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In This Issue

Letter from the Editor

We are pleased to present the cumulative index to the *United States Attorneys' Bulletin*. We hope that you will find the index useful in locating articles on legal issues of interest to you. A special thanks goes to Managing Editor Jennifer Bolen for putting the cumulative index together.

This issue serves another important purpose. It contains inspirational stories of federal prosecutors with long and distinguished service in the Department. Our focus is on our history and tradition, and the timing couldn't be better. This is an era in which federal prosecutors dedicate entire careers serving the nation. Attorney General Reno's tenure is the longest of any Attorney General in the 20th century. Our featured interviewee in this issue is Deputy Assistant Attorney General John "Jack" Keeney, whose Department career began in 1951. Former Harvard Law Professor Ernest Brown began a "one year" stint as a professor in residence at the Tax Division in 1970 that continues today. Special Litigation Counsel Brown is quick to point out that there are other lawyers in the Tax Division who have served longer, but he has a special claim of seniority—Mr. Brown is 92 years old!

Many thanks to all of you who continue to give us your comments and suggestions for the *Bulletin* and our publications program. Please feel free to call me with your comments at (340) 773-3920 or on Email at AVIC01(DNISSMAN)

DAVID MARSHALL NISSMAN

Contents

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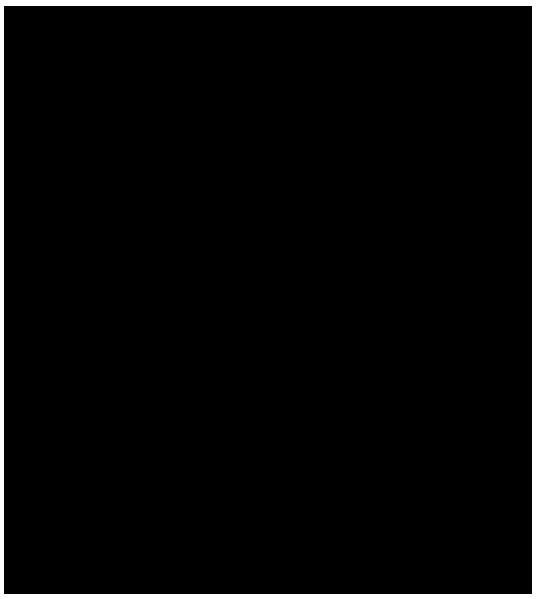
Interview with Deputy Assistant Attorney General John C. Keeney



Jack Keeney

For 26 years, John C. "Jack" Keeney has been the Deputy Assistant Attorney General of the Criminal Division. He was born in Wilkes-Barre, Pennsylvania. He received a Bachelor of Science Degree from The University of Scranton in 1947 and, in 1949, he received his LL.B. from The Dickinson School of Law. In 1953 he received is LL.M. from George Washington School of Law. Keeney joined the Department of Justice in 1951. From 1943 through November 1945, he served the country as a Navigator, U.S. Army-Air Force and saw active duty in the 8th Air Force in 1944.

In the current bestseller, *The Greatest Generation*, author Tom Brokaw chronicles the experiences and accomplishments of our World War II veterans. United by a common mission that required putting the good of all above individual interests, these Americans share some very special qualities. Brokaw comments that

they are unusually modest, dedicated, and have made remarkable accomplishments in all fields.

Our featured representative of this group epitomizes these and other special values. Jack Keeney was a navigator aboard a B-17 bomber that was shot down over Germany. He became a POW. When you walk into his office today you see a framed picture of a B-17 on his wall, but when you ask him about his war experiences his responses are modest. He simply says he "was one of the fortunate ones."

Keeney's dedicated service to his country includes an incredible 48 year (and counting) career at the Department of Justice. As you read the interview you will see that he is part of the can-do generation that, when confronted with problems, even of epic proportions, quietly manufactured solutions. Circumspect, modest, unassumingly honest, he speaks of his experiences prosecuting communists in the 1950s, the early years of our organized crime program, the behind the scenes anguish at the Department during the Watergate era, the development of international cooperative agreements, and many other fascinating historical subjects. As we pay tribute to a career in progress, our purpose is to inspire others to dedicate their energies to solving the problems facing us in the spirit of service to our country.

Keeney (JK) was interviewed on October 13, 1998, by Assistant United States Attorney (AUSA) David M. Nissman (DN), Editor in Chief, *United States Attorneys' Bulletin*.

DN: I want to take you back to March 19, 1951, your first day of work at the Department. What were your impressions?

JK: Just kind of bewildered. I came in at 9:00 in the morning and reported to Bill Foley, who was then the head of the Internal Security Section in the Criminal Division. I don't remember very much other than that. It was a long time ago.

DN: What was your first job at the Department?

JK: We were doing internal security file reviews and cases under the Smith Act. We did a lot of file reviews in those days and I did cases. When I came in there was an Internal Security and Foreign Agents Registration section within the Criminal Division. In 1954 the section was split out of the Criminal Division and a separate Internal Security Division was created. It operated from 1954 until the 60's.

DN: Was everyone in the Department housed in one building?

JK: No. We actually spent a lot of time in the old post office building. We were not all in one building. I don't think we went beyond one additional building.

DN: And the FBI was in the main building?

JK: Yes.

DN: Was there a physical barrier between the FBI and the rest of the Department?

JK: No. Hoover's office was on the fourth floor. I think where Civil Rights is now. No, there were no barriers.

DN: So if you needed to go see an FBI agent, you just took the elevator up and found him?

JK: I never recall ever doing that. There were no physical barriers but there were other kind of barriers between the Department and the FBI at that time. Hoover discouraged fraternization with the Department lawyers.

DN: Why was that?

JK: I was never sure exactly what it was but he liked to keep his people separate.

DN: You mentioned doing file reviews as part of your job with Internal Security. Were these reviews of registered aliens?

JK: Of potential security risks was really what it was. For a period of time, I was executive secretary of the interdepartmental committee on internal security that was based here in the Department but had representatives from the other agencies. The committee addressed interagency security problems such as security at the border, customs inspections, things like that.

DN: The McCarthy era is a very interesting period of American history. How were the cases selected?

JK: Actually, the FBI controlled the selection of targets. They would periodically come over to the section with a memorandum similar to a pros memo. They would have compiled all of the information that they believed would support a prosecution of particular individuals and they would give it to us. Then we would examine it and see what we could do with it. What usually happened was that we would accept most of the recommended targets and then go out in the field and start presenting the case, meet with some of their informants, some of the defectors. We got an opportunity to assess the case and the credibility of the witnesses. By the time I got into it, they were quite a few defectors who turned out to be key witnesses. Also, some of the convicted defendants came around.

DN: Were the informant issues during that period of time different than the informant issues today?

JK: Yes. Disclosure of informants, *Brady*, and so forth, was not really the law at that point. As a matter of fact, even the Jencks Act came about because in one of our cases we didn't turn over the 302s and other reports of witnesses that we used or didn't turn them over in a timely fashion. The long and the short of it was that we got slapped down on that and then the Congress enacted a statute which codified what the Supreme Court did in the *Jencks* case and created a set of procedures helpful to the Government in that we were not required to produce a witness list before trial and did not have to turn over some of
the statements until after direct examination. It was a positive step because it was fairer.

DN: What kind of discovery was given in those days?

JK: As little as possible. The defendants weren't surprised as to who the witnesses were because a lot of the people that we used as witnesses had appeared publicly in Congressional testimony. If there was a surprise witness, it would be a real surprise, because it was so unique. The only real surprise was when somebody defected almost simultaneously with the trial.

DN: Describe what these cases were about?

JK: The Smith Act cases only addressed the prosecution of avowed Communists. What we charged them with was teaching and advocating the overthrow of the government by force and violence. We had to. The Supreme Court in the leading decision of *Dennis* said we had to prove not just advocacy of the Communists' programs and principles - but advocacy of action. We had to prove that they had taken some action along the road leading toward violence.

DN: Did you develop any type of specialty during this period?

JK: I became a specialist in, of all strange things, contempt of Congress cases. We had maybe a half dozen referrals from Congress for contempt by people who appeared before Congress who had Communist leanings. I got indictments on a couple of them and actually tried one against a Professor Yellin from Indiana, and it went to the Supreme Court.

DN: What did you do after the Smith Act cases?

JK: I left the Internal Security Division in May of 1960. I went into the organized crime section.

DN: Why?

JK: I didn't see any future in the Smith Act unit and I wasn't going to go any further. So I was interested in what was then a more attractive area.

DN: Was the FBI responsible for investigating those cases at that time?

JK: There is a little bit of history there. At that point, Hoover would not admit there was such a thing as organized crime. We built the program with, primarily the Internal Revenue Service and we used the Customs and ATF to some extent. The FBI played a limited role early on in the organized crime cases.

DN: What kind of criminal activity were you investigating?

JK: We were looking for what we now call La Cosa Nostra, the mob, in the various cities. We tried to create a focus on particular cities and the leadership in the cities. I think at that time there were about 18 cities where there was an organized crime group operating and we tried to focus on them.

DN: How did you gather information?

JK: The agencies had their own intelligence files which were not all that good. We got them and put them together and were able to define at least who the targets should be in the individual cities. We didn't have much in the way of insiders or anything like that. The cases that we made to a considerable extent were tax cases where they didn't pay their taxes, sometimes didn't even file. Some of them were rather easy to make in the gambling area. I had gambling cases in Las Vegas where the gambling was legal in Las Vegas but using interstate wires to gamble was illegal. So we were just able by the collection of toll records and so forth, to get an idea of how they were operating and then we could concentrate on the individual bettors, immunizing them if necessary, to make the cases against people who were operating in interstate gambling networks.

DN: You were part of a very small group of lawyers who, because of a variety of factors including a lack of statutory weapons, faced great hurdles. How do you view your efforts to dismantle the Cosa Nostra?

JK: I view it as being unsuccessful as far as I was concerned. I had the Las Vegas beat and we were hell bent to try and get the people we knew were skimming money out of the casinos. While I was on the beat, we just didn't do it. We did later and to a large extent, got the mob out of Las Vegas. I really cannot claim much credit for that.

DN: How long a period of time did you work in the organized crime section?

JK: From '60 until I became Chief of the Fraud Section in '69.

DN: During this period of time, did Hoover change his view of organized crime or did the FBI become more involved with your investigations?

JK: The FBI did become more involved. From my perspective, the principal impetus was the creation of the organized crime strike forces which were started in September 1966 by Henry Peterson, the AAG of Criminal. I always viewed it as an end run around Hoover. Petersen went to the Internal Revenue Service, the Customs Service, ATF, and other agencies, and got a commitment from them to join in a strike force, the first of which was in Buffalo. We ran into a snag in that Don Bacon, who, I believe, was the principal deputy in the Internal Revenue Service, told us that 'we're gonna have trouble selling this in the tax area so let's call it a study group.' We actually called the strike forces study groups at first until we got them going! There was as an operation in Buffalo and I think it forced Hoover to recognize that there was as an organized crime problem and the FBI gradually became involved in the strike forces.

DN: What role did Bobby Kennedy play in the fight against organized crime?

JK: Well, he didn't create the strike forces (they came after his time) but he gave life to the organized crime program. When he came in '61, the section wasn't doing much except getting newspaper clippings and putting them in files.

DN: What was the relationship between the Attorney General and the lawyers?

JK: The relationship between God and men. Kennedy opened it up. Line attorneys got to talk to the Attorney General which was unheard of. The Attorney General was almost in isolation. We used to meet periodically with Kennedy in what is now the conference room up there. If we had a problem he would ask "what can I do?" And you would say well, we need some help from the IRS and we're not getting it so he would call the Commissioner and the problem would be taken care of. If you had a problem in Labor, he would get Secretary (later Justice) Goldberg and he could move things. We got a lot of cooperation. We did a lot of unusual things. For example, speaking of Goldberg, we didn't have immunity statutes to speak of in those days, so one of our attorneys used one of the labor administrative statutes and immunized some witnesses. I used some of the interstate commerce statutes to immunize gamblers. I did it myself. A lot of us did it. It was a rather common technique. We didn't have the immunity statutes until later. We didn't have legal wire tapping at all.

DN: What else did you do to immunize witnesses?

JK: There was as an immunity statute in the narcotics area. We also used the Federal Aviation Act, things like that, to investigate skimming in Las Vegas.

DN: How did that relate to gambling?

JK: One of the gamblers in Las Vegas was moving money from Las Vegas into Panama and Switzerland and we were focusing on that at one point. We had an investigation which indicated that some travel agents had some information. So we laid a foundation for an investigation under the Federal Aviation Act and we were able to immunize one of the key people. Ultimately, we were able to indict one of the leaders in Las Vegas on that, but that is as an example of how we had to stretch. I've always said Congress has been very good to us in the statutes that they have given us. I call them the cornerstones, wiretapping, immunity, witness protection, and the RICO statute. It took

us a long time to learn how to use the RICO statute. Now we use it very effectively.

DN: You mentioned the fact that you were working without a wiretap statute. Tell us about the "illegals," as they came to be known and explain what it was like to have to defend these in court?

JK: The FBI had been tapping, more importantly they had been bugging. They had a theory: bugging was unconstitutional but was not illegal. Wiretapping under the Communications Act not only required an interception but a divulgence as well, and the theory was that disclosure within the Department was not divulgence within this statute. That is how they got around it but we were unsuccessful in defending those in court.

DN: How many Attorneys General have you worked for?

JK: I think something like 16. Remember some of the people have become AG who were my immediate bosses. I was in this position when Ben Civiletti was the Assistant AG and became the Deputy and Attorney General. I was Thornburgh's deputy. So I knew some of them rather well and others not so well.

DN: You've served over five and a half years at various times as Acting Assistant Attorney General (AAG) for the Criminal Division. That's more time in recent memory than any

Presidentially appointed AAG in the Criminal Division has served.

JK: That may be true and it is certainly true for the last 30 years because the average AAG tenure since 1972 in the Criminal Division is about two years and I have served longer. But before 1972, the AAG frequently served through the term of the President and sometimes well into the second term. For example, when Jack Miller was AAG under Kennedy and then Fred Vinson was AAG under Johnson, they served pretty much the four years. After that it has been about a two year period for the AAG.

DN: When did you serve as the Acting AAG?

JK: First time I was acting was after Henry Petersen resigned and retired at the end of '74 and Dick Thornburgh didn't come in for about seven months. In this Administration, I served a long time until Jo Ann Harris came in, and then I served a longer time after she left. In between and in various transitions I have served quite awhile. Ben Civiletti was out of the country a lot on the Park investigation in Korea so I was acting during those times.

DN: You became a Deputy AAG in 1973 during Watergate. What was happening at the Department?

JK: It was in turmoil. I was involved in the Watergate investigation which, at the time, was bifurcated. I was Chief of the Fraud Section and we had the dirty tricks part and the part involving money that was being moved through Mexico. We were a little bit restricted in what we could do because the primary thrust was the investigation in the United States Attorneys Office in D.C. involving obstruction of justice.

DN: Who was doing that?

JK: Henry Petersen was the AAG at that time. In the United States Attorney's Office, Earl Silbert, Don Campbell, and Sidney Glazer were working

on the investigation and they kept it until it was taken over by Archie Cox.

DN: What happened when Archie Cox began his investigation?

JK: When the independent counsel came in we just gave him everything that we had going with respect to the investigation of Watergate and anything related to it.

DN: What role, if any, did the Department have in the investigation thereafter?

JK: Once Bob Bork took over there was great tension between Bork and the independent counsel group. Henry Petersen, who was the Criminal Division AAG, and Bork both wanted to keep the group investigating Watergate at the Department intact. I was in on some of the meetings they had in our conference room where they were in fact pleading with Cox' group to stay on and carry on. Ultimately, it worked out but there was a lot of mistrust there. One of the favorable things was that many of the people on the special prosecution team had worked for Henry and that helped a little in getting over the rough spots. It was pretty raw and nasty at that point. They were just thinking of walking out and that would have slowed down the process considerably.

DN: Who was thinking about walking out?

JK: The staff of Archie Cox. There was a feeling by Cox's staff that the Department would use Cox's firing as an opportunity to reinsert itself into the investigation. Robert Bork was the one who fired him. Incidentally, Bork fired him and did not resign from the Department on the recommendation of Attorney General Elliot L. Richardson, who told Bork to stay on because otherwise the Department would be in total disarray. Richardson waited awhile before he admitted that but now he says that he did ask Bork to stay on. Bork was the Solicitor General and he was the third in line when the order came to fire Cox. Richardson refused and resigned. Ruckleshaus, the deputy, was told to do it. He refused and resigned and then Bork, the third person in line became the Attorney General. With more soul searching and consultation with Richardson, Bork did fire Cox and carried out the presidential order. So there was bitterness towards Bork by Cox's staff.

DN: What were the feelings of the people in the Criminal Division while all of this was going on?

JK: There was quite as an uproar. We were thankful to Bork for not resigning because there was a strong feeling if Bork resigned there would be a test of manhood for every other AAG and that they all would resign. I think that may have been true, so to that extent, we were grateful that he didn't.

DN: How did the Department get back to business?

JK: Well, when the special prosecution forces decided to remain intact and Jaworski was appointed special prosecutor, things settled down.

DN: As you look back on your years here, what do you feel are the most significant contributions that you have made to the Department.

JK: The most significant contribution was that I was the Department's representative on the negotiation of the treaty with Switzerland in criminal matters. That was the first criminal matters treaty we had with any foreign country. From 1969 to 1973 we negotiated that. We encountered great difficulties because we were dealing with three separate languages and bank secrecy was so sacrosanct to the Swiss. We had trouble working out the mechanics that would allow us to get access to banking records in the same fashion as their prosecutors would get access to their banking records. That is how we finally unraveled the mechanical problem - getting them to explain how they did it in their criminal prosecutions and then try to modify it for us. The interesting thing is that we had as an additional hurdle, the so-called Economic Espionage Act. The Swiss were very zealous and protective of their secrets and they didn't like giving any bank secrets to a foreign nation. We had to work around that and that is why it took so long.

DN: Well how did you ultimately overcome that hurdle?

JK: We got around it by, in effect, creating an exception for major criminal investigations. They were very sensitive about organized crime and organized crime money being in Swiss banks. They didn't like the idea of being accused of protecting racketeers and their money. During this period Bob

Morganthau testified before the Congress and he unloaded on the Swiss for protecting organized crime. They really resented that. There was a picture of an individual getting on a plane and the caption 'there goes the money to Switzerland' or something like that. They were anxious to come to some accommodation. We kept the primary emphasis on organized crime—if we made a showing that organized crime was involved, it expedited the process of getting access. Since then things have worked pretty well and we have used it for a lot of violations besides organized crime cases.

DN: After that, were you involved in any other international agreements?

JK: I was involved in the executive agreements, which were in effect treaties. They are agreements with the Ministry of Justice of some foreign country and the Department of Justice. I think we had 27 of them. The foreign bribery investigations initially started by the SEC that took place in the late 1960's used the executive agreements to get information. Those were pretty successful and we still use them occasionally.

DN: What message would you like to give federal prosecutors?

JK: I guess the big message is trust. You've got to carry yourself in a manner so that people trust you. If they trust you, a lot of potential problems won't develop or if they develop, they will go away.

DN: What would you like to say to federal prosecutors who are just beginning their careers at the Department?

JK: It is a great place to work. Obviously, I think that or I wouldn't have stayed as long as I have stayed. The work is interesting and the people are fine lawyers and fine people. It is a pleasure to be one. It is amazing the number of people, Republicans, Democrats, who have been here who still feel very kindly toward the Department. I get calls from people that go back 20-25 years and they are very supportive. I have been up on the Hill and the people really come out of the woods to support the Department. It is a good place to work.

DN: You've been with the Department almost 50 years, including 25 as a Deputy AAG. What are your plans for the rest of your career?

JK: To do what I've been doing for the last 25 years. I don't have any plans of leaving any time soon. ~

AGAC: Beyond the Massacre[†]

David W. Downs, Deputy Director, Operations
Executive Office for United States Attorneys

"Watergate produced many bizarre events, but the Saturday Night Massacre was doubtless the most bizarre." Though most of the facts of Watergate have long since been made public, Richard Kleindienst's assessment still speaks for most Americans. What exactly happened that weekend in October 1973 that earned it a moniker reminiscent of a gangland shootout? Those few days marked the turning point for the nation and for a small, newly-organized group of United States Attorneys called the Attorney General's Advisory Committee (AGAC).

Several thousand miles away in New Mexico, United States Attorney Victor Ortega was having dinner in a local restaurant before leaving the next day for Washington to attend the regularly scheduled meeting of the AGAC. Some acquaintances came up to his table and asked if he had heard his boss just resigned. That was the first he heard about Attorney General Elliot L. Richardson's resignation, who had recently created the AGAC, but Ortega and his colleagues were soon swept up in the Saturday Night Massacre and became a part of that now famous chapter in American political history.

Members of that first AGAC arrived in Washington as scheduled on the Monday morning after the resignations of Richardson and Deputy Attorney General William Ruckelshaus, who had resigned rather than fire Special Watergate Prosecutor Archibald Cox as requested by President Nixon. They assembled Monday morning, October 22, 1973, in the Civil Division conference room then on the first floor next to Constitution Avenue. The 16 members convened and began an hour-long informal discussion about this latest episode in the Watergate affair and its implications for their work. At that point, then Solicitor General Bork entered the room with Criminal Chief Henry Peterson. Former United States Attorney Bert Hurn remembers feeling the tension heighten when the Acting Attorney General began his comments with the "formal and never used term, 'Gentlemen.'" He gave the United States Attorneys a first-hand account of what had happened, keeping his comments and instructions short. He emphasized that the most important thing at that point was to restore stability within the Department of Justice by appointing a replacement for the position of Special Prosecutor. Bork then asked the AGAC for their help, made it clear he wanted their recommendation within a few hours, and left. One United States Attorney commented later that he had never seen a man so scared or worried. Bork revealed some of his concerns in a 1990 interview, saying, "I told Richardson and Ruckelshaus that I was going to fire Cox and then resign, but they persuaded me that the Department needed continuity."

Everyone was worried about the resignations. Former United States Attorney Lincoln Almond said that people in the field and in Washington worried that the massacre would trigger mass resignations and jeopardize the Department. Another member stated it more bluntly, "We worried that the whole Department was about to go to hell."

Some members of the committee initially doubted that their charter empowered them to provide such a nomination to Bork, but a discussion of candidates' names soon began. The situation so unnerved the United States Attorneys that many still disagree as to what occurred next. Some say they divided the country into regions corresponding to federal judicial circuits from which they named one prospective nominee per

[†] Reprinted from the August 1995 *United States Attorneys' Bulletin*.

circuit. Others said there was no time for that. Most members of the Advisory Committee denied that the discussions contained a political tint, but at least one United States Attorney remembered differently. "There was some discussion," Charles Anderson recalled, "that the new special prosecutor needed to be a Truman Democrat and not someone from the Kennedy clan." "The committee did this," Anderson stated ironically, "in order to avoid the appearance of politicizing the issue."

By noon, a representative of the committee carried an envelope containing three names to Bork's office, including a state attorney general from the Midwest and two others: Thomas Murphy, who was former Police Commissioner of New York City and the prosecutor in the Alger Hiss trial, and Leon Jaworski. Bork stated that Jaworski's name might have originated with the AGAC, but he also remembered Jaworski's name having surfaced in other circles. Bork himself studied a list of past presidents of the American Bar Association, discounting one name or another because the person was too old or lacked prominence. "I realized," Bork stated, "that it had to be a recognized name."

Whether or not the committee first suggested Jaworski's name, Bork's solicitation of advice from the fledgling Advisory Committee about such an important national matter confirmed its leadership role. The Attorney General, who had been so instrumental in the committee's inception, had just resigned, and no one knew if the experiment would continue. But the performance of the United States Attorneys under difficult circumstances increased the AGAC's credibility throughout the Department and ensured its survival. While the Saturday Night Massacre proved difficult for the nation, it enabled the AGAC to assume a larger role in Department affairs. "People at the top in the Department were desperately looking for guidance and leadership," one United States Attorney stated, "and they turned in part to the [AGAC]."

Perhaps the confusion of that week in October will remain as much a part of history as the events themselves. Even those at the heart of the crisis continue to disagree on what happened. Reflecting on the events, former Attorney General Elliot L. Richardson stated, "Bork believed the President had the right to fire Cox." When asked if that contrasted with his view, he replied, "Well, I thought the President had the power."

HEARSAY Quotes

‘ Bert C. Hurn, former United States Attorney for the Western District of Missouri:

Hurn stated that during the chaotic days of Watergate and its aftermath, the joke in the United States Attorneys' offices involved phone calls from Washington. Anytime a secretary buzzed a United States Attorney on the intercom and said that the Attorney General was on the phone, the favorite response was, "Get his name and I'll call him back."

‘ Robert J. Roth, former United States Attorney for the District of Kansas:

Similar to Hurn's story, Roth stated that he and his wife attended the United States Attorneys' Conference in New Orleans one year. At a formal function Roth introduced his wife to the Attorney General. But Attorneys General changed so frequently during those days, Roth's wife did not recognize Saxbe's name or face and asked which district he was from.

‘ Ralph F. Keil, former United States Attorney for the District of Delaware:

Keil was chairman of the AGAC's Subcommittee on Proficiency. Keil stated that during a meeting of the AGAC, Dick Thornburgh once said to him, "I don't know what you and your committee do, but it sounds like a good idea."

‘ Victor Ortega, former United States Attorney for the District of New Mexico:

Ortega remembers the first meeting of the AGAC with Attorney General Richardson and his Deputy William Ruckleshaus. According to Ortega, the Attorney General spent the whole day with the new Committee. But Ortega kept noticing that an aide would enter the room and inform Richardson of a phone call, a scene repeated several times during the day. Ortega and the other United States Attorneys learned later that those phone calls were part of the plea bargaining and resignation of Vice President

Spiro T. Agnew.

‘ Lincoln C. Almond, United States Attorney for the District of Rhode Island:

Lincoln Almond remembers one of the earliest AGAC meetings, held in San Francisco in April 1974, the exact week when Patty Hearst was filmed participating in a bank robbery. Almond remembers that all of the members got together and went over to view the bank film at Jim Browning's office. Browning was then United States Attorney for the Northern District of California. When the film was over, they conducted a straw poll on whether or not Hearst was a willing participant or was coerced. When asked what the majority opinion was, Almond responded, "She was involved."

‘ Charles H. Anderson, former United States Attorney for the Middle District of Tennessee:

During one AGAC meeting, Charles Anderson recalled several of the United States Attorneys meeting with Attorney General Richardson and complaining about "all the rinky-dink" tax cases the Department people were sending down to the field. To their surprise, Richardson shot back, "Well, if you don't think they're worth trying, then send them back." Anderson said the United States Attorneys replied meekly, "We didn't know we could send them back."

‘ Trivia:

Beginning AUSA salary during those years: $9,000 per annum. ˜

ABOUT THE AUTHOR

‘ **David Downs** is the Deputy Director of Operations for the Executive Office for United States Attorneys. In 1989 EOUSA hired Mr. Downs to write the "Bicentennial Celebration of the United States Attorneys," a history of the Office of United States Attorneys. In 1990 he became the Special Assistant to the Director of EOUSA, in charge of congressional inquiries. From 1991 to 1997 he served as the Deputy Director of OLE. He received his Bachelor of Arts from Samford University in 1976, his Masters in Divinity from Southern Seminary in 1979, and his Masters in Theology from Southern Seminary in 1980. He conducted his Doctoral Studies at Oxford University in 1981 and received his Ph.D. from Southern Seminary in 1984. **a**

Department of Justice History: Herbert Brownell and the Little Rock Crisis[†]

Ed Hagen
Executive Office for United States Attorneys
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Former Attorney General Herbert Brownell, who died on May 1, 1996, at the age of 92, ought to be remembered by everyone in the Department as a model of courage under fire. Brownell, who grew up in Nebraska, became involved in New York politics after graduating from Yale Law School. After serving in the State Assembly, Brownell managed Tom Dewey's successful campaign for governor. Dewey later introduced Brownell to Dwight Eisenhower. Brownell served as a key advisor in Ike's 1952 presidential campaign, and was appointed Attorney General after the election. Eisenhower later wrote that the selection "was practically a foregone conclusion in my mind, if he would agree to serve. He had become a close friend, and possessed an alert mind. Moreover, I so respected him as a man and lawyer that I did not seriously consider anyone else for the post."

Brownell was an intense man who kept some people on edge. One colleague recalled: "Did you ever get into a poker game with a man who remembered every card played in every hand, how each player bet each hand, who figured all the odds instantly in his head, and was lucky besides? It's exasperating, because a guy like that usually wins, and when the game is over you don't quite trust him, no matter how pleasant he seems." On Brownell's first day in Washington he saw an African-American being thrown out of a restaurant. Outraged, he coordinated legal and political measures that ended segregation in public accommodations in the District of Columbia.

This was only the beginning of Brownell's fight for civil rights in the Eisenhower administration. He helped persuade Eisenhower to appoint progressive Earl Warren as Chief Justice of the Supreme Court in 1953, and filed a persuasive brief for the Justice Department in the 1954 *Brown v. Topeka* case. After the Brown case was won, Brownell lobbied for the appointment of Federal judges who would enforce school desegregation laws. Brownell made headlines in 1956 when he declared that segregation on local buses would be prosecuted as "a crime against the United States." The next year he drafted the Civil Rights Act of 1957, the first important civil rights legislation to pass Congress since Reconstruction. The DOJ's current Civil Rights Division was a Brownell initiative.

The positive civil rights measures championed by Brownell met stiff resistance in the South, leading to a dramatic confrontation in 1957, when Governor Orval Faubus called out the Arkansas National Guard and placed it around Central High School in Little Rock to prevent the entry of 12 African-American students. The Justice Department immediately went to court seeking an injunction.

Faubus, stalling, sought a meeting with Eisenhower. Brownell strongly opposed the meeting, arguing there was nothing to discuss with Faubus, an untrustworthy character whose actions were clearly unlawful. Eisenhower nevertheless

[†] Reprinted from the July 1996 *United States Attorneys' Bulletin*.

met with Faubus. Faubus later wrote that Eisenhower appeared to weaken at one point, and turned to Brownell asking if the court proceedings could be delayed. Brownells tight-lipped response: "No, we can't do that. It isn't possible. It isn't legally possible. It can't be done." Faubus then agreed to change his orders to the National Guard troops and admit the students.

Faubus reneged on the agreement as soon as he got back to Little Rock. This enraged the President, who told Brownell, "Yes, you were right, Herb. He did just what you said he'd do—he double-crossed me." Eisenhower wanted to go to the press to expose Faubus' duplicity. Brownell told Eisenhower this would not be necessary. A court hearing that week was likely to result in Faubus being ordered to admit the students. It would be better to wait for the ruling and then act decisively.

At the hearing, Faubus' lawyers contested the court's authority. The judge ruled from the bench, and the National Guard troops were ordered removed. The following Monday, however, the school was surrounded by a violent, racist mob. The students were slipped into the school by a side door, and when the mob learned this they stormed police barricades. The mayor ordered the police to remove the students.

That afternoon Brownell called Eisenhower and briefed him on the events in Little Rock. Some disagreements arose over how to best protect the students. Brownell wanted to use local National Guard troops, because any other troops were six to nine hours away from Little Rock. Eisenhower opposed the use of local troops. Ultimately, a mix of regular Army and National Guard units from other parts of the state was deployed. Order was restored and the school was integrated.

The extraordinary and historic measure of using Federal troops to enforce the law was received with outrage throughout the South, decried even by moderate politicians like Lyndon Johnson. Mississippi Senator James Eastland compared Eisenhower to Hitler, although others focused on Brownell as the villain. Historian Stephen Ambrose recounts that one local political boss called for secession, but that "calmer heads reminded him that this time around the Feds had atomic weapons." In mid-October, as the crisis eased, Brownell resigned to pursue private legal practice. He had expressed a desire to leave on earlier occasions, but had been persuaded to stay. This time Eisenhower let him go.

Faubus, on the other hand, became an Arkansas hero and ended up serving six terms. There were still bad feelings about the case in 1969 when President Nixon (whose 1952 Vice Presidential nomination had been a Brownell initiative) considered Brownell for the position of Chief Justice of the Supreme Court. Reportedly, concerns about Southern opposition to Brownell caused Nixon to change his mind and nominate Warren Burger.

In retrospect, the politics of the decision are not important. Brownell's advice was morally and legally correct. His wisdom and courage served the nation well.

ABOUT THE AUTHOR

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The Evolution of Jury Power

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The idea of jury nullification is generally viewed as an abuse of power by twelve citizens whose only legitimate role is to apply the law as given to them by a judge to the facts that they find in a case. Yet it has not always been so. There are legal, historical, and philosophical arguments to justify a jury's right—as opposed to its inherent power—to nullify the judge's instructions on the law.

Medieval English juries were not called to sit in impartial judgment of facts passively presented to them. Instead, they were supposed to render a verdict based upon their own knowledge of the facts. Jurors were called from the location of the crime, which was the origin of the notion of a trial venue and which is the very opposite of the modern concept of a trial jury ignorant of the facts, parties, and witnesses.

Nonetheless, problems arose with jurors because of the costs involved with serving. Jurors had to pay for their own transportation to the town where the court was sitting, and had to bear their expenses of room and board for the duration of the case. Consequently, wealthier litigants were tempted to "help" jurors with these costs. As the line between assistance and bribery became blurred, there necessarily arose the need to reverse corrupt verdicts. The only means then available was by a writ of attaint, in which a super-jury of twenty-four was summoned not only to reconsider the facts disputed in the first trial, but also to try the first jury for perjury. If the first judgment was demonstrably false, then the first panel of jurors must have violated their oath to tell the truth about the facts known to them. If convicted, the original jurors faced severe penalties for their malfeasance, such as imprisonment and forfeiture of all possessions to the King.

The logic for such severe punishment ebbed as the function of the jury changed. With the increased presentation of evidence and testimony to assist the jury's fact-finding effort, jurors were no longer expected to act based on their own knowledge. Thus, a "wrong" verdict was more likely to result from a good faith mistake than from juror "perjury," and at a time when there were the beginnings of an appeal process. Although attaint fell into disuse, it did not disappear from the law. Instead, it became viewed as a means of controlling an obstinate jury.

Even Draconian punishment could not always guarantee a verdict in strict accordance with the law when powerful political sympathies were involved. For instance, in 1544 Sir Nicholas Throckmorton was acquitted on charges of high treason by a London jury, although there was no doubt he played a prominent role in the offense (Wyatt's Rebellion),[†] and in spite of the judge's instructions. Sir Nicholas went free and could not be tried again. However, his twelve jurors were called before the Court of the Star Chamber on a writ of attaint. Four of the jurors recanted their acquittal and went free. The other eight stood by their verdict and were fined and imprisoned.

In the next century, the courts' ability to punish an independent jury was relegated to history by Chief Justice Vaughan in *Bushel's Case*, 124 Eng. Rep. 1006 (C.P. 1670). William Penn and another Quaker leader were tried at Old Bailey Courthouse for disturbing the peace by holding an unlawful assembly. They were

[†] Wyatt led a popular Protestant uprising against the hated "Bloody Mary," the Catholic Queen of England whose name derived from the amount of Protestant blood she shed in her effort to return England to Rome's ambit.

acquitted despite undisputed evidence that they preached to several hundred fellow Quakers in a public street.

> The Court instructed the jury that a meeting of such size in such a place was legally a disturbance of the peace, and he instructed the jury to find so. The jury, however, refused to convict, and after being threatened by the judge and imprisoned without food, drink, or heat, they acquitted the defendants. The jury was imprisoned again, this time on a writ of attaint, until they paid a heavy fine. Four of the jurors refused to pay, and spent several months in jail, until one of them—Bushel— obtained a writ of habeas corpus from the Court of Common Pleas.

In discharging the attaint and freeing the jurors, Chief Justice Vaughan reached back to the medieval notion of jurors as quasi-witnesses. He wrote that jurors, as neighbors of the defendant and the witnesses, might have independent knowledge of the facts or of the credibility of the witnesses.

Vaughan also rested his decision on the alternative ground that a criminal acquittal is a general verdict—as opposed to a special verdict, where the judge applies the law to the facts found by the jury—and it would be impossible to second-guess the jury's application of the law to the facts, since no one else could know how the jury resolved the facts.

Bushel's Case found favor with lawyers in the American Colonies, and its impact is known to many through the 1753 libel trial of John Peter Zenger, the publisher of the New York Weekly Journal. Although the Zenger trial is remembered for establishing truth as a defense to libel, it did so only because defense counsel successfully appealed to the jury to nullify the controlling law. Nullification was not, however, new to colonial juries. For years colonial juries nullified prosecutions brought under the Navigation Acts, until jurisdiction was removed to Admiralty Court, which had no juries. So Zenger's attorney, Alexander Hamilton of Philadelphia, found a receptive audience for his plea. As support for his invitation to nullify the libel law, Hamilton relied on *Bushel's Case. See A Brief Narrative of the*

Case and Trial of John Peter Zenger (Notable Trials, 1989), pp. 75, 91-92.

John Adams was another colonial lawyer of note who held an expansive view of the jury's role. His notes of authorities for a 1771 case contain quotes from *Bushel's Case* and from Blackstone's Commentaries to support his planned argument that the jury could decide the law and find the facts. Thus, at the time of the Revolution, and among the lawyers who helped to bring it about, the idea of the jury as the conscience of the community with the right and obligation to decide both the law and the facts was conventional.

For the first 60 years of the nation's existence, federal juries had the right to decide the law. In *Georgia v. Brailsford*, Chief Justice John Jay instructed the jury:

> It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide. But it must be observed that by the same law, which recognized this reasonable distribution of jurisdiction, you have nevertheless a right to take it upon yourselves to judge both, and to determine the law as well as the fact in controversy. . . . [B]oth objects are lawfully within your power of decision.

Georgia v. Brailsford, 3 Dall. 1, 4 (1794).

In 1798, Congress enacted the Sedition Act, which approved the jury's right to decide the law: "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases." 1 Stat. 597. As the last four words suggest, the Federalist legislators did not believe that they were creating a special role for juries in seditious libel cases. Instead, they adopted the prevailing right of American juries to judge the law.

Nullification remained a respectable legal principle until the Civil War,

because it was widely applied to acquit those charged with aiding escaped slaves under the Fugitive Slave Act. However, nullification's death knell was finally sounded by the Supreme Court's decision in *Sparf and Hanson v. United States*, 156 U.S. 51 (1895), where the Court upheld the murder convictions of two sailors. At trial, the judge instructed the jurors that although they had the power to convict of any lesser included offense, there was no evidence to support such an offense. Thus, if they found the killing to have been felonious, the jury was required to convict of murder rather than manslaughter. Justice Gray's dissent pointed out the long history of nullification in the United States, and that the majority's decision would raise an anomaly whereby the defendant is presumed at his peril to know the law, but the jury is not considered competent on the law. *Id.* at 168, 174-75.

Since *Sparf and Hanson*, judges do not instruct juries on nullification and counsel cannot argue for it. This also means that prosecutors cannot argue the grounds *against* it either. Yet it does not mean that juries do not exercise the power of nullification in cases that offend their sensibilities.

In contrast to pre-Civil War juries that refused to convict individuals who aided escaped slaves, recent juries have refused to convict KKK members of crimes against black citizens. *See* Juan Williams, *Eyes on the Prize: America's Civil Rights Years, 1954-1965*, at 38-57, 221-25 (1987). Likewise, nullification has played a major role in death penalty and battered spouse cases, and in cases involving minimum mandatory sentences and the newly favored three-strikes laws. For instance, a mistrial was declared in a California three-strikes case when the jurors refused to deliberate on the validity of the defendant's two prior convictions.

In *People v. Jones*, Cr. No. 15792 (January 1995), a San Francisco jury convicted Jones of attempted carjacking, but were then told for the first time that it was a three-strikes case. The jurors stated that they felt violated by the system. Such reluctance by juries to ignore their moral sensibilities and become judicial rubber stamps forced the law to introduce discretion into death penalty decisions. Legislation followed and codified the fruits of jury activism. *See Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

Conclusion

The concept of jury nullification is currently enjoying a resurgence of popularity. For instance, The Fully Informed Jury Association, based in Montana, has promoted legislation that would require state judges to instruct juries on their right to determine the law. Association members have also been charged with jury tampering for passing out leaflets advocating nullification to a potential jury pool in front of a San Diego courthouse. In Colorado, a juror was held in contempt of court for concealing her belief in jury nullification, thereby causing a mistrial, and for giving a nullification leaflet to a fellow juror. *People v. Kriho*, No. 96CR91 (February 1997).

It is arguable that conscientious jurors would be better off receiving instruction on their ability to determine, or nullify, the law from the judge, with elucidating arguments from both the prosecution and the defense, than from pamphlets written by laymen who may have a hidden political agenda. But the shortcomings of the leaflets and their information are a byproduct of the consolidation of judicial power begun in the mid-nineteenth Century. The fact is that juries are exercising this power anyway, for good reasons, for bad reasons, and sometimes for no reason at all. The legal system might be better served if the jurors were given guidance by the courts and, if the prosecution were allowed to put forward counter arguments to defense invitations (sometimes only subtly hinted at), to nullify.

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Department of Justice History: The Trial of the Century†

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In this era of sensationalized criminal trials, the term "trial of the century" gets used pretty loosely. But the recent passing of Judge Thomas Murphy is a reminder of a truly historic case successfully handled by Murphy when he was an Assistant United States Attorney almost 50 years ago.

Thomas Murphy, the grandson of a police officer, grew up in New York City. His younger brother, Johnny Murphy, was a star relief pitcher for the New York Yankees. Standing 6 feet 4 inches tall, heavy set with a walrus mustache, Tom Murphy made an imposing presence, but was quiet and unassuming.

In 1949 Murphy, then an AUSA in New York City, was assigned to prosecute Alger Hiss for perjury. Hiss, who had clerked for Justice Oliver Wendell Holmes, Jr., was a rising star in the State Department, playing notable roles at the Yalta conference and in the formation of the United Nations. In 1948 he was accused of espionage for the Soviet Union by an editor of Time magazine, Whittaker Chambers, himself an admitted former Soviet agent. Hiss denied the allegations in a highly publicized hearing where he was closely questioned by a then obscure California Congressman, Richard Nixon. After Chambers repeated the charges in a public forum, Hiss brought a libel suit, which, unfortunately for Hiss, resulted in the discovery of corroborating evidence. This, in turn, led to a grand jury proceeding, in which Hiss again denied having been a Soviet agent.

Although the then existing statute of limitations ruled out any prosecution of Hiss for espionage, he was indicted for perjury based on his grand jury testimony. The case became a national sensation, focusing as it did on the momentous issue of whether the government had been infiltrated by Soviet agents at the highest level. Although Murphy had significant corroborating evidence--he was able to show that sensitive documents had been retyped on Hiss' typewriter, with interlineations in Hiss' handwriting--Hiss was ably defended, and enjoyed the support of many prominent people. Character witnesses for Hiss included two sitting Supreme Court Justices and a former presidential candidate (Murphy was not amused when the trial judge shook Justice Frankfurter's hand in front of the jury as Frankfurter began his testimony for the defense).

The six-week trial resulted in a jury deadlock, hung eight to four for conviction. The case was tried again four months later. Murphy's resolve hardened for the second trial. Chambers later wrote:

> *His grasp of the intricacies of the Hiss case was now firm and supple. He was at ease with it with the relaxed authority of a man who has mastered an art and now wants to practice it. He understood the case, not only as a problem in law. He understood it in its fullest religious, moral, human and historical meaning. I saw that he had in him one of the rarest of human seeds--the*

† Reprinted from the July 1996 *United States Attorneys' Bulletin*.

faculty for growth, combined with a faculty almost as rare--a singular magnanimity of spirit. Into me, battered and gray of mood after a year of private struggle and public mauling, he infused new heart, not only because of what he was, but because he was the first man from the Government who said to me in effect: "I understand." I needed no more.

The second trial lasted ten weeks. Murphy worked late every night, analyzing the court record and dictating detailed notes on everything that had taken place during the day. His resulting cross-examinations masterfully extracted contradictions and inconsistencies from witnesses. The defense called an eminent psychiatrist, Dr. Carl Binger, who offered the expert opinion that Chambers was a psychopath prone to repetitive pathological lying. Murphy's cross-examination was aggressive. When Binger initially resisted Murphy's suggestion that "psychopathic personality" was a "wastepaper basket classification of a lot of symptoms," Murphy confronted Binger with a psychiatric monograph so describing the condition. Binger indicated he had not read the work, but "agreed with every word." Murphy then painstakingly kicked at the underpinnings for Binger's opinion. For example, Binger had watched Chambers testify, and in his direct testimony cited Chambers' tendency to gaze at the ceiling during the testimony as "confirmatory" evidence of a psychopathic personality. Murphy quietly instructed an assistant to watch Binger's testimony; the assistant counted 50 glances at the ceiling in less than an hour. Murphy asked Binger whether this established a psychopathic personality. Binger replied, "Not alone."

At the end of the trial, Murphy's command of the evidence was such that he was able to deliver an organized and compelling two and one-half hour summation without the use of notes. The jury later returned with a verdict of guilty as charged, and Hiss was sentenced to five years of prison. Chambers later wrote:

When Thomas Murphy decided, somewhat reluctantly, to take the Hiss Case, almost nobody had heard of him. Within the Justice Department he was known as a man who had never lost a case. Otherwise, he was a man who jostled no one, for he seemed without ambition beyond his immediate work. . . . Yet when the historic moment came, Murphy was waiting there at the one point in time and place where he could bring all that he was and all that life had made him to bear with decisive effect for the nation.

Murphy's career did not end with the Hiss case. Less than a year later, the New York City police department was rocked by gambling and bribery allegations. The mayor made Murphy Police Commissioner and told him to clean up the mess. Murphy replaced all 336 plainclothes officers with younger officers, and instituted a merit system for promotions. Murphy went after the "venal rascals who bring harm to other loyal workers as well as violate the public trust," while standing up for the honest majority. "For every cop who will take a buck from a bookie, there are hundreds who will stand up for you and me and take a bullet." He left after less than a year, gaining unanimous praise for a job well done, and was appointed to the U.S. District Court by President Truman.

He served with distinction for many years as a trial judge. The media coverage of the Hiss case, although extraordinary for its time, falls short of what we have today. There would be no movie or book contracts for Murphy. Shortly after the trial, Murphy stepped out of a taxi in New York. The driver asked the other man in the cab, "Who's the big fellow?" "That's Tom Murphy, the man who just convicted Alger Hiss," the man replied. "Oh," said the driver, "you mean Johnny Murphy's brother!"

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Courtroom Technology

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