prosecutor. From the perspective of the California prosecutor back in the 1970s, we were of course intensely concerned with, interested in, and cognizant of the profound consequences of Watergate. But mostly as American citizens, not so much in our capacities as public prosecutors. There is an institutional difference between how the prosecution function is delivered in the state system, and how it is delivered in the federal system. That means that although Watergate did not have direct relevance to us, it did have an effect on prosecutors in terms of raising our consciousness in terms of ethical behavior, and it still does.

The mindset of the local prosecutor, at that time and now, is that there is no case that cannot be handled and investigated all the way through by the local prosecutor. That includes all levels of corruption. Frankly, the local prosecutors believe that if there were corruption within the local jurisdiction, there is no reason for the federal government to come in, because they can take care of it. I think that this is a basic local mindset. Having had my own experience in the Criminal Division watching the activities of people like Reid Weingarten in the public integrity section, it's a sort of a parochial mindset, but it is still there. There has been a history in California of prosecutions at the state, local and county levels, and those prosecutions have been carried out within the system. They have not led to the development of any kind of independent body of prosecutors or investigators. They all have been handled within the system.

The local prosecutor is part of the government of the state, is an

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executive official, and carries out a public prosecution function, the same as the Attorney General does at the national level. But the systems really are different. State governments actually have more than one unit of government. There are three separate levels: the state, the county, and the municipal and city level. The state has all the functions of the government; it has a governor and an attorney general, a legislature, and a judicial branch. These bodies, in the state system, do not directly relate to the local prosecutor. Neither the governor, nor any other executive in the state system can remove a local prosecutor. They simply don't have that power. There is in the California Constitution a provision which states that the attorney general is a "supervisor" of local district attorneys, but it does not really play out that way or have any effect upon removal power. At the county level, the district attorney is elected by the county electorate, and that is the same as all of the other officials. The board of supervisors, the legislative body in the county, is elected but doesn't have any power over the local district attorney. They do not have the power of removal. The only people who can do that are the electorate, so the district attorney in the local setting has a different kind of relationship to the power that is given to him by the public than one has in the federal system. As far as the system itself is concerned, the board of supervisors sets your budget, so to that extent the power of the purse can have an effect in this area.

But in California, Watergate really did not have much of an impact upon the function itself. Back in the 1970s there was a prosecutor in a local county who was deemed by a majority of the board of supervisors to be a little too aggressive in terms of local corruption, so they removed half of his investigators and gave them to the sheriff. The California courts looked at that and said: "No, you can't do that." They stated that the investigative function of a prosecutor is completely inseparable from the public prosecution function, that the board of supervisors doesn't have the power to take that function away and that it can't be assigned to another agency. So they had to be returned to the prosecutor.

There is also a different relationship in terms of the way in which the public prosecutor in California is defined. As I said, the state attorney general has a supervisory role. In practice, this means that it is a complementary role. It means that if for some reason, the district attorney is no longer able to function in the county, the state attorney general can come in and take over. It also provides a way in which the problems of recusal, where a district attorney may be faced with prosecuting a member of the office, is met by the state attorney general coming in and handling the case. In the state attorney general's office, you have an institutionally independent prosecutor who is available to come in should there be a reason for the local

prosecutor to be displaced.

There are other aspects that should be borne in mind. The culture and the business of the local prosecutor is probably different than at the federal level. The local prosecutor would be more comfortable prosecuting the burglars in the Watergate affair than the people who were involved in the cover-up. And that is what local prosecutors do—they are overwhelmed with trying murders, rapes, burglaries, and robberies. They have an overwhelming workload with marginal resources, so the idea of committing investigators or prosecutions to a public integrity section is a nice idea but is virtually unavailable to the local prosecutor. They simply don't have the time or resources to do that. That is a weakness in the system and it ought to be something that is dealt with. But, if you look at the local prosecutor, you see that the problems for the local prosecutor are that the jurisdiction ends at the county line. That is the biggest problem—you don't have the resources. You lack the resources to commit to complex long-term investigations, and the resources to develop the skills to be able to do this. The federal government can provide that, but local prosecution is simply overwhelmed by its burden of just delivering the services.

One other aspect that should be noted about the local prosecutor in California (this is not true in every state) is that the elected position is non-partisan. The elected position is non-partisan not only in rhetoric, but in reality. At least it was back in those days (the Watergate period). Maybe it is a level of innocence, but it really was deemed to be an apolitical position. The position itself, the decisions made by the local prosecutor were apolitical, and if there was a tinge of partisanship, there was a reaction by people who would say "this is an abuse of the prosecutorial system." So you did have an apolitical kind of function in existence.

The perceived institutional conflict of the executive investigating itself is not a part of the prosecution service in California and most states. It just does not happen that way. But when you look at it not only in terms of the mechanics of prosecution, but in terms of the ethics of prosecution, I think that Watergate played a role. In California in 1974 and 1975, the district attorney's association developed and promulgated, I think for the first time in this country, uniform crime charging standards which were essentially ethical behavior norms that were put together by the prosecutors. I do not think that Watergate specifically stimulated that, but it did allow us to get a lot of money out of Washington to do it, and I think that it performed a significant role in raising the consciousness and the urgency of improving the ethical behavior of prosecutors. So I think that there was an effect as far as that's concerned.

Just a few words about the experiences on the Justice

Department end. I remember the George Hansen case. I have a little bit of a different take on it. I was appointed the associate attorney general. During the confirmation process, it turned out that they weren't going to confirm me, because I was the one in charge of the George Hansen prosecution. It took a little while to get that undone. But that was undone. I must say that the experience of coming to Washington in the Criminal Division and being able to interact with public integrity section lawyers that I thought were as good as the prosecutors in my office back in California was a wonderful thing to see. These were extremely dedicated and talented people who commit themselves to do this. I think that the federal government is performing a tremendous service in being able to give resources to the whole country, to do complex investigations, to reach into any level of corruption.

One of the other tasks that I had when I was in the Justice Department was working with the U.S. Marshal Service and part of my responsibility was to make decisions in terms of whether security details of the marshal's service should be given to federal judges. Now at that time I thought that federal judges were fungible. I think I have changed my mind on that. I think that maybe the notion of going after federal judges by prosecution; maybe we could ease up on that a little bit.

My final comment is that given the structure, i.e., the way in which the prosecution services are delivered at the local level, the volcano of change that Reid Weingarten spoke about that was created by the firing of Archibald Cox¹ just did not resonate in this criminal system. The mountain was not there.

Thank you very much.

1. See J. Reid Weingarten, "Volcano of Change," 51 HASTINGS L.J. 693 (2000).