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**Ray Padgett** | raypadgett@shorefire.com

**Mark Satlof** | msatlof@shorefire.com

T: 718.522.7171

**Intelligence Squared U.S.**

**U.S. prosecutors have too much power**

For the Motion: Paul Butler, Nancy Gertner  
Against the Motion: David Hoffman, Reid Schar  
Moderator: John Donovan

**AUDIENCE RESULTS**

**Before the debate:**

**40% FOR**

**18% AGAINST**

**42% UNDECIDED**

**After the debate:**

**54% FOR**

**36% AGAINST**

**10% UNDECIDED**

Start Time: (19:34:06)

John Donovan:

We're going to start the debate now. Let's please welcome our debaters to the stage, and we'll begin our program. Thank you.

[applause]

John Donovan:

All right. With everybody seated, I'm going to make just one more of those moments, so spontaneous applause to begin our program. Thank you.

[applause]

John Donovan:

So the cops are getting all of the attention and also most of the heat these past few years in the conversation about what is not working in the American criminal justice system. But the police officer who arrests a suspect actually hands that suspect off quite quickly to another law enforcement officer. And that is the district attorney, the DA, the prosecutor, whose job is not to be that suspect's friend but to put him or her away if the crime and the evidence call for it.

19:35:17

In the movies, the prosecutor is usually portrayed as the hero we want locking up corrupt politicians and mob leaders. And that's why they have the powers they do. But what if those powers and how they are being used are also a part of what's wrong with the criminal justice system? And do those powers need to be reined in? Well, that sounds like the makings of a debate. So let's have it, "Yes," or, "No," to this statement, "U.S. Prosecutors Have Too Much Power." That is our debate from Intelligence Squared U.S. We are in Chicago in partnership with the Northwestern Pritzker School of Law as part of the Newt and Jo Minow Debate Series with four superbly qualified debaters who will argue for and against this motion, "U.S. Prosecutors Have Too Much Power." As always, our debate will go in three rounds. And then our live audience here in Chicago will vote to choose the winner. And only one side wins. Our motion, again, "U.S. Prosecutors Have Too Much Power." Let's meet the team arguing for the motion. Please welcome, ladies and gentlemen, Paul Butler.

19:36:19

[applause]

Paul Butler, you are a professor at Georgetown Law. You are a former federal prosecutor. You were in the Department of Justice's Public Integrity Section. You wrote a book called, "Let's Get Free: A Hip-Hop Theory of Justice." And in the first pages of that book you write about the events that led to your becoming a self-described, "recovering prosecutor."

[laughter]

What happened?

Paul Butler:

I was part of a team prosecuting the biggest case in the Justice Department. We were going after a United States senator for public corruption. While I was working on that case, I got arrested and prosecuted for a crime I didn't commit. The same thing I had done to defendants I prosecuted now got done to me. If you want to find out what happened in my case, buy my book.

19:37:15

[laughter]

John Donovan:

I think that's a justified advertisement.

[applause]

And, Paul Butler, who is your partner?

Paul Butler:

My partner is my friend, the visionary, glass ceiling shattering, rock star among judges, Nancy Gertner.

John Donovan:

Ladies and gentlemen, Nancy Gertner.

[applause]

Nancy Gertner, welcome. You're also arguing for the motion that "U.S. Prosecutors Have Too Much Power." You are a former U.S. federal judge. You're now a senior lecturer at Harvard Law. Years ago you were giving a talk at Yale Law School. And you were asked, "What does it take to become a judge?" Your answer was, "To become a judge, try representing the first lesbian feminist radical anti-Vietnam War activist accused of killing a police officer and taking every abortion case in the Commonwealth of Massachusetts and speaking out on every hot button legal issue of the day."

[laughter]

So is that a workable strategy?

19:38:16

Nancy Gertner:

Well, it worked.

[laughter]

You actually forgot the last part. It was not only taking every abortion case in the Commonwealth of Massachusetts, doing every political case you could find, it was also the final coup de grace, was marrying the legal director of the American Civil Liberties Union of Massachusetts, and you became a judge.

[laughter]

John Donovan:

Ladies and gentlemen, Nancy Gertner and the team arguing for the motion.

[applause]

So we have two debaters arguing against the motion that "U.S. Prosecutors Have Too Much Power." Please let's welcome first David Hoffman.

[applause]

David, you are a former inspector general for the City of Chicago. You are also a former federal prosecutor. You have led investigations and prosecutions that involve fraud, civil rights violations, gangs, weapons, trafficking. Now you're a partner at Sidley Austin, doing corporate criminal defense.

19:39:16

And so my question is wouldn't it be more in your self-interest to be on that side of the -  
- of the table?

David Hoffman:

You know, I'm looking out at some of my partners at Sidley here tonight, and I think they're thinking the same thing.

[laughter]

And, frankly, you know, Reid is a friend and former colleague in the U.S. Attorney's Office and both of us now at law firms. We do spend a significant amount of our time representing entities and individuals against prosecutors, arguing against the Justice Department or the SEC, arguing that they are using their in an unwise or incorrect manner, asking them to do something or not do something, but that's different than the argument we're going to make tonight. I mean, the argument -- and the question tonight is about whether there is too much power, not whether in specific cases the power is used unwisely. So it's a pleasure for us to try to put on our prosecutor's hats tonight.

John Donovan:

All right.

David Hoffman:

And to argue that prosecutors do not have too much power.

John Donovan:

And you've already mentioned your partner, Reid. Who is your partner? Full name.

19:40:08

David Hoffman:

My partner tonight is -- I hear that Paul's partner's a rock star, so just to match things, my rock star partner is my friend and former colleague in the U.S. Attorney's office, Reid Schar.

John Donovan:

Ladies and gentlemen, Reid Schar.

[applause]

So, Reid, some of your story was just given away, but you are also arguing against the motion that U.S. Prosecutors Have Too Much Power. You are a partner at Jenner and Block. You co-chair the white collar defense, an investigations practice, but prior to that you were the lead prosecutor in both corruption trials of a former governor named Rod Blagojevich and in another life -- if you had left the U.S. Attorney's office sooner and had been running the former governor's defense instead, would you have won for him?

Reid Schar:

No.

[laughter]

The evidence in that case was pretty overwhelming, including the governor's own voice on wiretaps and with due deference, the prosecutors in those cases were actually quite good as well.

19:41:13

John Donovan:

All right. Well, we have a lot to go ahead, but let's welcome again and thank both teams, the teams for and against the motion U.S. Prosecutors Have Too Much Power.

[applause]

Now this is a debate. It's a contest. It's a contest of ideas and persuasion, maybe a little bit of humor and anecdote, but in the end these debaters here are trying to persuade you to vote for their side of the motion U.S. Prosecutors Have Too Much Power. By the time the debate has ended, you will have been asked to vote two times, once before you've heard the arguments and once again after you've heard all of the arguments, and the team who will be deemed the victor will be that whose numbers who have moved most of you in percentage point terms to their side. So, let's register the preliminary vote. If you go to those keypads that are tethered to your seat, pay attention to keys number one, two, and three. If you agree with the motion, the button you push is number one. U.S. Prosecutors Have Too Much Power. One means you agree. If you

disagree you push number two, and if you're undecided, which is a perfectly reasonable starting position, push number three.

19:42:15

Hold that thing down for a few seconds until you see your number come up in the little screen. It might take three or four seconds and then you are locked in. And we'll give it about another 10 more seconds. If you want to correct your vote, go ahead and do that. Okay. It looks like everybody's locked out, so we're going to move forward to round one. Let's move on to round one. Our motion is U.S. Prosecutors Have Too Much Power. In round one the debaters have six uninterrupted minutes. They speak uninterrupted in their opening statements for six minutes each, and to speak first in support of the motion U.S. Prosecutors Have Too Much Power, let's welcome to the lectern, Nancy Gertner, a senior lecturer at Harvard Law and former U.S. federal judge. Ladies and gentlemen, Nancy Gertner.

[applause]

19:43:09

Nancy Gertner:

Six minutes. You have no idea how difficult this is for a former judge, but I'll do it. Let me set the stage. Mr. Alvarez, who is Hispanic, or Mr. Hargrove who is black is before me. I'm taking a plea. He's pleading guilty to distributing a quantity of drugs for which he's going to get a five-year mandatory minimum. I lean over and I say, "Sir, has anyone coerced you into pleading guilty?" "Oh no, your honor," he says. I know that that's not true. It's not coercion like waterboarding or thumb screws, but it is coercion nonetheless. The prosecutor said to him, "If you don't plead guilty to this one count I'll charge you with three. It'll be a 15-year mandatory minimum, five years, 15." This was a coerced plea. The prosecutor might say, "Plead now or the deal is going to change." It's like dealing with liberty as if it were a sale at Macy's. And when you rush to plead you won't know much about the case against you.

19:44:09

The prosecutor is supposed to disclose evidence that is exonerating, evidence that is exculpatory, but too often the rush to plead guilty means you don't get that information. Too often too many play hide the ball. Nevertheless, I turn to Mr. Alvarez or Mr. Hargrove and I say I accept the plea and I sentence him to five years. There's no judging going on here. Nothing is going on in an open courtroom. No one is subject to appeal. As Judge Gleeson said in a comparable situation in the southern district of New York, sentencing to a mandatory minimum has all the solemnity of a driver's license renewal. Make no mistake about it, I didn't sentence him. The prosecutor sentenced him. The prosecutor was the judge, jury, and executioner. And it's not just Mr. Alvarez

or Hargrove. It's Aaron Swartz, the 26-year-old Internet prodigy accused of computer fraud for downloading scholarly articles off of the organization called JSTOR.

19:45:14

He was offered a six-month sentence if he pled guilty or seven years if he went to trial. And he committed suicide. Or Kevin Ring, who was prosecuted for a lobbying scandal. After trial, the prosecutor recommended 17 to 22 years. When Jack Abramowitz, who was the head of the scandal, who was the ring leader, was offered four on a plea. 90 percent of federal trials plead guilty. Ninety-five percent of state trials you don't raise Constitutional challenges. It would interfere with the plea. You don't raise meaningful defenses. A battered women syndrome, for example, you don't want to raise that because if you do, the deal will be gone. You don't want to raise challenges to flawed forensic evidence. Coercion, yes.

19:46:04

Now, "Who cares?" you might say. "They all plead guilty. After all, they're probably guilty." There were 1,576 exonerations in the United States since 1989. 10 percent of them were pleas plain in that group, because it's so difficult to get exonerations where other claims of innocence. Who cares, you might say? We get people to cooperate. The system becomes much more efficient. I'm from Boston. Jimmy Martorano pled guilty to 20 murders for which he got 14 years in exchange for his testimony against Whitey Bulger. "Who cares?" you might say. "Cooperators give truthful testimony. It's the way the system works." The best way I can describe that is something a former partner of mine said. Sometimes, not always, cooperators don't just sing. They compose. It's not just mandatory minimums. It's vague statutes, vague laws that enable prosecutors to pick the person and then the crime.

19:47:08

Harvey Silverglate calls it "three felonies a day," where there are multiple counts for a single incident, vastly increasing the possibility that you'll get an extraordinary sentence. This can destroy companies. Arthur Anderson went under before the Supreme Court reversed the conviction. And Aaron Schwartz died. Surely, there are wonderful prosecutors that are on this stage today. They'll say they're doing God's work. "Trust me," one said to me, charging a first offender with a 15-year mandatory minimum. But we are rightly skeptical in this country about concentrations of power. "Trust us," they will say, "Not those judges," judges, after all, who are not accountable. These are things, you always talk about good prosecutors and bad judges. But judges can be appealed, reviewed, bound by precedent. We're the only country in the world in which there are not generally career prosecutors, where being a prosecutor is a stepping stone to higher office.

19:48:09

David Hoffman, I understand, has run for higher office. Sadly, defendants are, too often, those stones. Prosecutors have too much power. My colleagues on this stage will talk about the fabulous decisions that they have made. But the issue is not the rogue prosecutor. It's the endemic risk of power misapplied. It is about balance, the check of a judge, of a jury, an appeal. It is about transparency. It is about mass incarcerations which prosecutorial decisions are largely responsible. It is about coercion, and it is about, as my partner will say on this stage -- sadly, it is also about race. U.S. prosecutors have too much power, have much too much power. Vote one. Thank you.

19:49:09

John Donovan:  
Thank you, Nancy Gertner.

[applause]

John Donovan:  
And that is our motion: U.S. Prosecutors Have Too Much Power And here to make his opening statement against this motion, David Hoffman. He's a partner at Sidley Austin. He is a former inspector general and federal prosecutor. Ladies and gentlemen, David Hoffman.

[applause]

David Hoffman:  
Thank you very much. Reid and I plan on making three points throughout our presentation tonight. I'm going to focus on the first one, which is to talk about the importance of prosecutorial power. We're also going to talk about the limits of prosecutorial power. And I think you're going to hear a very different version about the realities of prosecutorial power than the one you just heard from Judge Gertner. And third, we're going to be talking about -- and making sure there's a recognition that there are certainly various problems in our criminal justice system in our society. My guess then problems that the four of us may completely agree on from the stage, that are not issues regarding prosecutorial power.

19:50:11

And we're going to try to focus on the question presented this evening. Regarding the importance of prosecutorial power, the people who benefit the most from strong, effective prosecutorial power are those with the least power and resources in our society. Prosecutors and strong prosecutorial offices are an antidote against the most powerful. And therefore, this issue is in fact a social justice issue. The reason that I

became prosecutor and many are drawn to it, where the harm of crime, where the burden of crime falls hardest on those at society in the low end of the spectrum, often where the harms regarding the crime are the least visible. Prosecutors in our society have a duty -- have a duty to use the powers that are appropriate and that are strong to minimize the harm from crime on those who are the least powerful.

19:51:07

And I'm going to talk briefly in this opening statement about public corruption crimes and about gang and gun violence crimes, topics that in Chicago we have a great deal of experience with, unfortunately. When there is a conspiracy by public officials to hand out public jobs or public contracts or to give public services in exchange for bribes or political favors, there are victims from that conduct. And the victims are people who are the regular people without connections, not involved in politics, who can't get that good paying job with security and benefits because they don't have connections, the people who get less desirable services, people who then have the perception of a system -- correctly at times -- of haves and have nots, based on political connections. How do you stop -- how do you stop a secret effort by the most powerful public officials to hand out public goods to the politically powerful so they can maintain office? Perhaps an election would do the trick.

19:52:12

But unless the corruption is exposed, that's quite unlikely in our current system. What it requires is a strong, independent prosecutor's office to investigate and prove the crime beyond a reasonable doubt, unanimously to a 12-person jury, where the crime itself was usually kept hidden in sophisticated ways by sophisticated people. And the key tools in that regard are wiretaps, flipping cooperators, getting people on the inside to cooperate, one of the most difficult things to do in law enforcement, where there are very strong reasons, always, not to cooperate, but where that cooperation may be essential to proving the crime. The dynamic with gangs and gun violence in Chicago is similar. And we know this from the horrific news stories we read too often. But look at the chart of who the victims are of gun violence described. Look at the map.

19:53:04

In our still segregated city, those killed from guns are overwhelmingly black and Hispanic, who live in our low-income neighborhoods. In the early 2000s, when I was in the U.S. attorney's office, we paired up with local police and prosecutors to apply our prosecutorial resources where there were the most dead bodies, not just to make cases, but to try to lower the murder rate by making cases. Our methods of making cases against gang leaders and those who were the most violent gang members were very similar to what happens in the public corruption or organized crime context; try to use wiretaps whenever you can, try to flip people on the inside when you can get them to

flip, and conduct a secret and confidential investigation using the grand jury. We knew we had to be successful at stopping gang leaders in order to make change, but we also knew you cannot prosecute your way out of this problem. And so we used strong federal gun laws not just to make some cases, but also to persuade those most likely to pick up a gun in a high-crime neighborhood, that they shouldn't do so.

19:54:08

We started something called "parolee forums," where we brought into a gym 30 parolees who had been paroled for gun crimes to the most violent neighborhoods, had community service leaders and law enforcement, and delivered a message to try to persuade people not to use a gun. Now, you make think this sounds a little "pie in the sky," but after several years of this, this was studied by academics and found to have been one of the leading causes, along with other things law enforcement, that lowered the murder rate. And let me just put some numbers on this and try to humanize this a bit. There are two police districts, one in Englewood on the south side, one in -- on the west side that I want to talk about. And then there's a police district north of here on the lake front. All those have 100,000 people in them. In the year before we started this, in 2001, 62 people were killed in the Englewood District, 70 on the West Side, and five on the lakefront. The racial breakup of those -- of those districts, 98 percent and 92 percent black in the districts where there were the most murders and 74 percent white in the relatively safe one.

19:55:07

Three years later after the program, the murder rate had been cut in half. So if you just look at those two districts, that's 70 additional people who are alive because the homicide rate had lowered. Let's have some seats for those people here tonight. These are people who generally are not at these debates. Let's put the people who are alive, because of strong prosecutorial action that has lowered homicide rates, in this room.

John Donovan:

David Hoffman, I'm sorry, your time is up. Thank you very much. David Hoffman.

David Hoffman:

Thank you very much. Appreciate it.

[applause]

John Donovan:

And a reminder of what's going on, we're halfway through the opening round of this Intelligence Squared U.S. Debate. I'm John Donovan. We have four debaters, two teams of two, fighting it out over this motion, "U.S. Prosecutors Have Too Much Power." You've heard the first two opening statements, and now on to the

third. Debating for the motion, "U.S. Prosecutors Have Too Much Power," I want to welcome Paul Butler, a professor at Georgetown Law and former federal prosecutor. Ladies and gentlemen, Paul Butler.

[applause]

19:56:10

Paul Butler:

My name is Paul Butler, and I represent the United States. That's how I used to start my opening argument. I represented the government in criminal court in the District of Columbia, and I used that power to put black people in prison and Latino people and poor people. Like a lot of prosecutors, that was pretty much all I did. During the time I did that work, I learned some things. What I learned is that prosecutors have too much power. Prosecutors have turned our great nation into the world's leading jailer. We have five percent of the world's population and 25 percent of the world's inmates. Prosecutors have made prison our primary social policy for poor people. About 80 percent of people who are locked up are poor. For African-Americans this is horrific. There are more black people under criminal justice supervision than there were slaves in 1850. If you're a black male without a high school degree, you're more likely to be in prison than you are to have a job. Imagine the impact of all these prosecutions on black families.

19:57:13

It's not just the guy doing time on the inside, but we have a lot of people in our community, women and children, especially, who are doing time on the outside. It's not just a problem for minorities. We lock up more people of every race now than we did 20 or 30 years ago. Right now we have one in 100 Americans who have a criminal case. We know that this obscene expansion of the prison population has little to do with the crime rate. When crime goes up, prosecutors put more people in prison. When crime goes down, prosecutors put more people in prison. When the crime rate stays the same, prosecutors put more people in prison. I speak from whence I know. I became a prosecutor because I don't like bullies. I stopped being a prosecutor because I don't like bullies.

[laughter]

My –

[applause]

-- my power to be a bully came from the Supreme Court case called, *Bordenkircher versus Hayes*. Mr. Hayes wrote a bad check for \$88. The prosecutor said, "I'll ask the

judge to give you five years if you save us the trouble of going to trial. If you don't take this deal and lose -- and you lose the trial, we're going to ask for life."

19:58:17

Mr. Hayes went to trial, lost, and he got life, a life sentence for writing a bad check for \$88. Supreme Court said, "It's all good." That, my friends, is why 97 percent of people who are prosecuted today end up pleading guilty. Prosecutors tell defendants, "Unless you take this deal, we're going to bury your ass." I'm a hometown kid. I grew up in the South Side in a neighborhood not far from here in miles but in another way of speaking it's a world away. The police were notorious in my neighborhood for how they treated black boys. I got to graduate high school and go to Yale, but lots of my homeboys went to jail. I knew these guys were talented and smart, and most of them didn't get a fair shake from the criminal justice system. So I went in as an undercover brother who hoped to make a difference from the inside. But rather than change the system, the system changed me.

19:59:11

You know what we called defendants in the office where I worked, "cretins" and "douchebags." Lawyers, including me, were competitive, were ambitious. The incentives to move up in a prosecutor's office are to lock up as many people as you can for as long as you can. And, frankly, because prosecutors have so much power, it was easy to do. We have so many crimes in the U.S., no one has even been able to count them all, on the federal side alone, 4,000 -- at least 4,000. Justice Scalia said, "Prosecutors have so much power, they can find a crime to charge anybody with." We made our decisions about who to prosecute in a conference room that didn't have any windows. Well, imagine a group of 20 and 30 and 40 year olds sitting around kind of playing God. One of my cases was against this guy who was a supply clerk at a government office, and this guy had a little side hustle where he was selling film that belonged to the government. So we arranged this sting to send in this undercover agent to pretend to be somebody who wanted to buy film.

20:00:14

The clerk says, "I can sell you as much film as you'd like." Our agent was like, "Well how much? Can you do \$500?" "Yeah." "1,000?" "Yeah." "\$5,000?" "Yeah." Every time the clerk said yes his sentence went up by years and years. And in the office, we were watching this on video and we were cracking up. When the clerk had agreed to sell the amount of film that would send him to jail for about 20 years someone said okay, let's put that dumbass out of his misery. Now as a prosecutor I had this guy under my thumb. I don't have to charge him with a crime. No judge can make me. Or I can throw the book at him, or I can charge him with a misdemeanor. It's my decision whether he's looking at probation or 20 years, and I'm making that decision in the

privacy of my office. I don't have to explain to anybody what I'm doing. So I ask the dude, "What can you do for me? Who can you snitch on?"

20:01:07

You scratch my back, I scratch yours, and we think about all the wrongful convictions, innocent people who have been sent to jail. Many of those cases come from prosecutors making deals like I did. Prosecutors use this power to go after people like Eric Garner in Staten Island for selling a single tobacco cigarette. Prosecutors use this power to put people like Michael Brown -- he was stopped by the police for walking in the street. They prosecute that case. And how do federal prosecutors like Reid and David use this power? David said it's antidote to the powerful, but about 50 percent of the people his office prosecute who go to jail, they go to jail for drug crimes. Why has no one gone to jail for the financial crisis? Those are the real criminals.

[applause]

So, when David comes forward -- when Reid comes forward, I want to know whether there are too many black and Latino people in prison in Chicago. I want to know why half of the people your office prosecutes are for drug crimes. I want to know if you can guarantee me that nobody's being biased against because they're African American or Latino.

20:02:16

John Donovan:

Paul Butler, I'm sorry, your time is up. Thank you very much.

[applause]

Our motion U.S. Prosecutors Have Too Much Power and making his opening statement against the motion, Reid Schar, a partner at Jenner and Block and former federal prosecutor. Ladies and gentlemen, Reid Schar.

[applause]

Reid Schar:

So, this evening we're going to touch on a lot of those issues and we're going to deal with mandatory minimums on our side and we're going to deal with racial disparity and whatever else you want to talk about, because we have the answers to all those in what was just described as not the office that David and I grew up and practiced in.

John Donovan:

Reid, can you just take a little step closer to your microphone?

Reid Schar:  
I sure can.

John Donovan:  
Thank you.

Reid Schar:  
But what I want to talk about in my opening is what often isn't discussed in the context. As the judge indicated, the perception is that prosecutors are judge, jury, and executioner.

20:03:05

Well, let's talk about the checks and balances, significant checks and balances that exist throughout the system from beginning to end that actually significantly limit what a prosecutor can do and how a case proceeds. Let's use it in the context of a hypothetical. Let's take a bank robbery. Bank robbery occurs in Chicago. Person runs into the bank, robs the bank, runs out with money, maybe uses a weapon, is gone. At this point in time there is a single person who knows exactly what happened in that robbery, the robber. The prosecutor knows virtually nothing. So now the question becomes well, the prosecutor, will he ever be able to make a case against that individual? Maybe. They're going to try. They're going to try to build a case, but what people don't talk about is the number of cases that never get made. Many, many cases are never solved. In Chicago, our homicide rate unfortunate -- do you know how many cases are actually resolved that end up in homicide? Just below 50 percent at this point. Over half the murders in Chicago go unsolved. But in our hypothetical, let's assume the prosecutor and the agents were able to get to a point where they want to charge the case. They think they know who did it. So, at the federal system what do they do?

20:04:10

They go to a neutral third party. They go to a magistrate judge, and they say to the judge here's the evidence I think proves that this person did it by probable cause. That's the standard at the arrest stage. They want an arrest warrant. Neutral magistrate has a decision to make. Either yes I agree with you or no I don't. Sometimes they reject it. Let's assume the magistrate says okay. Agent goes out, arrests the individual. Now where do we go? We go back in front of the neutral third party, the judge. We're going to debate bond. Does the defendant get bond? He will be represented or she will be represented. The prosecutor will make his argument. Defendant will make his argument. Then we go potentially to a probable cause hearing, again in front of the magistrate. What happens in front of the probable cause hearing? The prosecution must put on its witness, open the cross examination. The judge, again, must decide is

there probable cause to believe this crime was committed? In our hypothetical, let's assume, the judge finds that in fact there is probable cause. Of course, he hasn't even been indicted yet, so now we go to the grand jury, a group of people made up of individuals from society who are brought in, who are asked to listen to evidence.

20:05:11

Now we're in the grand jury city. Now, you probably heard the phrase, "Well, how much of a check or balance is that? The grand jury will indict a ham sandwich." Well, there is -- that's a bit of a trite phrase, and you need to go underneath it. Let's get underneath these issues. Why is that? Because, one, prosecutors often don't ask for votes on cases where they don't think they can meet the standard. And two, pursuant to Department of Justice policy, you don't seek an indictment unless you have proof beyond a reasonable doubt. So the standard for indictment is here. You're going in here. So in our case, grand jury returns an indictment. There is probable cause. Now where do we go in the system? Now we go to the judge's room, to the trial court where there is a brand-new, neutral third party who is going to oversee everything that happens from here on out, whose job is to make sure, much like the prosecutor, that justice is done. And what happens? Well, now, what's the burden? The burden on the prosecutor is the highest burden known in the law in United States, proof beyond a reasonable doubt.

20:06:13

Defendants unhappy with discovery? Defendants unhappy with the way the prosecutor's acting? Defendants unhappy with anything? Bring a motion. You've got a judge who will decide that motion. So how will the case resolve itself? Well, typically one of three ways. One, it could be dismissed. That does happen from time to time. Prosecutors exercise discretion. They choose not to go forward even at that point. Two, the defendant could plead guilty, which means -- just so we're clear -- the defendant walks into court, raises their right hand to take an oath to tell the truth, and admits that they committed the crime. It is the judge's job to determine whether they are satisfied with that determination. The judge has got to determine whether or not it's voluntarily, whether it's knowing. Or it goes to trial. And what happens at trial? In the United States -- and it's a good system -- the prosecutor must prove to 12 people unanimously that there is proof beyond a reasonable doubt.

20:07:10

One juror looks at that case and decides there's reasonable doubt, there's no conviction. And what happens after the conviction? Then the judge looks at it again, and the judge can decide, I think the jury got it wrong. I'm throwing the case out. Now we go to sentencing. Does the prosecutor from on high say what the sentence is? No. That's not what happens. Prosecutor makes their argument. "Here is what I

think is mitigating, aggravating. Here is what I think the sentence should be." Now it's the defendant's turn, through counsel. "Here's what's aggravating, maybe, here's what's mitigating." And the defendant gets an opportunity to talk to the judge without being cross-examined. And then the judge decides what the sentence is. And we'll talk about mandatory minimums and how that comes into play. Then are we done? No, we're still not done, because now the defendant gets to go to a brand-new courtroom, the appellate court, where three brand-new judges look at the issue. They're completely neutral.

20:08:05

And the defendant can raise whatever he or she wants, issues about the trial, issues about the plea, issues about the sentencing. It's all overseen through that check and balance. And then when that is done, they still can come back through what's called a 2255, which is basically the federal version of a habeas. So if we're going to have a discussion about whether prosecutors have too much power, let's at least frame it within the system that we have today, that puts significant checks and balances. And at the end of the evening, what you are going to see is that prosecutors do not have too much power, and the correct vote is against the vote -- the motion, number 2.

John Donovan:

Thank you, Reid Schar.

[applause]

John Donovan:

And that concludes round one of this Intelligence Squared U.S. debate where our motion is U.S. Prosecutors Have Too Much Power. Now we move on to round two. And in round two, the debaters address one another directly with questions and challenges, and they also take questions from me and from you, members of our live audience here in Chicago. The motion is this: U.S. Prosecutors Have Too Much Power. The team arguing for the motion, Nancy Gertner and Paul Butler, have argued that indeed prosecutors, perhaps have never been so powerful.

20:09:13

And they are arguing back from the reality that there are many people behind bars today, people who never got a trial but had to settle for deals where the district attorney held all of the cards and sometimes often has used his or her power in -- to discriminate against poor black and Latino defendants with no real oversight, they say; and that all of this has been exacerbated by the reality and existence of mandatory sentencing and vague laws. The team arguing against the motion that prosecutors do not have too much power, David Hoffman and Reid Schar, are saying, do not confuse the fact that there are many people in jail with the fact that prosecutors do have

power. They say that the power prosecutors have is justified, it is used to go after the big guys; corrupt politicians, mob leaders, gang leaders, who themselves because injury to society's most vulnerable.

20:10:09

They say that leverage is critical, and they make the case that there is oversight, step by step by step, and that there are many checks and balances. So we're going to -- what we do in these debates is we revisit the opening statements and take them apart to go piece by piece through some of the statements that have been made. And what I want to do is go to the side first arguing against the motion and go to David Hoffman and say that, a key -- a key point of your opponents is that the mandatory sentencing laws, mandatory minimums themselves are resulting in a plea bargain reality, where more than 90 percent of the people at the federal level and also at state level who are in -- actually didn't go to trial, they ended up pleading because the leverage the prosecutors have is so great that, as Paul Butler said, they have defendants under their thumbs. Just on the point of whether you think that leverage, as they are talking about it exists, is their portrayal of that situation realistic?

20:11:03

David Hoffman:

It's not accurate, although there certainly is leverage. And, you know, look, mandatory minimums have existed in various forms as long as the nation has existed. And the main reason that there have been so many strong, high mandatory minimums over the last 20, 30 years, is a reaction by Congress and legislatures against judges, believing the judges were imposing sentences that were too lenient in some respects. Now, that's a policy issue. And my guess is that we would have a lot of agreement between the four of us on the policy issue of whether drug sentences, mandatory minimums or otherwise, are too strong. But on the issue of leverage and --

John Donovan:

The expected coercion due to that leverage.

David Hoffman:

Well, look, you know, there is a mandatory minimum in the state of Illinois for murder. It's 20 years. There's a mandatory minimum for rape. It's four years. There's a mandatory minimum in federal law for buying and selling children. It's 30 years. And there are mandatory minimums for drugs. When you prosecute a public corruption case, you very infrequently have the opportunity to use mandatory minimum sentences because they're generally -- there are no mandatory minimum sentences in federal law for bribery or fraud or other types of crimes that you would often get insiders committing to try to flip them.

20:12:11

So the dynamic of a prosecutor -- you're always trying to go up the chain. And this idea that -- the office that was described by the other side of, you're trying to flip people to get someone for having one marijuana cigarette, is not the office we know. You're trying to flip people to go up the chain, to get the leaders --

John Donovan:  
Okay.

David Hoffman:  
-- to get the ones who are most culpable. And the dynamic is you're going to use sentences and the likelihood of what the sentence might be to try to persuade someone --

John Donovan:  
Okay.

David Hoffman:  
-- along with the strength of evidence that they should cooperate.

John Donovan:  
Let's let Nancy Gertner respond to you.

Nancy Gertner:  
Well, look, it was true that mandatory minimums came about because of the concern about disparity and some lenient judges and also some judges who were sentencing people too much. But one of the things that an old professor of mine said, which was wonderful, is that "discretion is hydraulic. When you take it away from one, it feeds to the other." And so what happens is we've taken away discretion from judges. No matter what you've said, you've taken away from discretion from judges in the mandatory minimum cases and even mandatory guideline period, and then that feeds to the prosecutor.

20:13:12

The notion that there is a meaningful oversight by the judge, you couldn't have had a judge who wanted to be more of a meaningful oversight than me. If I didn't feel that power, nobody did. And in most plea bargaining situations, candidly, the colloquy felt like a Kabuki ritual. And it was the worst Kabuki ritual when the government insisted on appeal wavers, right? If you plead guilty, you're not only going to give up your right to trial, you not only face the whatever mandatory minimum the prosecutor would charge, but in addition, you had to give up your appeal rights as a condition of pleading guilty.

John Donovan:

All right. Let's let Reid Schar respond to that.

Reid Schar:

So, on the issue of the mandatory minimum, again, I think we need to come back to the fact that mandatory minimum is a hedge on power, on judges and prosecutors. It basically says, if X is the situation, whether it's amount of drugs, whatever it may be, Y must be the sentence. X isn't something that is decided by prosecutors.

20:14:09

Whether you have a certain amount of drugs, whether you bought or sold children, God forbid, whatever it may be, that is something that's either determined by a jury or ultimately a judge. Someone's got to make that determination ultimately, and that's what triggers a mandatory minimum. It's only when there's discretion added -- and that's really the argument that I think is here -- that what prosecutors can do is they can say, "Look, we could charge this." In fact, the legislator maybe wants us to charge this. But we're going to use our discretion and not charge that. Then suddenly it becomes a cudgel and something that's too much power. I say the argument to this is really, if you took all discretion away from prosecutors and just said, always -- always charge the mandatory minimum, you wouldn't be arguing that the prosecutors have too much power. You'd really be arguing what this debate, I think, and mandatory minimum is about, which is we don't like the way the legislature has handled it.

John Donovan:

Let's bring in Paul Butler.

Paul Butler:

So Justice Kennedy said, we don't have a criminal justice system. We have a plea bargaining system. The reason why --

[applause]

-- 97 percent of people plead guilty, and not because they don't want to take their case to trial -- but because they can't afford to.

20:15:14

They don't know -- they don't want to take the risk of having the book thrown at them. And as far as these -- let's call, "pyramid prosecutors," where you start your way at the bottom and then work your way up to the top, it never works out that way. That's why 80 percent of people who are incarcerated are poor. At the time that they're locked up, they are living below the poverty line. So you guys are going after the little fish. You're not going after the big fish.

John Donovan:

Well, yeah, what about that, because your argument, David Hoffman, was that you are focused on the big fish. And it seems as though we're talking about two sets of defendants here or -- there's a focus on two sets of defendants because you're talking about the corrupt politician and the mob leader, your opponents are talking about the kid on the street with some drugs in his pocket or maybe a gun in his pocket. So are these two ships missing in the night here?

David Hoffman:

You know, perhaps.

20:16:03

I mean, I think that Reid prosecuted the governor of the State of Illinois and I prosecuted gang leaders and, in addition, corrupt police officers. And so Paul's just wrong. It absolutely was not only the point of how we used cooperators, but we were actually successful at doing so. And, you know, I think that --

John Donovan:

But if you could -- let me interrupt you because I just --

David Hoffman:

-- sure.

John Donovan:

-- I'm sure -- I think it might drift off the point that he was making, which I think is valid. He's talking about that 97 percent of people in jail today who got in there through plea bargaining, the majority of whom in all likelihood were not government officials or gang leaders but much -- people much lower down the scale without means, without access to adequate defense, that those are the situations I think that they're outlining where they're talking about the power is so out of balance that, again, defendants are under the prosecutors' [inaudible].

David Hoffman:

Well, let me say one thing. There's a variety of ways to dress it up, but let me say one thing about an imbalance in power. Look, we as a society need to give significantly more resources to criminal defense, counsel, and otherwise. And there is an imbalance of power.

[applause]

20:17:07

That is not an argument for prosecutors having too much power. It is an argument that acknowledges the imbalance. But, you know, look, when Sidley and Jenner -- and this especially comes up in pro bono cases -- when we represent individual defendants and we come into the room with prosecutors, we don't feel like there's an imbalance in part because we know we have resources that we're going to bring to bear. But most -- the vast, vast, vast majority of criminal defendants don't have that opportunity. And so the fix of this is not to reduce power of prosecutors. That's going to make it more difficult to go up the chain. The fix -- one of the fixes here is to increase the amount that society gives for criminal defense.

John Donovan:  
All right.

[applause]

Nancy Gerner. [unintelligible] want to hear -- your opponent's saying --

Nancy Gertner:  
[inaudible]

John Donovan:  
-- agreeing that the disparities are there, but saying the prosecutors' power is not the nexus of it.

Nancy Gertner:  
Resources are important. There's no question about it. I wouldn't argue with that. But resources are really only part of the problem. Let me talk for a minute about white-collar crime. This notion that Harvey Silverglate describes of three felonies a day, which is that you can take anything -- you can charge anyone with virtually anything from the vast vague Criminal Code.

20:18:13

And with respect to what that means, take the case of Senator Ted Stevens, all right, the Alaska senator who was prosecuted based -- prosecuted before the election, loses the election, winds up having his conviction overturned because material was kept from him-- the availability of vague laws and overlapping prosecutions enables prosecutors to pick whomever they wish to go to, whoever they wish to prosecute. Now, it's not -- we're going to trade stories of horror stories, and they're going to have -- trade stories of wonderful, you know, noble prosecutors. The issue is an endemic one, an information deficit, the prosecutor has the information, a resource deficit, you can equalize it to a degree, but they are bound to have more, and a law deficit, which is as long as there is mandatory minimums and mandatory guidelines or at least guidelines

that are largely enforced, you're going to wind up with leverage beyond anything that any defendant could possibly have.

20:19:13

John Donovan:

Well, let me go to your opponents.

[applause]

Is there -- is there a problem with an information deficit with the prosecutor knowing more than the defendant?

Reid Schar:

You know, I think the answer to that is largely, "No," because when you -- when -- you know, John, when you get to the point of trial, it is incredibly transparent. What happens is there are -- there are rules that are in place. Any rule is subject to abuse. So we can't have a debate about people who aren't applying the rules or who are abusing the rules. What the rules say -- I can tell you what the office that David and I were in -- is, "You turn things over. You just turn them over. And you provide information. You provide witness statements." Now, is there risk in doing that? Have we had grand jury witnesses shot and killed because -- in the Mikos case in particular that we remember -- because information was turned over? Yeah. There's dangers to it. You try to protect things through protective orders. And there were consequences, but the rule of the road is and should always be applied that that information is turned over and it is provided.

20:20:10

Now, there is one individual, again, if they are actually guilty, who should know quite a bit of information as well, and that's the defendant.

John Donovan:

All right. I want to go to Paul Butler and ask you to reflect on Reid's depiction of the situation as it exists once a defendant actually goes to trial, knowing that you're talking about the plea bargaining where they don't go to trial, but he's making the case that if the defendant gets to trial then the prosecutor's power has a lot of checks and balances. True or not true?

Paul Butler:

Well, again, if we want to talk about the three percent of cases that go to trial, even there the prosecutor has so much evidence that he's [unintelligible] in part through the grand jury. So the way that the grand jury works is the defense attorney is not in the room, the prosecutor is the legal advisor. She doesn't have to present any evidence

about innocence. All she has to do is make a low-level probable cause showing that the guy is guilty and then there's an indictment. There's this process called discovery in civil cases. You know about depositions. That doesn't happen in criminal cases. You don't even have to tell the defense who your witnesses are until shortly before the trial.

20:21:12

So, again, if you're a defense attorney or a defendant, an accused person, you're out-gunned. When I represent someone on appeal, if that's supposed to be the check, maybe this says something about my legal skills, I don't think so, but when I represent someone on appeal I say the first thing you need to know is we're going to lose. And I'm saying that based on statistics, way fewer than five percent of people who appeal their cases prevail. I don't think that means their trials were perfect. I think that means the decks are stacked against them because prosecutors have way too much power.

[applause]

John Donovan:

David Hoffman, let me ask you. You've all worked in the same system, but it sounds like you're talking about two different systems, two different experiences, dramatically so, and I want to ask you, David Hoffman, just your thought on why that is.

David Hoffman:

Well, you know, one of the things that Paul said is that there is an incentive to lock up as many people for as long as possible. I just don't recognize that at all, and frankly, I would ask the former federal prosecutors who are here if they recognize that.

20:22:10

John Donovan:

Just one -- and then I'll let you go back. I just want to ask the two of you, do you stand by that? Do you both recognize that? You have 10 seconds to answer because I want to give the floor back to David.

Paul Butler:

Well, I can answer in less than that. Two and a half million people in prison is evidence that prosecutors are locking up as many people as they can for as long as they can.

Nancy Gertner:

That's the incentive structure. If you don't get convictions you are not well thought of in the office.

[applause]

John Donovan:

Let me bring it back to David Hoffman.

David Hoffman:

I mean, the idea that -- you know, you're salary doesn't increase because you get convictions. You don't get a promotion because you get convictions. In fact, the way to get well thought of in the U.S. Attorney's office in Chicago, among other things, was to go and say you know what? My mind has changed. I've now received evidence that's making me think that we shouldn't charge this case or maybe we should dismiss the case. Reid and -- I've been in meetings with Reid where those things happen with my cases and with Reid's cases. You as a prosecutor have a duty to be just. That's our duty. Now, not everyone in every system does that, and obviously that's the case, but that is your duty.

20:23:07

And you don't have control over the outcome, because there's going to be a judge and a jury who are going to control the final outcome. But it is your job to decide what you think is fair and just. That's what the incentives are, and in our office, and I would gather in the U.S. Attorney's offices around the country, the incentive is to do that, and if that means charging someone, fine. If that means seeking a long sentence, fine, but if it means that someone should not be charged, that's the case. And just give me a chance later to talk about the confidentiality of the grand jury system, which by the way

—

John Donovan:

Actually, I do want to come to it. So I will. I want to go to Nancy Gertner, because you brought up white collar crime. There's a different category that we haven't talked about and that's pressure brought on corporations to settle financially where they spend -- end up paying billions of dollars without anybody going to jail, without criminal prosecution brought, and again, if you want to talk about trickle-down effect, you know, that comes out of their shareholders' 401(k)s, et cetera. Are you concerned about that?

20:24:06

Nancy Gertner:

Well, Arthur Anderson was the classic example of a company that actually died as a result of a conviction that was then overturned. White collar offenders, all you need is the hint of scandal and it creates incentives to plead guilty, to cooperate, to basically get out from under the case more than any other. Grand juries are oftentimes leaky, supposed to be confidential. It's not a surprise that everybody in town knows what's going on in the grand jury and that invariably incentivizes people to plead guilty who perhaps -- and then go up the chain, only it's not clear where the up is and where the

down is, because too often, as my partner would say, cooperators not only sing, but compose.

John Donovan:

Reid Schar, do you want to respond?

Reid Schar:

Yeah, I just totally disagree with -- a lot of the very broad brush statements that are being made, things like everybody in town knows what was going on. The day that we arrested Governor Blagojevich, the shock in the eyes of the prosecutors in the office was amazing because nobody -- virtually nobody in the office, our own office, knew that we actually had wiretaps and what was going on.

20:25:17

So there is -- there's a lot of broad brush statements that are being made here that I think are not really fair. And when you look at each individual situation, even going back to the issue of pleas, you know, again, you know, people plead guilty. And what we haven't talked about is the fact of the matter is they often plead guilty because they're given better deals than they might otherwise deserve. There are lots of things prosecutors don't know. A lot of times individuals have committed -- in my bank robbery example -- five bank robberies, and we caught them on the last one, and that's what they're going to get prosecuted for. And they know if they can make that case go away quickly, there's going to be four that we may never find out about. So there are a lot of things that go on in each -- and each case is individual. In each case, we talk like -- each one goes through all the checks and balances we've discussed.

John Donovan:

Paul Butler, I want to get now to the point that David Hoffman brought up. Grand juries just need the 10-second -- no, the 20-second explanation for those who are not familiar with how they work.

20:26:10

What happens in a grand jury which is relevant to our discussion in terms of the power of the prosecutor. And then I want to have David Hoffman respond.

Paul Butler:

Yeah. I got to say, as a rich white guy, Governor Blagojevich stands out in prison. He's not the normal guys you're sending there. The way the grand jury works is, in the federal system, it's a room. It's 23 people chosen just like regular jurors, only they get asked fewer questions. The prosecutor is the legal adviser. So it's your job to tell them about the law and the standard for indictment. You call witnesses. And just check this out. You may --

John Donovan:

Paul, can you watch -- stay on your mic. Thanks.

Paul Butler:

Yeah. Check this out. You may have, in criminal procedure, learned about the Fourth Amendment and how the police have to have probable cause to get evidence. That's not true in the grand jury. The standard is "relevant." I see my dean, Martha Minow is here. Dean, I missed this day on law school where we learned about grand juries. Well, this is how much power they have. When I was a baby prosecutor, I would just fill out a form saying what evidence I wanted from the defendant or from the defense side, and I would get it.

20:27:16

It turned out I was doing that on behalf of the grand jury, but I didn't know it. I thought I was just doing it because I was the prosecutor. That's how much power prosecutors have. They run the grand jury. The defense attorney is nowhere present.

John Donovan:

I want to bring it to David Hoffman, and after that, I'm going to go to audience questions. So I just want to remind you again to raise your hand. I'll call on you. Please tell us your name. Stand up, wait for the microphone, and then ask your question. David Hoffman, on grand juries.

David Hoffman:

Yeah. There's a reason that the grand jury and the confidentiality of the grand jury is in the Bill of Rights. You know, conducting investigations that are confidential, that are private, that are secret is a protection for individuals. That's why it's in the Bill of Rights. For every case that gets investigated where there's a grand jury number opened in the U.S. attorney's office where charges are brought, there are multiple cases where there's no charges brought. So grand jury is a tool to investigate to figure out what happened and if charges should be brought.

20:28:12

Paul is absolutely right that it is a one-sided show in terms of the prosecutors there, and there's no cross-examine of the witnesses. But this is an investigation to determine just whether the process should even be started, whether a charge should be brought. And do we want that to be a public process, where no charges are going to be brought? There are myriad people who are thankful that the grand jury process was secret because no charges were brought. And how about the witnesses? It is essential for witnesses to be able to come in and feel comfortable telling the truth for cases that

may never get brought, or may, whether they may never have to testify at trial, that they can know that their testimony is going to be confidential.

John Donovan:

Nancy Gertner, would you want the secrecy removed from the process of the grand jury?

Nancy Gertner:

I think it is de facto removed. With all due respect, when you talk about broad brushes, police talk, FBI talks, Blagojevich may have been the exception, virtually every major prosecution in the Boston area, for example, has been in the Boston Globe.

20:29:10

John Donovan:

But you didn't answer my question. Would you want it formally removed?

Nancy Gertner:

Well, the -- formally removed, no.

John Donovan:

Why?

Nancy Gertner:

Followed, perhaps. But I think that there ought to be more protections on the grand jury. I think, for example, there ought to be defense participation in the grand jury. I think there ought to be more exchanges of information with respect to that. It is, for many cases, the indictment is the end of the case. In other words, the indictment, to some degree, ruins a company, ruins a person. The indictment is the end of the case. I think we can hedge it about with safeguards. I think we actually should look to that. Ferguson and all the grand jury proceedings that we've seen with respect to Eric Garner, we've understood how distorted the process is and how important it is. And so we should, it seems to me, look again at reconfiguring this.

John Donovan:

Let's go to some audience questions. And again, if you raise your hand -- ma'am, right there. I'm -- if you stand up, they'll find you. And the mic's coming up to you.

20:30:06

Also, I wanted to say, if you're a member of the press, we'd appreciate it if you would less us know that, like by telling us who you're with.

[laughter]

Female Speaker:

Thank you. My name is Karen Daniel. Generally, prosecutors have absolute immunity against getting sued for misconduct that they commit in the course of doing their jobs. Is that an example of prosecutors having too much power, or is absolute immunity a necessary component to prosecutors being able to effectively do their jobs?

John Donovan:

Let's take it to Reid Schar first.

Reid Schar:

It's a –

[applause]

It's a fantastic question. And there were a number of actual -- first of all, obviously, prosecutors are bound by the ethical rules in their license. And there's something called the Hyde Amendment, and there are a variety of other actual statutes that have been passed in the wake of certain things that actually do allow civil cases against prosecutors go forward.

20:31:04

I think the difficulty is, if you took away a lot of immunity, what would end up happening, potentially, is that you'd end up with lots and lots of lawsuits against prosecutors by not necessarily people that are, correctly found not to be guilty, but people that actually are still in jail. And so it's a difficult balance, but I don't think because of the variety of things that prosecutors are bound by in the ethics rules and the actual other laws that exist that actually do allow lawsuits against prosecutors, I don't think it's one of an indication of too much prosecutorial power.

John Donovan:

Paul Butler.

Paul Butler:

So what prosecutors say to defendants is, if you don't want to do the time, don't do the crime. What I say to prosecutors is, if you don't want to get sued, follow the law. Be ethical. Then you won't have to worry about it.

[applause]

John Donovan:

Reid Schar. Reid Schar.

Reid Schar:

You know, David and I are now in civil practice as well, and I can tell you the standard for being sued is not just, "Do the right thing." So there are lots and lots of lawsuits that are filed every day.

20:32:12

[Applause]

Paul Butler:

Well, quickly, if you look at the numbers, it may be a high standard. But if you look at the numbers, prosecutors are almost never disciplined. They're not disciplined by the Department of Justice. The conservative Judge Kozinski of the ninth circuit has an article in the Georgetown Law Journal, where he says the office of professional responsibility for prosecutors is a joke. They don't get in trouble. It's like their protection agency.

Nancy Gertner:

And it's called -- he calls for actually eliminating prosecutorial absolute immunity because that's the only place where there at least would be some forum to review what they do.

[applause]

Male Speaker:

My name is Bill Strom. And hearing the debate so far, Mr. Butler described a system of plea bargaining in 97 percent of cases rather than a system of criminal justice. And Mr. Schar then described a system of several checks and balances all the way from the point of arrest to the point of appeal and post-conviction release.

John Donovan:

Good summary, actually.

[laughter]

Male Speaker:

Thank you.

20:33:10

I'm wondering if the two sides might be able to come together over the proposal that there be checks and balances in a system of plea bargaining, whether a policy mechanism that would make that possible is desirable.

John Donovan:

You know what I -- what I would prefer, rather than creating a wonderful Kumbaya moment in -- in the middle of a debate that has to be adversarial --

[laughter]

Male Speaker:

Perhaps [unintelligible].

John Donovan:

Would -- no, no. But would be whether your question could be rephrased to say, do we need a major overhaul of the checks and balances, or not. Would you be okay with putting the question that way to each side?

Male Speaker:

Certainly.

John Donovan:

Do we need a major overhaul -- [laughter] -- of the checks and balances? Does a lot need to change? Nancy Gertner.

Nancy Gertner:

Judge Rakoff in the New York Review of Books calls for review of plea bargaining by federal judges, by a federal magistrate who could look at what the charges are. The difficulty of that is an information deficit, which the judge has as well.

20:34:07

I mean, I can tell you that cases would be -- I'd have to deal with pleas in front of me. And I know nothing about the case at all. And after that elaborate plea colloquy, I knew even less. Yes, if we wanted to keep it as a plea bargaining system, we have to do something about mandatory minimums and leverage. We have to do something about the information deficit so that it's a meaningful plea bargain. The word "bargain" --

John Donovan:

But those are --

Nancy Gertner:

-- is such a misnomer in the --

John Donovan:

But are those changes --

Nancy Gertner:

-- context.

John Donovan:

Are those changes in the prosecutor's power, or are those changes in the law?

Nancy Gertner:

That would have to be changes in the law.

John Donovan:

So do you want to do an overhaul of prosecutorial powers.

Nancy Gertner:

No. We'd have -- but if you change the mandatory minimums, you'd be changing the prosecutor's --

John Donovan:

Okay. Let's take it --

Nancy Gertner:

-- power as well.

John Donovan:

Take it --

Nancy Gertner:

And if you created a review like a magistrate reviewing the plea bargain, then at least you have some hope of some meaningful checks and balances.

John Donovan:

Okay. So that's --

Nancy Gertner:

But I would prefer a trial system. Call me crazy.

John Donovan:

Take it --

Nancy Gertner:

I'm a judge. You can't possibly interrupt me.

John Donovan:

David Hoffman.

[laughter]

[applause]

20:35:06

John Donovan:

But now you have to stop talking, your honor.

[laughter]

David Hoffman. So one specific that came from the other side would be some sort of review of the plea bargain process.

David Hoffman:

May I, your honor?

[laughter]

Nancy Gertner:

No.

[laughter]

David Hoffman:

Continuing on, for the reasons we said, I do think it's unfair to throw the mandatory minimums as a reason why prosecutors have too much power with regard to plea bargaining. But I want to address the -- there was an interesting article by Judge Rakoff about -- the idea was basically that there should be a magistrate judge who should be like a mediator in all plea bargains, or if the parties wanted, and should be available for that. I -- let's imagine how that would work. I don't think it's a good idea. And I actually think a better solution is to empower the defense bar more with more resources and time to review things, you know, to understand -- as in a civil case, but to understand whether what the prosecutors are proposing and what the defendant is willing to plead to is fair--

20:36:13

--you have to review the evidence. So the defense attorney has hopefully reviewed boxes of evidence. Now you're going to bring in a magistrate judge. I don't know magistrate judges or judges who have lots of time to all the sudden take on a whole bunch of other cases and review boxes of documents. And with due respect to judges and magistrate judges, the best person to advocate in front of the prosecutor that a certain plea proposal is unjust is a defense attorney, the defense attorney who not only has the ability to review the evidence because it's their case, but the ability to talk to their client in an attorney-client privileged setting that the magistrate judge or mediator

would not have, and to argue to prosecutors. This is what we do and defense attorneys do all the time when they have the time and resources to review the evidence and to come into the prosecutor's office and say, "Your case stinks," or, "There's an aspect of your case that is going to get suppressed," or, "This is what's going to happen if we go to trial." So it's bargaining that way.

20:37:06

We do need more of that, and that's perfectly fine. But that shouldn't -- the proposal to have a magistrate judge is both unrealistic and not putting the resources where it belongs, which is creating more balance.

John Donovan:  
Okay.

David Hoffman:  
[inaudible] -- we have no problem with that.

John Donovan:  
I would --

[applause]

-- I just have to do this part for the radio. I want to remind you that we are in the question and answer section of this Intelligence Squared U.S. Debate. I'm John Donovan, your moderator, and we have four debaters, two teams of two, arguing it out over this motion, "U.S. Prosecutors Have Too Much Power." Let's go to some more audience questions.

[applause]

Right up in the corner. I think that -- yeah. Would you mind coming out to the aisle? Thanks.

Male Speaker:  
I'm Andrew Nelson.

20:37:54

Because so many U.S. individuals have been wrongfully accused, slandered, wrongfully prosecuted, railroaded to prison, et cetera, should not we all be inexorably bent and utterly intent on actualizing legal precedents that meaningfully hold accountable any officer of the court for misprision of felony perhaps, misprision of treason, insofar as

their withholding exculpatory evidence and testimony that would justifiably exonerate the innocent is concerned?

John Donovan:

That was a -- that was a long question.

Female Speaker:

Right.

Male Speaker:

It's a rhetorical question, by the way.

John Donovan:

Yeah, I get it was a rhetorical question. So you've made your point and I think your answer is, "Yes," so I'm going to move on because I think we've covered it in -- sir, up in the -- yeah. Hello.

Male Speaker:

Sorry. Hello.

John Donovan:

Do you have a long rhetorical question?

Male Speaker:

I don't think so.

John Donovan:

Okay.

Male Speaker:

I'm Eric Sullivan. I was wondering. I really appreciated the question earlier about the ships passing in the night, especially as Paul, I think, mentioned that the banks have not been prosecuted pretty much at all.

20:39:05

And so I'm wondering if you think -- and I guess it's only on the one side, I don't know if that's allowed -- can you limit the prosecuting power for some of these low level [unintelligible] without impinging on their power to take down some of the bigger guys?

John Donovan:

Wow. This is a complex question. I think it's an interesting question. Since we are talking -- since the two of you are talking about what almost sounded like "A Tale of Two

Cities" to some degree, you may object to that, but -- so I withdraw it, but I think you get the --

[laughter]

-- I think you get the gist of the point, that they're talking about a class of people who are relatively far more powerless than others. And you have been talking about needing to use those prosecutorial powers to get the big guys, and they've been talking about the little guys are under the thumb of the prosecutors. And so the question is sort of saying, "Do we need to have I guess a graded -- a graduated system of prosecutorial powers or not? Does it makes sense logically and could it work?" And then I want to come to this side as well.

20:40:01

David Hoffman:

I don't think a gradated system makes sense or could work, but the concern about -- look, of course it's true that while we -- the most important cases that we were making in the office were the ones -- the most difficult ones we were attempting to go up the chain and make cases against the most powerful members of a criminal enterprise or the most powerful public officials where there's evidence of corruption, but of course there are people, especially, especially in the state systems, where it's not that kind of situation. It's just people who have been arrested for low-level drug crimes or other crimes where there's just one person. So, of course there's a mix of people who are prosecuted and convicted and sentenced. And, you know, I would suggest that one of the key policy issues there regarding the large number of people who are in prison for non-violent drug offenses, the race of a high percentage of those people relates to sentencing decision. It's not about the power of prosecutors. It's about whether drug sentences for non-violent drug offenses are too high.

20:41:07

That is a very important policy debate and, as I said, my guess is that the four of us might have a lot of agreement on that. That is not this debate. That is a policy issue that we as a country should drugs be legalized? Should some drugs be legalized? Should sentences be changed? But people are in prison for non-violent drug offenses at a -- I would say, you know, too high a rate, not because of prosecutorial power, but because the sentences across the country, post-1980s, post-crack/cocaine situation --

John Donovan:

Okay. I want to interrupt you because I want to actually come back to the question --

[applause]

-- because as David did start with the question and moved to another area. I want to come back to the question about whether there should be some sort of consideration given for the power of the defendant, the power relationship of the defendant, and what power the prosecutor is able to exercise. Paul Butler.

Paul Butler:

Yeah, if I could address both those. So, you know, remember I talked about all the women and children in African American, Latino communities, poor people who are doing time on the outside. It's because prosecutors don't think about that. What's the difference with corporations? Under the federal sentencing guidelines a corporation can be investigated and prosecuted just like a person.

20:42:13

So, you know, if you think that Volkswagen or BP or Exxon ought to be in jail or have some kind of punishment, that's possible, but check this out. The federal sentencing guidelines say if bringing a prosecution would have a negative effect on the shareholders or on the employees, the prosecutors don't have to bring the case, even if they think the corporation is guilty. So, I think when it comes to that kind of law, what's good enough for Exxon and Volkswagen is good enough for poor people. I think we ought to have the same kind of consideration for them.

[applause]

And real quickly with regard to the war on drugs, respectfully, David, it's all about race. Black people don't use drugs more than anybody else. That usually doesn't surprise folks on the college campus. I hope it doesn't surprise you.

[laughter]

So, African Americans, according to the National Institute of Health are about 12 percent of people who use drugs or sell drugs.

20:43:08

If you go, though, to the National Institute of Health -- or I'm sorry, the Bureau of Justice Statistics in D.C., they'll tell you 60 percent of people who are locked up for drug crimes are black. So, 12 percent of people who do the crime, 60 percent of people who do the time. Cyrus Vance [spelled phonetically], the D.A. in New York, he's a brave man. Why? Because he commissioned a study to see whether race was playing a role in his office, and he found at every stage of the process race mattered. He controlled for the crime. He controlled for prison record or background record. Race was making a difference. Race was doing a lot of work. So, it's not just about the laws or the

sentences. It's about the way that prosecutors are exercising their discretion in a race-based way.

John Donovan:  
Reid Schar.

[applause]

Reid Schar:

So I think we need to understand, there was a funeral in the city of Chicago today for a nine-year-old child who was shot and killed and executed in an alley because his father was wanted as part of a gang dispute.

20:44:13

That happened today. And prosecutors have limited resources, particularly federal prosecutors, and we in the U.S. Attorney's office had decisions to make, and the decision was do I want to go to a college campus and see if I can get some users? Or do I want to go down into the areas which unfortunately are poorly socioeconomic, tend to be heavily minority, and go after the people who are pulling triggers and executing children and doing things like that sort? Where can I have the greatest impact to try to make a difference in people's lives? And there's a huge drug debate that has to be had and it goes to users, it goes to other things, and it goes to legalization, but as a prosecutorial office I want to save people's lives, and that's where I go. And does that have an unfair impact on minority communities? At some level, unfortunately it does because that tends to be, as David pointed out, where a lot of the death is occurring.

20:45:09

Doesn't mean that the U.S. Attorney's office doesn't indict cartels. Guzman el Chapo, who just escaped from another Mexican prison, is under indictment in the city of Chicago based on the U.S. attorney's office. It's not as if they don't go after other people as well. But what I want to do is I want to try to save lives with limited resources. And that does have a maybe unfair effect. But hopefully, maybe nine-year-old kids aren't going to be dying as much.

John Donovan:

And that concludes round two of this Intelligence Squared U.S. debate where our motion is U.S. Prosecutors Have Too Much Power.

[applause]

John Donovan:

And here's where we are now. We are about to hear brief closing statements from each debater in turn. They will be two minutes each. And it's their last chance to try to change your minds to vote with their side. And remember, you have voted once, and will be asking you to vote once again right after these closing statements, just a few minutes from now. On to round three, closing statements. Our motion is U.S. Prosecutors Have Too Much Power. Here making her closing statement supporting the motion, Nancy Gertner, a senior lecturer at Harvard Law and former U.S. federal judge.

20:46:13

Nancy Gertner:  
Do it here or –

John Donovan:  
You sit, yeah, for this one.

Nancy Gertner:  
Okay. A couple of days ago, I published an op-ed in the Boston Globe. It said I was a judge for 17 years. I presided over the sentencing of dozens and hundreds of largely African-American males. And I sentenced 80 percent of them to sentences which I believed to have been unfair, disproportionate and unjust. And I described what I plan to do about it, which is really part of why I'm here today. Part of the answer was in Congress, enacting mandatory minimums that led to that situation, but clearly part of the answer were prosecutorial discretion that that system enabled. And let me close by describing something that was said just in 2015, a few months ago, by a prosecutor who was responsible for someone spending 30 years on death row.

20:47:08

He said, "At the time the case was tried, there was evidence that would have cleared this man, Glenn Ford. The easy and convenient argument is that the prosecutors didn't know of such evidence and, thus, they're absolved of any responsible for wrongful conviction." He said, "I take no comfort in such an argument. Had I been more inquisitive, perhaps the evidence would have come to light years ago. My mindset," he said, "was wrong and blinded me to my purpose of seeking justice rather than obtaining a conviction of a person I believed to be guilty. I didn't hide evidence, I just didn't consider the evidence." In 1984, he says, "I was 33 years old. I was arrogant, judgmental, narcissistic, full of myself. I was not interested in justice as I was in winning. I was, to borrow a phrase from Al Pacino, 'Winning became everything.'" The issue is not the good prosecutor any more than it is the good judge.

20:48:10

The issue are the endemic risks of a system that enables prosecutors to say, "Winning is everything." Vote that prosecutors have too much power.

John Donovan:

Thank you, Nancy Gertner. And that is the motion, U.S. Prosecutors Have Too Much Power. And here summarizing his position against the motion, David Hoffman, a partner at Sidley Austin and a former inspector general and federal prosecutor.

David Hoffman:

Thank you. You know, winning is not everything, and that's not what being a prosecutor is about, either in approach or in duty. You know, Paul's written an article and has argued that good people do not become prosecutors. I don't know whether I'm a good person, but I became a prosecutor because when I was in law school I went down to the Woodlawn neighborhood, which was south of Hyde Park, to talk to people about whether a community service group should be started. And I heard stories from them about how their neighborhood was better, safer, because the Feds had come in and taken away Jeff Fort, one of the leaders of a big gang, and that made them feel better, parents feel more secure, and they were happy about that.

20:49:09

This is a social justice issue for many of the important prosecutions. And we should not be diminishing prosecutorial power. The parents in these neighborhoods who are looking for advantages in raising their children, where too many nights they put their children in a bathtub in order to protect them. They are looking for help from prosecutors and the police. And those same parents are, frankly, scared of the police as well. They worry about their sons getting arrested or hurt wrongfully by the police. And as prosecutors, we need to the powers to go after both, gang leaders, political leaders, and police officers who are abusing their powers. That's what being a prosecutor is. On the same week when I had just had three police officers plead guilty for lying under oath to try to enhance cases on people, I was driving with other police officers on the west side. They wanted to show me around. And they got a call that there had been shots fired, and a pizza delivery man had been shot to death in a van. We pulled up 30 seconds after the ambulance pulled up.

20:50:11

And there were the pizzas spilling out of the van. He's a 35-year-old father of two. He had been -- they were ready to move to another neighborhood farther south for safety. We should insist on strong, strategic, effective, smart use of prosecutorial power, hold our prosecutors to transparent and accountable judgments on that, but not diminish prosecutorial power. We thank you for listening. We respectfully request that you vote no on the resolution.

John Donovan:

Thank you, David Hoffman.

[applause]

John Donovan:

And the resolution again, U.S. Prosecutors Have Too Much Power. Here summarizing his position in support of the motion, Paul Butler, a professor at Georgetown Law and former federal prosecutor.

Paul Butler:

You know, Tshawn Lee, the nine-year-old whose funeral was held today, or J'Quantae Riles, who was gunned down last weekend, David, my argument is good people should not be become prosecutors. I know good people are prosecutors. And the four of us would have done anything we could to save those two lives.

20:51:10

But the tragic reality is that next weekend, someone else's child is going to be shot in Chicago, and the weekend after that, somebody else. So what these good people who our prosecutors are doing, it's not working. The folks in the community, they're not only scared of the bad guys and the cops, they're also scared of the prosecutors. So we have to invest in these communities and those children. And we have to demonstrate that their lives matter to all of us, and that we're not just going to focus on them when they messed up. Justice Clarence Thomas said that when he was a judge in D.C., he used to look out the window of his chambers and see all of these young black men filing into criminal court in chains. And he would think, "There but for the grace of God go I." President Obama speaking at the NAACP convention a few years ago, same phrase, "There but for the grace of God go I."

20:52:06

My friends, the determination of who goes to criminal court in chains should not be so fortuitous. It should not depend so much on race and class. As long as it does, we need to restore the system of checks and balances that the framers intended. We need to stop judging people by the worst thing they ever did. Yes, we need prosecutors. But we don't need them to have super powers. That's why the name of democracy and the name of transparency and the name of equal justice under the law. Please vote yes. Let the whole world know that prosecutors have too much power and that as Americans we're not going to take it anymore.

[applause]

John Donovan:

Thank you, Paul Butler. And that is the motion, U.S. Prosecutors Have Too Much Power. And here summarizing his position against the motion, Reid Schar, a partner at Jenner and Block and also a former federal prosecutor.

20:53:03

Reid Schar:

So I'm going to do something I don't do a lot, and talk a little bit about -- at least in public -- the Blagojevich case, to end here. What people tend to see from that case is the headlines, the big issues that came out. What they don't see -- and there's no reason they would necessarily see -- is the years. And it took many years to build to the point where that case was actually viable. It required wiretaps, very difficult to get, significant oversight on low-level people; required trying to convince people to cooperate. It required going to trial with all the checks and balances we've talked about, against other lower level people till they were convicted and they chose to cooperate. Countless grand jury subpoenas. It required off site meetings where we met with witnesses outside the purview of the U.S. attorney's office so they wouldn't be cited, jeopardizing their own safety or possibly the investigation. It had countless people who lied to us, who told us things that were just inaccurate and sent us off on wild goose chases, sometimes for months, people that refused to cooperate. And at the end, when we were finally, after years and years of using literally every prosecutorial power we had, able to get up on the wiretaps, able to listen to the governor's calls, then it required luck as well to add into the mix.

20:54:15

It happened to be that there was a presidential election. He was talking about selling the Senate seat. Or frankly, one of the worst things, and maybe the worst thing he did, on the phone, shaking down a children's hospital. He was holding up money that was meant for sick children until he got campaign contributions. None of those things would have been uncovered if it hadn't been for all the powers that the U.S. attorney's office had. So if we're going to take power away from prosecutors, we need to fully understand -- and it's hard to quantify -- but we need to fully understand there are going to be some people, maybe people like the governor, maybe people pulling the trigger, that are going to get away with crimes that will never be solved, that we can solve now. Do we have the right balance as it is? There are checks and balances, and I would urge you to vote no on this motion: Prosecutors do not have enough -- do not have too much power, number 2 on your keypad.

20:55:08

John Donovan:

Thank you, Reid Schar. And that concludes round three of this Intelligence Squared U.S. debate, where the motion is, U.S. Prosecutors Have Too Much Power. And now it's time

to learn which side you feel has argued the best. We're going to ask you again to go to the keypads at your seat. Just like the first vote, please vote again. Take a look at the motion, "U.S. Prosecutors Have Too Much Power." If you agree with this motion, push number one. Hold that thing down for a few seconds until the number lights up. If you disagree, push number two, same thing, hold it down till it lights up. If you remain or became undecided, push number three. And I'll give it about another 20 seconds, and then we'll lock that system out. And while we're doing that, the first thing I wanted to say is that for us to visit -- you know, New York is our usual home. By coming here to Chicago, I have to say that Intelligence Squared has unquestionably had one of the best debates that we've ever had. These four debaters brought intelligence and civility to one another and respect for one another, for the issues, for the audience. I just want to congratulate you all for the way that you all did this.

20:56:15

[applause]

I also want to say that it's really an honor for us to be partnering for the first time with Northwestern Pritzker School of Law on this debate. And this debate is the first in a series known as the, "Newt and Jo Minow Debate Series." And we want to celebrate that by bringing two gentlemen to the stage. So let's please welcome to the stage Daniel Rodriguez and Newt Minow.

[applause]

20:57:07

So we'll chat for a minute, but we couldn't let this moment pass. I first want to speak with Daniel Rodriguez, Daniel, our dean, and Harold Washington Professor here at Northwestern Pritzker School of Law, and also instrumental in bringing this debate series to life. So tell us the importance, the reason that the law school got involved with the Newt and Jo Minow Debate Series in the first place.

Daniel Rodriguez:

Thank you, John. This -- it's tremendous for the law school. And we want to thank IQ Squared for giving us the opportunity. And this is the culmination of a series that we know will go on for a good long time here at Northwestern. And it's a special honor to be able to honor two great friends of Northwestern University, and, of course, great friends of the City of Chicago, Newt and Jo Minow. So, yeah, it's just thrilling to be able to have the opportunity to honor them.

20:58:04

And with a particular shout out to Newt, no one in our community, in the City of Chicago, has done more to elevate public discourse, the father of presidential debates, former chair of the FCC, but just an individual who has really advanced the cause of civilized and reasoned discourse as this debate certainly well illustrates.

John Donovan:  
Terrific. Thank you.

[applause]

And, Newt Minow, as Dean Rodriguez has said, you are the originator of the televised U.S. presidential debates back in 1960. It's funny, people think they went back forever, but they are a relatively modern phenomenon. And currently you're the Walter Annenberg professor emeritus here at Northwestern. But I want to also ask you about - why did you get those debates kicked off back in 1960?

Newt Minow:  
Television was new at that time, and I felt that in our country it was a perfect medium for voters to get a better understanding of their candidates and what they offered.

20:59:12

There were no debates in '64, '68, and '72 because the law didn't change. But in 1976, three Northwestern Law School graduates -- I was one of the three -- three of us, Republicans, Democrats, independents, who had learned at Northwestern Law School -- if the law was wrong, you had to change it. And we did. And the debates resumed in 1976, and they've been with us ever since.

John Donovan:  
And this debate now is being live streamed globally on computers everywhere. So I'm assuming that you completely foresaw all of that happening?

[laughter]

Newt Minow:  
Well, I was lucky when I was at the FCC. We started communication satellites and the public broadcasting system, public radio. So it was really, tonight, fulfilling my dream of seeing that civilized discourse was spreading throughout the world.

21:00:14

And I'm particularly pleased that a start that came from Northwestern, which has meant to much to Jo and me.

John Donovan:

And we're bouncing off the satellites you helped put up there. Thank you very much, gentlemen, both of you.

[applause]

We're going to pull the seats first, right?

Male Speaker:

Yeah.

John Donovan:

I'll just wait before I do the announcement. Okay. The results are all in now. The motion, again, U.S. Prosecutors Have Too Much Power and the way this works, it's the difference between your first and second vote, the difference between the votes, that helps -- that does determine who our winner is.

21:01:09

So look at -- let's look at the first vote on the motion U.S. Prosecutors Have Too Much Power. In the first vote, 40 percent of you agreed, 18 percent were against it, 42 percent were undecided. Again, the first results. Let's look at the second results now. The team arguing for the motion U.S. Prosecutors Have Too Much Power. Their first vote was 40 percent. Their second vote 54 percent. They picked up 14 percentage points. That is the number to beat. The team against the motion, their first vote 18 percent. Their second vote 36 percent. They picked up 18 percentage points. That means the side against the motion won. The motion U.S. Prosecutors Have Too Much Power has been defeated.

[applause]

Our congratulations to that team and thank you from me, John Donovan, and Intelligence Squared U.S. We'll see you next time.

[applause]

21:01:58