



Inside the Offices of
the Government's
Most Powerful
Lawyers

THE PROSECUTORS

James B. Stewart

Author of *THE PARTNERS*



THE

ALSO BY JAMES B. STEWART

THE PARTNERS

Inside America's Most Powerful Law Firms

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PROSECUTORS

INSIDE THE OFFICES
OF THE GOVERNMENT'S MOST POWERFUL LAWYERS

James B. Stewart

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FOREWORD

IN popular American literature, it is always the criminal defense lawyer who is the hero. Who even remembers the name of the prosecutor in the Perry Mason television series? As I hope the tales in this book make clear, it is the prosecutor who wields the greater power, undergoes the greater stress, is faced with more intractable dilemmas, and, in the end, is the keeper of the flame of both justice and order.

It is a job that, while rich in drama, proves difficult for most men—or women—to occupy for any extended period of time. Many of the characters who appear in this book are young, surprisingly so for the amount of responsibility they exercise. Relatively few of them are still prosecutors today.

From my own experience, I remember working for a prosecutor as the only job I have held that drove me to tears of both pity and frustration. There was the occasion when my office recommended probation for a first-time marijuana offender who was also the sole support of his mother and sisters. The judge, a hard-liner against drugs, sentenced him to prison. At the other extreme, the most hardened criminal I've ever met was a violent, racist fifteen-year-old who had to be prosecuted as a juvenile. He was sentenced to the county youth home, where he continued to wreak havoc.

American officials work in a government of checks and balances, and prosecutors are no exception. There are limits to their power—

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judges, defense lawyers, the Bill of Rights and the scrutiny of the press. Yet they exercise enormous discretion. The decision to prosecute is one of the most solitary and unfettered exercises of power in the American political system. It has a profound influence not only on those named as defendants, but on everyone in society who looks to the criminal process for guidelines to his own behavior. It is a heavy responsibility.

Much of what prosecutors do is shrouded in secrecy. Grand jury proceedings, for example, are required by law to be kept secret. Because the deliberations and decisions of a prosecutor and his staff might, if made public, affect a defendant's right to a fair trial, they are invariably kept secret. Practically anything a prosecutor does, if discovered, can become the subject of attack by a savvy defense lawyer. For that reason, the public perception of prosecutors derives almost exclusively from what they do in court during a public trial.

This book goes far beyond the public activities of prosecutors. While there are trials and courtroom proceedings in these stories, the real drama is usually behind the scenes, where most of the work of prosecutors is carried out. This book would not have been possible if many prosecutors hadn't agreed to confide many previously secret aspects of their work, and I am deeply grateful for their trust. I hope the result is an unprecedented and candid portrayal of prosecutors at work.

This book is also about prosecutors who are (or were) at or near the top of their field, actively involved in many of the most challenging criminal cases in the country. They range from the Attorney General of the United States, the nation's top prosecutor, to the U.S. Attorneys and their assistants, to the District Attorney of New York City. Not every top prosecutor is portrayed or even mentioned, but there is a reasonably representative sample. Their selection isn't meant to slight the prosecutors who work in obscure rural areas or small towns and counties. They face many of the same pressures and dilemmas.

Any book about prosecutors is, necessarily, a book about crime. The crimes portrayed here are not what is usually found in police or detective novels. Rather, they are some of the most sophisticated and important crimes or criminal investigations of recent years, chosen to show prosecutors wielding their power and their skills when the stakes and pressure are high. There is murder, but it is murder committed in fiendishly complex circumstances. There is fraud, so sophisticated that some might not even detect it. Nearly all of the crime is white

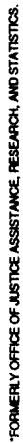
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collar. White-collar criminals are often the cleverest adversaries. And they possess the financial means to hire the best defense lawyers. Such cases test the mettle of even the best prosecutors. Indeed, the results in some of these cases can be described only as failures for the prosecution.

The cases and exploits of the prosecutors who appear in these pages were also chosen to show the full range of a prosecutor's work, from the earliest stages of a criminal investigation, through grand jury proceedings, through the discovery process, and through trials, convictions or acquittals, and appeals. They were chosen to highlight some of the abiding issues and controversies in the field, focusing particularly on the tension between law enforcement and provisions of the Bill of Rights. I can think of almost no other area that has given rise to so much public misunderstanding, in particular the sense that countless criminals have been set free due to legal technicalities. I hope that at least some of that confusion will be laid to rest.

Prosecutors play a vital role in the American political system. Although their function is frequently described as apolitical, their activities can't be separated from the broader political context in which they work. The influence of politics is often subtle, and sometimes insidious. It is certainly present. Ultimately, the federal government shapes the actions and priorities of the nation's top prosecutors, and for that reason this book begins in Washington.

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PROLOGUE: The Great Hall of Justice

DEEP in the sprawling Washington complex that is home to the Department of Justice is the cavernous room called the Great Hall of Justice. Its neoclassical architecture, marble floors, columns, high coffered ceiling, and huge seal of the Republic tend to inspire a sense of awe no matter what one's politics or degree of patriotism. The room is dominated by two large statues. One is a bare-breasted woman standing on clouds from which Moses' tablets protrude. The other is a man wearing a loincloth, holding aloft a cluster of oak branches and arrows. The woman is called "the spirit of justice"; the man, "the majesty of law." While the precise symbolism escapes many observers, the sculptor's intent is clear: The figures personify a justice that is magisterial, serene, nonpolitical.

In October 1982, nearly two years into the Reagan presidency, the United States Attorneys gathered here for the first of the administration's meetings with the nation's top federal prosecutors, usually held once a year. There are ninety-four U.S. Attorneys, one for each of the federal judicial districts in the country. By virtue of geography and population, U.S. Attorneys for some of the districts command more power and prestige than others.

The U.S. Attorney for the Southern District of New York, based in Manhattan, for example, has long been considered the premiere prosecutor after the top Justice Department officials themselves. U.S.

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Attorneys located in key cities such as Boston, Miami, Chicago, Los Angeles, and San Francisco typically wield enormous power. The U.S. Attorney for the District of Columbia is unusual in that he presides over a force of what are essentially local prosecutors, since all criminal law in the District is federal.

The U.S. Attorneys are, first and foremost, prosecutors. In other words, they are lawyers who represent the United States in criminal proceedings against those accused of crime. Like other lawyers, they gather evidence, study judicial opinions and statutes, examine witnesses, and file appeals. Their "clients" are government officials—the Attorney General and the President—and, by extension, the people of America.

For that reason, it is the President who appoints the U.S. Attorneys and is ultimately responsible for their behavior. But partly for administrative reasons, partly because of custom, and partly because U.S. Attorneys serve the judicial districts located within the fifty states and the District of Columbia, the prerogative of selecting them has largely shifted to the senators from the same political party as the President.

In practice, the degree of senatorial control over their appointment has varied widely, depending on the interest of particular senators, on their political power, prestige, and seniority, and on the degree to which the President and his top aides want to exercise control over the appointment process.

The prosecutors who gathered for their first Reagan administration annual meeting included a few holdovers from previous administrations, a few of whom had become near-legends. H. M. Ray, a U.S. Attorney from Mississippi, had held his office for twenty years. Sidney Lezak, from Oregon, had been attending these meetings for over eighteen. Their careers dated to the early sixties, and no subsequent President had dared replace them.

But to a greater degree than in nearly any other administration, the group gathering for the first Reagan administration meeting consisted of new faces in Washington. In the case of the Reagan administration, the President and his aides took an unusually keen interest in these appointments. Edwin Meese, counselor to the President and one of his top advisers, was himself a former prosecutor who considered criminal prosecution one of the nation's top priorities. The result had been the wholesale replacement of most U.S. Attorneys who had served in the Carter administration—even some Republican holdovers from earlier administrations.

That President Reagan and Meese took such an interest in the U.S. Attorneys was fully consistent with the President's politics and priorities. On the surface, the function of the federal prosecutors is straightforward: they decide who should be charged and with what federal crime. In practice, their work is complex and their influence far-reaching. Simply launching a federal investigation can have major, even dire, consequences for their targets. In deciding what crimes to prosecute—and what crimes to ignore—they make vitally important decisions about the fundamental values that will be reflected in administration policy.

And yet their function has been deemed essentially nonpolitical. This theory posits that it is Congress that defines what is a crime. Prosecutors simply prosecute them—all crimes, whatever the prosecutors' own feelings about the wisdom of Congress's criminal statutes. It is a theory that has been embraced publicly by Republicans and Democrats alike when it has been expedient to do so.

For many of the new federal prosecutors, the gathering was their first opportunity to meet in person the men who headed the hierarchy of criminal prosecution in the country and were their current bosses.

The U.S. Attorneys were greeted by the Attorney General himself, William French Smith, by virtue of his office the nation's top prosecutor. He was ultimately responsible for all their activities, answerable directly to the President. The remarks by the silver-haired former partner in Gibson, Dunn & Crutcher, a large and prestigious Los Angeles law firm, were fittingly brief. Although Smith had an unusually close relationship with the President and had been his personal lawyer for years, he had virtually no experience in law enforcement or criminal law and made no secret of the fact that he planned to delegate responsibility for those areas to his top aides.

Next came speeches from the two men most directly involved with the U.S. Attorneys: D. Lowell Jensen, the Assistant Attorney General in charge of the Criminal Division, and Rudolph ("Rudi") Giuliani, the Associate Attorney General, the third-ranking official in the Justice Department. It hadn't taken long for the U.S. Attorneys with even one ear to the ground to realize that Jensen and Giuliani were locked in some kind of power struggle within the still-new administration.

The two men seemed opposites, in both appearance and temperament. Jensen is tall, clean-cut, square-jawed, quiet and thoughtful. A native of Utah who spent most of his life in California, he had an

instinctive affinity for the Reagans. Nonetheless, he is at least nominally a member of the Democratic Party. He was already a popular figure with the U.S. Attorneys who knew him. He was an experienced state prosecutor in one of the busiest criminal districts in the country—Alameda County, California, which includes both Oakland and Berkeley. He had been a prosecutor during the turbulent late sixties, and worked closely at the time with Meese, who was an Assistant District Attorney in the office. Since then Jensen had become known as a strictly professional prosecutor, one who let few, if any, political ideologies interfere with a zealous determination to convict criminals. He was the administration's symbol of a bipartisan commitment to fight all kinds of crime.

Giuliani, by way of contrast, is stocky and dark-haired, a flamboyant, aggressive, voluble New Yorker. His words pour forth in a torrent. He seemed at first glance out of place in the Reagan administration. He was largely an outsider, once a protégé of Harold Tyler, Deputy Attorney General in the Ford administration. He had worked in the Justice Department then and had been an Assistant U.S. Attorney in the Southern District of New York.

In those positions he had developed a reputation for hard work, political savvy—and an enormous ego. Those who knew Giuliani doubted that he would settle for any role out of the limelight, even if it meant stepping over a few of his colleagues in the administration.

Indeed, Giuliani had already scored what many deemed a political coup by being named Associate Attorney General, a position that ranked above Jensen. Moreover, as the highest-ranking Justice Department official with experience in criminal law, Giuliani had been given greater responsibility than had previous Associate Attorneys General in the criminal arena. Although Jensen had direct responsibility for criminal cases, Giuliani had seized responsibility for overseeing the appointment of the U.S. Attorneys. As a result, it was Giuliani rather than Jensen to whom the prosecutors owed their jobs.

The gathering of U.S. Attorneys should have been a triumphal appearance for Giuliani. But the case being most avidly discussed among the prosecutors as they convened in Washington had cast a shadow on his career. Already, the opinion of many of the U.S. Attorneys at the meeting was that Giuliani had blundered.

The case was *United States v. McDonnell Douglas Corporation*, the result of an enormous investigation begun during the Carter administration; it involved foreign payments, bribes, and fraud, and was