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John G. Heinberg

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## CENTRALIZATION IN FEDERAL PROSECUTIONS<sup>1</sup>

JOHN G. HEINBERG\*

### I. PERSPECTIVE

An assumption has frequently been made by publicists situated outside the Department of Justice that federal prosecutions are completely centralized. Such impression may easily arise from a casual perusal of relevant provisions of law. These may be summarized in brief fashion from Title 28 of the U. S. Code, enacted into law by the Eightieth Congress in 1948. United States Attorneys are appointed to office by the President with the consent of the Senate. Except for the District of Hawaii, they are appointed for terms of four years, and serve "subject to removal by the President." Assistant United States Attorneys are appointed by the Attorney General to assist United States Attorneys "when the public interest requires." The Attorney General may remove Assistant Attorneys from office. He is also vested with supervision over all litigation "to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys . . . in the discharge of their respective duties."<sup>2</sup>

As recently as April 1940, however, the Attorney General of the United States, speaking before the U. S. Attorneys at their Second Annual Conference in Washington, pointed out:<sup>3</sup>

"Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized department of justice. It is an unusual and rare instance in which the local district attorney should be superseded in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his contact with and intimate knowledge of the views of the court, and his

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\*Professor of Political Science, University of Missouri.

1. In the preparation of this article the author has accumulated debts of gratitude to the University of Missouri Research Council for the award of a Summer Research Professorship, 1949; to staff members of the Justice Section of the National Archives; and to the Librarian of the Department of Justice.

2. 28 U. S. C. §§ 501-510 (Supp. 1948).

3. The text of this address, one of the very few existent official commentaries on federal prosecutions, is available in two publications under the same title. See Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940), 31 J. CRIM. L. & CRIMINOLOGY 3 (1940).

acquaintance with the feelings of the group from which his jurors are drawn, it is an unusual case in which his judgment should be overruled.

“Experience, however, has demonstrated that some measure of centralized control is necessary. In the absence of it different district attorneys were striving for different interpretations or applications of an act, or were pursuing different conceptions of policy. Also, to put it mildly, there were differences in the diligence and zeal in different districts. To promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help, some degree of centralized administration was found necessary.

“Our problem, of course, is to balance these opposing considerations. . . .”

It is the task of this paper to spell out generally the elements of “centralized control” in so far as available records and other sources permit.

## II. LEGAL AUTHORIZATIONS

A distinction must be drawn between the powers of the President to appoint and remove, and those of the Attorney General to supervise and direct, U. S. Attorneys. It is with the latter powers that we are concerned, for in actual practice the exercise of the power to remove United States Attorneys from office has been offset by considerations involving their appointment, as well as by conditions under which they serve. These can be outlined in general terms. The 93 United States Attorneys, as well as the more than 400 Assistant United States Attorneys are political appointees. So is the Attorney General himself. U. S. Attorneys are therefore individuals who possess considerable standing in local and state political party circles. It is certain that the executive and legislative branches of government have not absent-mindedly participated in the elevation of such men to office. Locally, they have attachments and affiliations that cannot be disregarded. When the names of current U. S. Attorneys are sought out in *Who's Who* and other biographical collections there appears to be an emerging career pattern. Many of them have received an LL.B. from a law school within the state in which their districts are located. They have been admitted to the Bar, and have become affiliated with a local law firm. They have been elected or appointed to some public office of the vicinage. They have local religious, matrimonial and civic affiliations. Also important is the consideration that both U. S. Attorneys and Assistant U. S. Attorneys are professional lawyers. It would appear that not many of them look

forward to a lengthy prosecutor's career, but rather to contacts that can be established for future, and other, professional careers. A number of them, of course, serve more than one term in office. Even brief tenure of office supplies many contacts, and endows them, and more especially the Assistant U. S. Attorneys, with "trial experience."

As might be expected, there is, relatively, a high degree of turnover among both U. S. Attorneys and Assistant U. S. Attorneys. For example, of the 93 U. S. Attorneys in office on July 1, 1949, sixty-one had been appointed to the position since 1944. Twenty left office between January 1, 1948, and July 1, 1949. Approximately one-fourth of the Assistant United States Attorneys resigned from office during the same period and there were 103 new appointments.<sup>4</sup> Such exhibition of willingness to resign from public office is a commentary in itself: the interests of many professional lawyers within the system appear to take precedence over those of the professional prosecutor. There are some examples of men with long tenures within the system, and of individuals who have "worked up" from Assistant Attorneys to high positions in the Department. These, however, constitute only exceptions to the general rule, although there is evidence that the Retirement Act has exercised some influence in prolonging careers in recent years.

The basic Judiciary Act of 1789, which created the Office of Attorney General, also created thirteen United States Attorneys, but the Attorney General was authorized neither to supervise nor to direct them. Nor was there much need for such authority on his part, for the body of federal criminal law was not extensive at that period. In 1820, certain powers of "superintendence" over United States Attorneys were granted to an officer "to be designated by the President within the Treasury Department," and on May 29, 1830, Congress created the office of Solicitor of the Treasury and authorized the office to have supervisory control over U. S. Attorneys, Marshals and Clerks of Court. Although the Attorney General gained a measure of control over U. S. Attorneys in 1861, general supervision was not granted until the Department of Justice, itself, was created in 1870.<sup>5</sup>

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4. These figures are compiled from a corrected copy of the REGISTER OF THE DEPARTMENT OF JUSTICE AND THE COURTS OF THE UNITED STATES (1947). Another tabulation was made on June 29, 1929. It shows that 78 of 414 Assistant Attorneys resigned from office during the year July 1, 1928 to June 30, 1929. *General Records of the Department of Justice, Administrative Division*. "Memorandum for Mr. Stewart," June 29, 1929.

5. See EASBY-SMITH, *THE DEPARTMENT OF JUSTICE—ITS HISTORY AND FUNCTIONS* (1904); Sewell Key (Special Assistant to the Attorney General), *The Legal Work of the Federal Government*, 25 VA. L. REV. 165-201 (1938); ARTHUR J. DODGE

It was not until 1933, however, that the supervisory functions of the Department of Justice in tax litigation were established completely, through the elimination of the Solicitor of the Treasury and others from participation. This was brought about by an Executive Order of the President, No. 6166, of June 10, 1933, which provided:

“The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals and of clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

“As to any case referred to the Department of Justice for prosecution or defense in the courts, the functions of decision whether and in what manner to prosecute, or to defend, or to comprise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

“For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.”<sup>6</sup>

General and uniform departmental rules for the control of prosecutions were not immediately issued under these authorizations. Even today, they do not comprise an extensive code. But there can be no question as to the Department's expansion of its supervisory authority over U. S. Attorneys, particularly during the Twentieth Century. The “autonomy” of U. S. Attorneys within their districts has been further restricted through the use by the Department of Special Assistants, as described below. Such records of the Department of Justice as are available for inspection shed light upon some aspects of this trend.<sup>7</sup>

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(of the Department of Justice), ORIGIN AND DEVELOPMENT OF THE OFFICE OF THE ATTORNEY GENERAL, Doc. No. 510, 70th Cong., 2d Sess. (1929).

6. The Executive Order was issued under Section 16, of the Act of March 3, 1933. (Public Law 424, 47 Stat. 1517.) It must be construed with reference to Sections 3229 and 3230, REV. STAT. (2d Ed. 1878). For explanation of the changes made see REP. ATT'Y GEN. 54 (1934), and also the opinion of the Attorney General rendered to the Secretary of the Treasury on November 5, 1934, 38 OPS. ATT'Y GEN. 124-128 (1934).

7. Archives of the Department of Justice are not ordinarily open to the public until a period of forty years has elapsed.

## III. FORMS OF DEPARTMENTAL CONTROL

Supervision and direction by the Department has been exerted by means of letters and telegrams from before the time it was established until the present. Copies of letters and telegrams are available in hundreds of bound volumes called *Instruction Books* in the National Archives. Perusal of the letters down to 1904 reveals that the Department has instituted inquiries, issued instructions, given authorizations, refused approvals, made suggestions, interceded on behalf of other departments of the government, issued a few preemptory orders and supplied commendations for work well-done. Random spot checks in the records for relatively recent years show that case loads, prosecutions and convictions vary enormously among federal court districts. Each district is established by law, and the Department of Justice has no authority whatsoever to make changes in their composition. Some of them embrace entire states; some states are split into two districts; and others into three or even four. The counties of states included in each district are stipulated in the *United States Code*.<sup>8</sup> The districts with the greater number of current annual convictions are Texas Western, California Southern, and New York Southern. In each of these districts the annual number of convictions totals between 1500 and 3000. At the other extreme, in each of the four Alaskan districts, and in those of Delaware and New Hampshire, the total annual number of convictions runs to less than 50. By reason of the very large number of cases of the same type in the Texas districts, and in California Southern as well, the Southern District of New York is preferable for sampling. To it, for sampling purposes, can be added Delaware, Kansas and Utah. Taking the year, 1939, the flow of recorded correspondence between the Department of Justice and the U. S. Attorney for the Southern District of New York consisted of between 600 and 1100 letters and telegrams per month; for the Delaware District about 60 per month; for Kansas 100 and for Utah about 60. There are more letters from U. S. Attorneys than from the Department, but not during specific months. Letters in recent years deal more extensively with questions of law, policy and procedure. That there are far more letters from the Department referring inquiries or complaints from other agencies of government is not surprising. Most of these agencies did not exist in 1904. There is far more evidence of constant control by the Department over small expenditures by the attorneys than of departmental intervention in the prose-

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8. 28 U. S. C., Part I, Chapters 5 and 6 (Supp. 1948).

cutions of individual cases. Although the majority of letters from attorneys to the Department are addressed to the Criminal and Tax Divisions of the Department, a very large number of letters from the Department concern civil matters.<sup>9</sup>

While letters and telegrams could be employed in particular instances, general rules also developed. Initially, they were scanty, and incorporated in printed *Instructions*. Until 1929, printed *Instructions to United States Marshals, Attorneys, Clerks and Commissioners* were issued irregularly in such years, for example, as 1898, 1904, 1916, 1925, and 1929. Other general rules were incorporated in departmental *Circulars*.<sup>10</sup> The *Circulars* by no means contained instructions for U. S. Attorneys alone. Currently, they are often addressed to *all* employees of the Department, or to selected groups, such as Marshals or Attorneys. They often contain informative matter only. Information for the use of U. S. Attorneys deals with selected court decisions, questions of policy and procedure, and other matters in such a fashion as both to *instruct* and *guide* their efforts. Many *Circulars*, as well as many letters and telegrams, touch upon prosecutions only indirectly, their contents dealing with permissive or non-permissive expenditures by the U. S. Attorneys.

About 1939 or 1940, it appears that the form of general departmental rules under which U. S. Attorneys were supervised and directed existed in a rather cumbersome state. These were embodied in the printed *Instructions*, no reissue of which had taken place since 1929, and the *Circulars* had become so numerous that the Department found it necessary to issue an *Index* in 1940, and another in 1942. Some of the general rules set forth in later *Circulars* underwent modification and lengthy elaboration. During the war period resort to a new *Index* was not attempted, but in 1945, the general rules *in effect* were condensed and published in loose leaf form under the title, *The United States Attorneys Manual* which is kept up to date by means of printed, loose-leaf inserts. An additional *Manual* for the handling of tax cases was issued in 1947.

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9. Letters may deal with any matter within the field of duties of the U. S. Attorney. These include: (1) prosecution of all offenses against the U. S.; (2) prosecution or defense, for the government, in all civil actions, suits or proceedings in which the U. S. is concerned; (3) making such reports as the Attorney General shall direct. For other duties see 23 U. S. C. § 507 (Supp. 1948).

10. *Circulars* have been numbered since December 31, 1907. Number 4048 was issued on July 1, 1948. Unnumbered *Circulars* date from April 2, 1856, although only one bears a date previous to January 8, 1863. These terminate as of December 31, 1907, although some unnumbered instructions or memoranda have been issued from time to time since that date.

## IV. SIGNIFICANT DEPARTMENTAL CONTROLS

From recent unpublished *Annual Reports* of the Attorney General, from testimony given at *Hearings* on the department's appropriation bills, and other available information, it is possible to portray significant departmental controls in prosecution, both as to their initiation and their dismissal. It must be grasped at the outset, however, that control over the initiation of prosecutions is not general and uniform, *it depends upon the type of criminal law violated*. To describe the controls it is necessary to bring certain aspects of the internal organization of the Department into the picture.

Many years ago the Attorney General, whose office is vested with numerous duties and functions apart from that of supervision and direction of U. S. Attorneys, was forced to delegate the active exercise of his powers in this field to subordinates, the heads of divisions. These subordinates further delegate work and responsibility to sections. Sectional assignments are made at intervals and depend upon the capabilities and aptitudes of staff members. There is no way of telling in advance how many violations may arise under a particular statute coming within an assignment. Nor does the Department have pre-knowledge as to what the Director of the Budget and Congress will allow in next year's appropriations, what new responsibilities for prosecution Congress will impose by statute at its next session, or what requests the President will make under his constitutional obligation to take care that the laws are faithfully executed. It was the testimony of the Assistant Attorney General in charge of the Criminal Division<sup>11</sup> on December 8, 1947, for example, that some 33 attorneys in the Criminal Division had been working full time and overtime on the loyalty program; that perhaps another 100 or more organizations would have "to go through the mill"; and that it would occupy a great deal of time by attorneys who would be compelled to neglect some of their duties, in order to get the list out. He indicated further that it would lead to a backlog; that such work would ordinarily be handled by the Internal Security Section of the Criminal Division, but due to the small number of attorneys in that section it had been necessary to borrow from others in order to secure the requisite manpower to do this work.<sup>12</sup>

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11. T. Vincent Quinn, Assistant Attorney General from July 23, 1947 to August 10, 1948.

12. *Hearings before Subcommittee of the House Committee on Appropriations on H. R. 5607, 80th Cong., 2d Sess. 67 (1949)*. See also pp. 71-73.

A. *Initiation in Tax Cases*

Control over prosecution of violators of internal revenue laws, aided by the Executive Order quoted above, is almost entirely—although not completely—in the hands of the Tax Division of the Department, but that division must rely heavily upon the work of an investigative agency that is outside the Department. Violations of internal revenue laws are investigated by the Intelligence Unit of the Bureau of Internal Revenue, and recommendations made are reviewed by the Penal Division of the Chief Counsel's Office. Then, after cases are referred to the Department of Justice, "the evidence is carefully analyzed in the Tax Division and conferences are held with the prospective defendants and their counsel upon request. If it is determined upon this independent examination that the taxpayer willfully intended to evade his taxes and that a conviction can reasonably be expected, the case is transmitted to the appropriate United States Attorney for presentation to a grand jury. Proposed drafts of indictments, legal memoranda and analyses of any special problems are prepared in the Tax Division and forwarded to the United States Attorneys. In addition, services of attorneys in the Division are made available for grand jury presentations or trials whenever the United States Attorney asks for assistance. A substantial number of grand jury investigations and trials have been handled by the Tax Division attorneys during the past year. All appellate proceedings growing out of criminal prosecutions are actively directed by this Division."<sup>13</sup>

The United States Attorney is of course a key figure in the conduct of criminal tax prosecutions. According to the tax *Manual*, "If prosecution is authorized a proposed form of indictment or information is prepared in the Tax Division and the case is transmitted to the United States Attorney. From this point on it is primarily the responsibility of the United States Attorney to present the case to the grand jury and to conduct the trial. The Division is prepared, however, to supply whatever assistance may be desired in the handling of cases at any stage." In some instances, particularly where prosecution may depend upon the evaluations of important government witnesses, cases may be referred to the United States Attorney for his consideration and recommendation before authority to prosecute is given. The recommendation of the United States Attorney in such cases

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13. REP. ATT'Y GEN. 544-545 (unprinted) (1947). See also *Hearings*, *supra* n. 12, pp. 99-101.

carries great weight with the Department.<sup>14</sup> The jurisdiction of the Tax Division covers all cases under internal revenue laws except those that relate to liquor taxes. Many cases are ultimately disposed of by the entry of pleas of guilty.<sup>15</sup> Close supervision by the Department was explained by Assistant Attorney General Caudle late in December, 1947: “. . . with reference to every case that reaches the Department of Justice and goes out, we supervise that case until it is closed. We maintain supervision with the United States Attorney all the way down until the end so that the policy in reference to prosecution will be consistent all over the country as to tax cases. It is quite different from the general run of criminal cases, like prosecuting or securing an indictment of someone who is stealing an automobile and carrying it across a State line.”<sup>16</sup>

### B. *Initiation in Criminal Cases Generally*

The Criminal Division of the Department supervises U. S. Attorneys in the enforcement of federal criminal laws generally. According to the *Annual Report of the Attorney General* for 1948, more than 1,500 criminal and civil statutes come within the jurisdiction of the Criminal Division. “During the past ten years, over 200 statutes affecting the work of the Division have been enacted, approximately 120 of which may be classified as permanent legislation. The Division has virtually no control over the volume of work which may arise under any of these acts. While the United States Attorneys are primarily charged with the responsibility of prosecuting criminal cases, the Division gives assistance on questions of law and policy, practice and procedure, pleadings, etc., and whenever necessary, because of the disqualification of the United States Attorney, lack of personnel or length of time required by certain litigation, aids in the actual prosecution of cases through the assignment of trial attorneys and assists in the preparation of briefs and the argument of cases on appeal.”<sup>17</sup>

The work of the Criminal Division is parceled out among various sections. The General Crimes Section for instance, “supervises and assists

14. A MANUAL OF INSTRUCTIONS TO UNITED STATES ATTORNEYS IN THE HANDLING OF TAX CASES pp. 93, 95 (U. S. DEP'T JUSTICE 1947).

15. According to testimony before a Senate subcommittee in 1948, on “a rough guess” only about ten per cent of these cases actually go to trial. “These cases are prepared so well,” testified Mr. Slack, “that when they do go out for prosecution the taxpayers know we have a good case, and quite generally they offer to plead guilty.” *Hearings before Subcommittee of the Senate Committee on Appropriations on H. R. 5607, 80th Cong., 2d Sess. 634* (1949).

16. *Hearings, supra* n. 12, pp. 103-104.

17. REP. ATT'Y GEN. 378 (unprinted) (1948).

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the enforcement of all ordinary criminal statutes, except those assigned to other sections, which simply make behavior criminal and prescribes for their violation."<sup>18</sup>

"This Section," according to the Attorney Generals' 1947 *Report*, "handles a volume of diversified matters involving enforcement problems of law, policy and procedure arising in connection with the great body of common crimes, such as those committed on Government reservations and on the high seas, embezzlement and theft of Government property, frauds other than those growing out of war contracts, including surplus property and veterans' frauds, larceny in interstate commerce, violations of national banking and bankruptcy laws, white slavery, kidnapping, counterfeiting, liquor revenue, customs and narcotic laws, and offenses against public justice and the integrity of Government operations."<sup>19</sup>

Other sections within the Division include one for Internal Security; the Foreign Agents Registration Section; the Administrative Regulations Section; the Civil Rights Section, the Trial Section, and an Appellate Section. According to testimony supplied to Congress in 1949, the number of lawyers in the Division is about 81, and "not many" of them become career men.<sup>20</sup>

Unlike the prosecution of tax cases there is no general rule as to Departmental pre-approval imposed by the Criminal Division except in cases involving violations of such statutes as those on espionage, neutrality, civil rights, the registration of foreign agents, and provisions of the Fair Labor Standards Act. Under the Food, Drug and Cosmetics Act, for example, the U. S. Attorney is authorized to institute a prosecution if the facts, to him, appear to warrant such action. Under the Fugitive Felon Act, the *Instructions* indicate that each case must be decided on its own merits in the discretion of each United States Attorney, except in those cases where the Department has by *Circulars* requested a complete statement of facts.<sup>21</sup>

### C. Dismissals and Nolle Prosequi

Dismissals and the employment of *nolle prosequi* also come under control by the Department. The general rule is that no case shall be dis-

18. *Id.* at 404.

19. REP. ATT'Y GEN. 386 (unprinted) (1947).

20. *Hearings before Subcommittee of the House Committee on Appropriations on the Department of Justice Appropriation Bill for 1950*, 81st Cong., 1st Sess. 125 (1950).

21. Stipulations regarding prosecutions under a number of particular laws are set forth in THE UNITED STATES ATTORNEYS MANUAL.

missed nor *nolle prosequi* entered by a U. S. Attorney until after application has been made to the Department and authority to dismiss has been received. An exception may be made in "urgent cases," but if the U. S. Attorney deems the immediate dismissal of a prosecution necessary, or even any count in an indictment, he must report promptly to the Department as to the action taken and the reasons therefor. There are other exceptions to the general rule. Departmental authority to dismiss cases supervised by the Criminal Division need not be secured by the U. S. Attorney if the defendant is dead or permanently disabled by insanity; if a superseding indictment or information has been returned; if criminal liability involved in a charge has been compromised; if the defendant has been convicted on one count or in one case when there are separate indictments and the United States Attorney believes that further prosecution would not result in additional punishment; if the defendant has served an adequate sentence imposed by a state court for an offense growing out of the same transactions involved in the federal charge, and further prosecution would not result in additional punishment; or if the proceeding has been pending for more than three years, the defendant is a fugitive, or the violation is of a relatively minor character, and the investigative agency informs the U. S. Attorney that all leads have been exhausted. Furthermore, departmental authority to dismiss is not required in cases involving trivial or insubstantial offenses if the offender has a good reputation, and failure to prosecute will not seriously impair law observance or respect for law generally, and the offender has been inducted into the armed forces. In the same category are offenses involving violations of the Fugitive Felon Act, provided the offender after apprehension has been turned over to the prosecuting authorities of the state from which he fled. These exceptions are, of course, subject to revision by the Department at any time.

#### V. THE USE OF SPECIAL ASSISTANTS

While the vast majority of both grand jury hearings and trials in the district courts are in the hands of United States Attorneys, increasing use is being made of Special Assistants to the Attorney General. The use of Special Assistants in the presentation of criminal cases before federal grand juries was not specifically authorized until 1906. It had been held in the case of *United States v. Rosenthal*, in 1903, that existing statutes did not authorize a Special Assistant to conduct, or to aid the conduct of proceedings before a federal grand jury, and that indictments based upon

proceedings so conducted would be quashed upon motion.<sup>22</sup> In an Act,<sup>23</sup> approved on June 30, 1906, Congress provided:

"The Attorney General or any other officer of the Department of Justice or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which the proceeding is brought."<sup>24</sup>

Within the limit of appropriation and good judgment, the Attorney General, therefore, may use Special Assistants in prosecutions in any district. They are used in tax cases and, to a limited extent, in other types of cases.

A statement of departmental policy on the use of Special Assistants, revelatory so far as Departmental-United States Attorney relationship is concerned, was supplied by Assistant Attorney General Alexander M. Campbell, in charge of the Criminal Division, on January 28, 1949. This occurred during Congressional hearings on the Department's Appropriation Bill for 1950.

"MR. FLOOD: (Congressman Flood) You mentioned, in your answers to the Chairman's questions and in your direct statement, that lawyers on your staff in Washington go into the field to assist and actually to perform service in criminal trials in the various districts?

MR. CAMPBELL: Yes Sir.

MR. FLOOD: Why do you do that?

MR. CAMPBELL: Because of the particular types of cases involved. For example, in setting up these Communist-investigating grand juries over the country, we wanted a uniform operation, so to speak. We formulated a policy, and it was necessary to send a man out in each instance. However, in each case he took the United States Attorney with him; but our man actually did the work.

MR. FLOOD: What do you mean when you say he took a United States Attorney with him?

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22. *United State v. Rosenthal*, 121 Fed. 863 (C. C. S. D. N. Y. 1903).

23. 34 STAT. 816, 5 U. S. C. § 310 (1946).

24. During the discussion on this measure in the Senate, the decision in *United States v. Rosenthal*, *supra*, was given as the reason for the passage of the Act. See 40 CONG. REC. 7914 (1906).

MR. CAMPBELL: He would take him into the grand jury. In other words, he would not go up there and take the headlines away from the local man.

MR. ROONEY: As a matter of fact, you need the local United States Attorney for jury selection and to get the true general local picture; is that right?

MR. CAMPBELL: That is right . . .

MR. FLOOD: Then there is a spirit of cooperation between the district attorneys and your office in these cases.

MR. CAMPBELL: It is wonderful.

MR. FLOOD: So there is no intention of usurping the power of the United States attorneys in the districts?

MR. CAMPBELL: It is just the opposite. I instruct every man who goes out that the first thing to do when he gets into the district is to rap at the United States Attorney's door and tell him that he is there to cooperate, but that we have a special problem; maybe there is a national policy involved, maybe there is a new program like this anti-Communist program. He takes the United States Attorney into his confidence. But he will actually do the work.

MR. FLOOD: In the last 6 months of last year, on how many occasions did one of your men go to an average DA's office? Would you say it was usual or unusual?

MR. CAMPBELL: It is unusual except in this general type of case.

MR. WHEARTY: May I put it this way? I think that we had about 15 lawyers in the field somewhere in the United States at all times during the year.

MR. FLOOD: And how many United States DA's are there?

MR. ANDRETTA: We have 93 districts."<sup>25</sup>

## VI. REACTIONS OF U. S. ATTORNEYS

There are few available record sources in which the reactions of U. S. Attorneys themselves to controls from Washington can be found. One of the best is in the form of transcripts of the Annual Conferences of United States Attorneys, but only those for the 1939 and 1940 Conferences are available. In 1939, the U. S. Attorneys were brought to Washington for

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25. *Hearings before Subcommittee of the House Committee on Appropriations on the Department of Justice Appropriation Bill for 1950*, 81st Cong., 1st Sess. 125-126 (1950).

their First Annual Conference. Conferences have been held annually in each succeeding year.<sup>26</sup> After the officials of the Department, including Heads of Divisions, are introduced, addresses are made by various ones in which departmental policy and problems are presented. Then the U. S. Attorneys are given an opportunity to raise questions and to make observations.<sup>27</sup>

At the 1940 Conference considerable discussion took place on the subjects of the activity of Special Assistants to the Attorney General in connection with the "autonomy" of United States Attorneys in their own districts, and on the relationship between the investigating personnel and United States Attorneys.<sup>28</sup> Of the fourteen U. S. Attorneys who participated in the discussion, four were critical of the employment of Special Assistants and eight expressed favorable attitudes. Another's attitude was favorable, but he complained that he was forced "to 'holler' loud and long to get" such assistance from Washington. Still another, who had held the position of Special Assistant to the Attorney General before being appointed United States Attorney, recounted that the instructions to him as Special Assistant were "that when I went out to help a United States Attorney I was to go there merely to assist him and work under his directions. He was the boss. And if I couldn't get along with the United States Attorney, it would be just too bad for me. I feel sure that is probably still the policy of the Department and if any of you people have trouble with Special Assistants who try to take over the show, I think a complaint to the Attorney General would remedy that very speedily."

The 1941 Conference was an executive session, and the transcript of proceedings is maintained in a confidential file. No transcripts are available for the Regional Conferences held in 1942, 1943, and 1944, nor for the Annual Conferences in Washington, 1945-1948. Since 1943, U. S. Attorneys have attempted in various ways, to secure the removal of limitations placed by the Hatch Act upon their political activities. Formal resolutions to this effect were adopted at the Regional Conferences both in 1943 and 1944. So far, (July 1, 1949), these efforts have failed.

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26. Save for 1942, 1943, 1944. During these years Regional Conferences were held in different parts of the country.

27. Department of Justice, *Conference of United States Attorneys*, April 19-21, 1939 (unprinted).

28. Department of Justice, *Second Annual Conference of United States Attorneys*, April 1-4, 1940, pp. 20-55 (unprinted).

## VII. SOME OBSERVATIONS

The "opposing considerations" mentioned by (then) Attorney General Jackson in 1940, continue to preserve a "balance" in the federal system of prosecutions. Viewed in historical perspective, however, the "balance" has tended to tilt toward centralized administration particularly during the first half of the Twentieth Century. But the "District Attorney," as he is popularly known in contrast to the language of the law, preserves a great measure of his former discretion. Subject to supervision and direction by the Department, his judgment and discretion in initiating prosecutions is bound by general rules only in some types of cases. Even in tax prosecutions he remains a key figure. An indirect check upon his initiation of prosecutions exists in the more rigid rules regarding dismissals and the employment of *nolle prosequi*. While the Department can employ its own men, Special Assistants to the Attorney General, in special law enforcement campaigns, it cannot—with only "fifteen men in the field"—even begin directly to undertake the job of federal criminal prosecutions generally. Five hundred U. S. Attorneys and Assistant Attorneys perform that function. Since prosecutions are before judges and juries, the presumption appears sound that U. S. Attorneys will possess greater knowledge "of local sentiment and opinion," have "contact with and intimate knowledge of the views of the court," and be better acquainted with "the feelings of the group from which his jurors are drawn." This presumption was again approved by Assistant Attorney General Campbell, in charge of the Criminal Division, in his testimony in 1949.