Matheson New Dean

Alan Matheson was appointed as the third Dean of the College of Law on February 21, 1979 by ASU President John Schwada, subject to confirmation by the Board of Regents. Dean Matheson had served almost one year as Acting Dean, after the resignation of Ernest Geilhorn. After a thorough and lengthy national search, an advisory committee to President Schwada recommended Dean Matheson as the best available candidate; the President concurred with the committee recommendation.

At the time of his appointment as Acting Dean, Matheson was Associate Dean and Professor of Law. He has been at the law school almost since its founding—he joined the faculty during the school's first semester, in the fall of 1967. Since that time, he has continuously served the school both as an administrator and as a teaching faculty member, except during a one-semester sabbatical leave spent at the University of Southampton, England, in the fall of 1974. He also served the school as Acting Dean once before, when Dean Willard Pedrick took a sabbatical leave in Australia during the spring of 1973.

Dean Matheson was educated at the University of Utah, where he received his undergraduate, master's, and law degrees. He was elected to Phi Beta Kappa, Order of the Calf, and the chief editorialship of the Utah Law Review. Thereafter, he studied and served as an Associate in Law at the Columbia Law School. He served as Assistant to the President of Utah State University for six years before joining the ASU law faculty.

Milton Schroeder was named Acting Associate Dean by Dean Matheson in July 1978. Milton Schroeder joined the ASU law faculty in 1969. Although he had no direct previous experience in administration, he has acted as chairman of a number of important faculty committees, including the 1976 Task Force on the Curriculum, and he prepared a self-study to evaluate the school's programs upon its tenth anniversary.

Immediately before he became Acting Associate Dean, Schroeder accepted President Schwada's request to head an advisory committee to assist in the selection of a new dean. The committee included Professors Stephen Lee, Ben Moulton, and Hal Bruff; Phoenix attorneys Edward Jacobson and Louis McCleneny; and ex officio, Vice President Karl Dannenfeldt (who was replaced upon his retirement by Provost Paul Muhleman). The committee advertised the position widely, invited applications from numerous persons inside and outside legal education; carefully evaluated the numerous resulting applications; and invited several candidates to extensive interviews with faculty, administration, and itself at the University. Its final recommendation to President Schwada of Dean Matheson's selection was carefully considered, but warmly made.

ARIZONA STATE LAW FORUM
Carter Report Names ASU

ASU's favorable rating in the Carter Report may no longer be a recent news, but it is still worth examining. Last year, the College of Law was ranked among the top 30 law schools in the nation in the widely-circulated report and was also voted most likely to improve. The report reflected a survey of law teachers and deans throughout the United States. The survey was conducted by the academic senate of the University of California at Berkeley, and the resulting report was named in honor of the late Allan Carter.

Those polled were asked to evaluate the top 18 law schools to educational attractiveness (on a scale of 1 to 10) and to Faculty Quality (on a scale of 1 to 5). The emphasis in Educational Attractiveness was on recommending schools to prospective students. Those surveyed were asked to consider the reputation and accessibility of faculty, curriculum, innovative programs, library resources, other educational facilities, quality of students, prominence of alumni, and other factors which contribute to an effective and professional environment. For Faculty Quality, they were directed to consider only the scholarly competence and professional achievements of the current faculty. Incidentally, among factors suggested to them, the respondents indicated that they considered student quality, library resources, and faculty research competence among the most important in evaluating the quality of schools, and university strength and faculty external activities among the least important. The survey polled 42 law deans and 264 law faculty members. The faculty were selected from among various specializations and represented younger as well as older teachers. The deans and faculty were remarkably similar in their rankings. Although only 52 percent of those surveyed responded, the committee found no significant biases in response rates (or in ratings) from different parts of the country; deans and faculty from more highly-rated schools did more often respond, but the committee found that their ratings did not differ from respondents at lower-rated schools.

The study committee recognized that law faculty and deans are not the only experts on the quality of law schools. Present and prospective employers of graduates, as well as prospective law students and their advisors, also evaluate schools. The Carter Report was limited to the smaller group because of the cost and time required in identifying and surveying the larger.

Those surveyed were also asked which schools would significantly improve their ranking over the next five years because of administrative leadership, quality of younger faculty, innovative programs, resource availability, etc. The schools that received the most votes were drawn from throughout the general rankings. There was not the same consensus on improving schools as there was on present quality of schools — no school appeared on more than about 30 percent of respondents' lists — but ASU was more often mentioned than any other school.

In a similar survey conducted by the same study committee, ASU's College of Education was also ranked in the third tier nationally and was also voted most likely to improve. The ASU College of Business Administration was in the fourth tier and eighth most likely to improve nationally. Only law, education, and business schools were studied by the committee.

The accompanying tables are taken from the final version of the Carter Report. Only the top ten schools were ranked in order; others were ranked only in groups of ten.

Among Top Law Schools

Top Ten Law Schools

In Carter Report

1. Harvard
2. Yale
3. Stanford
4. Michigan
5. Chicago
6. U.C. — Berkeley
7. Columbia
8. Pennsylvania
9. Virginia
10. UCLA

Second Ten

Cornell
Duke
Minnesota
N.Y.U.
North Carolina
Northwestern
U.C.L.A.
Texas
Wisconsin

Third Ten

Arizona State
Boston U.
U.C. — Davis
U.C. — Hastings
Georgetown
Indiana
Utah
Vanderbilt
Washington

Top 40 Law Schools

1. Harvard
2. Yale
3. Stanford
4. Michigan
5. Chicago
6. U.C. — Berkeley
7. Columbia
8. Pennsylvania
9. Virginia
10. UCLA

Second Ten

Cornell
Duke
Minnesota
N.Y.U.
North Carolina
Northwestern
U.C.L.A.
Texas
Wisconsin

Third Ten

Arizona State
Boston U.
U.C. — Davis
U.C. — Hastings
Georgetown
Indiana
Utah
Vanderbilt
Washington

1977 Entering Class

Indices Rate Favorably

As the Carter Report indicates, an important factor in determining educational attractiveness of a law school is the quality of the student body, but comparative academic quality of students is very hard to measure. In past years, the College of Law has attempted to measure the academic potential of incoming students by assigning an index number to each that gives approximately equal weight to the Law School Admission Test score and the undergraduate grade point average (by multiplying the latter by 200 and adding to the LSAT).

Last summer, the American Bar Association released the median LSAT score and the median undergraduate grade point average of the incoming class of each of the nation's 164 law schools in Fall, 1977 (a few months after the Carter Report was published). ASU's median LSAT was 135 highest, and its median grade point average was 277. If all the median figures are combined under the ASU index, the resulting comparative figures would indicate that the quality of the 1977 ASU entering class was the 25th best in the nation. Other schools use these factors differently, and the ASU class might not rank as highly under some other school's measurement of academic potential.
In the regional Moot Court competition held in Albuquerque November 3 through 5, 1977, two ASU teams faced 13 teams from seven schools in a double elimination competition. The first ASU team, consisting of Richard Gerry, Kevin Hayes, and Frank Fanning, was eliminated in the third round. ASU's second team, Denise Blommel, Karen Kennedy, and Ruth Koester, won best orals but lost on the brief and the round, and was judged second place overall.

The three women and adviser Michael Berch of the law school faculty traveled to New York in mid-December for the nationals, where 29 teams argued in a single elimination competition. The ASU team won in the first round against Loyola (New Orleans), making history as the first ASU team ever to get past the first round of nationals. The next day they argued and won over Seton Hall, which had won best brief. (After this round, Denise recalled, Professor Berch lit a candle to St. Jude in St. Patrick's Cathedral.) Later in the day they won the quarterfinal round against Idaho. In the semifinals the next day, ASU faced an all-female team from the University of Texas (whose cheering section included Charles Alan Wright) and won, even though the timekeeper failed to start the timer on the Texas argument.

That evening Karen and Denise, "too tired to be frightened," faced Dickinson in the finals before a seven-judge panel. Dickinson won the round, one woman on the Dickinson team was named best speaker, and Denise was named second best oralist.

Punishment by Death

MICHAEL L. ALTMAN

England abolished the death penalty in 1965. The vote in the House of Commons in support of abolition was 200 to 98; in the House of Lords, the vote was 169 to 75. This overwhelming Parliamentary vote for approval of abolition is especially interesting because substantial support came from the ranks of both the Labour and Conservative parties even though the government did not support abolition and a controversial opinion poll revealed that 79 per cent of the people of England either favored the retention of the death penalty or expressed uncertainty about abolishing it.1 How could abolition be voted in this political climate? One M.P. offered this insight:

"We don't, in matters of life or death, think it is right to decide what is just or unjust by a spot unconsidered reaction taken on the street corner or in a club or pub."2 If this observation is accurate, and the literature on the subject suggests that it is, it may indicate that Parliament is less democratic and more civilized than most American legislatures, at least on the subject of the death penalty.

England was not always so civilized regarding capital punishment. Only 150 years ago, the criminal statutes in England included approximately 225 offenses that were punishable by death, and a leading commentator suggests that this figure understates the actual scope of capital offenses in British law at that time.3 The breadth of this "Bloody Code" is indicated by a few examples of the variety of offenses included: not only the traditional murder, rape, robbery, and treason, but also sheep stealing, picking a pocket, shoplifting, forgery, conspiring with gypsies, and stealing turnips.

British history shows how much our attitudes about the use of capital punishment have changed. I think most would agree that the death penalty is now an issue only when murder has been committed. British history shows, however, how little the arguments for the death penalty have changed during the last 150 years. For example, regarding the eighteenth and early nineteenth centuries, Leon Radzinowicz observed:

The unscientific approach to crime and criminals created an attitude of mind propitious to the inception...
United States Supreme Court case upholding the constitutionality of the death penalty. Mr. Justice Stewart, writing for a plurality of the Supreme Court, offered two justifications: retribution and deterrence. Justice Stewart had to find some justification for the death penalty, for he apparently accepted the argument that without justification the death penalty would be "cruel" within the meaning of the Eighth Amendment's prohibition of "cruel and unusual punishment." As explained below, his assertion that retribution constitutes a justification for capital punishment cannot be supported theoretically, while a justification of deterrence can be theoretically supported, the factual premises upon which it depends are too unlikely to support executing a person for committing the murder.

With regard to retribution, Mr. Justice Stewart's support is stated in the negative. He states that the death penalty as retribution is not "consistent with our respect for the dignity of men" and it is not "inherently disproportionate." The first point — inconsistent with respect for dignity — is a bit obscure as a retributive argument. It means that what we refer to as our sense of dignity is necessarily undervalued, then he is only giving us one criterion for determining what is undeserved and not giving us a clue for deciding what is deserved. I also would have thought that if retribution is to be a justification for the death penalty, then there ought to be some assertion, consistent with retributivist theory, as to why the death penalty is deserved more than life imprisonment.

...while a justification of deterrence can be theoretically supported, the factual premises upon which it depends are too unlikely to support executing a person for committing a murder.

Mr. Justice Stewart's reference to proportionality might seem to provide some insight into why he thinks the death penalty may be deserved. He argues that the death penalty can be deserved for murder because it is proportionate to the crime — a life for a life (lex talionis). If this is Mr. Justice Stewart's theory, and it seems to be, it should be noted that there do not appear to be any contemporary philosophers (retributivists included), penal or criminologists who would credit lex talionis as a defensible justification for the death penalty. The reasons fordiscounting lex talionis are quite obvious. No country in the Western world would think of exacting punishment in kind from the criminal simply because he commits a serious crime. We do not mug a mugger, rape a rapist, or burn down the house of an arsonist, nor do we execute the family of a person who has murdered the family of another. Why then should we kill a murderer when we do not exact punishment in kind for other serious offenses? The point is that lex talionis is totally discredited in our jurisprudence, and it is not rational to extract it from the Old Testament for one offense and equate it with retribution. I do not mean to suggest that retribution is not an important part of Anglo-American criminal jurisprudence; it is. It is also a subject that has received considerable attention and support from quite respectable contemporary philosophers, criminal law professors, and practitioners. Retribution does not mean lex talionis, however, notwithstanding Mr. Justice Stewart, and in this short article, I can do no more than commend to the reader the rich literature on retribution that has emerged in recent years.

The second major justification for the death penalty, which Justice Stewart suggests is sufficiently credible to permit a state legislature to adopt a limited death penalty statute, is deterrence. The argument that the death penalty deters is clearly the critical theoretical argument upon which the legitimacy of the death penalty depends. It is a utilitarian argument, which of course may be and is rejected by those who reject utilitarianism, at least reject reliance upon utilitarian considerations to deter crime and death issues. The utilitarian argument is
that if the death penalty, as opposed to an alternative punishment such as life imprisonment, results in less innocent victims being murdered than murderers executed (after discounting the risk of error), then the death penalty is justified as a life-saving measure. This utilitarian argument, that the law should always favor life over death, is a very compelling argument, or at the very least an argument that cannot be regarded as irrational. Perhaps it is immoral for the law to authorize the state to deprive a person of life, but it is not irrational. Here I must concede that I am sufficiently a rationalist to accept the utilitarian argument if the death penalty deters (as previously described), it could be justified if administered in a fair and nondiscriminatory manner. I have no hesitation asserting, however, that it is not possible to impose the death penalty fairly, given the constraints and practices of our criminal justice system. Much has been said on this subject by Professor Charles Black, in his eloquent book Capital Punishment: The Inevitability of Caprice and Mistake and in his various other articles on this subject. Moreover, there seems to be an increasing awareness throughout the United States, among people of all political persuasions, that the criminal justice system operates arbitrarily.

Even if the arbitrariness of the system is not a sufficient reason to abandon the death penalty, there still must be support for the theory of deterrence. Intuition strongly inclines one to conclude that less people would be murdered if there were a real threat of execution; it was this intuition that supported the Bloody Code in England 150 years ago, and it is the same intuition that undoubtedly contributes to the results of American public opinion polls showing strong public support for the death penalty. Intuition is not always accurate, however, and studied consideration of the deterrence issue leads me to the conclusion that the death penalty does not have a greater deterrent effect on murder than life imprisonment.

Unfortunately, examination of the burgeoning literature on the subject of the death penalty and deterrence is not an easy task for those of us who confine quadratic equations with abstract art and who until recently

... the cold-blooded killer for hire will not be deterred by the death penalty because his cold calculations surely assume that he will not be caught.

Professor Zeisel has no difficulty answering that question in the negative after disposing of two classic examples, often put forth by death penalty proponents and accepted blindly by the Court in Gregg. First, he observes that the cold-blooded killer for hire will not be deterred by the death penalty because his cold calculations surely assume that he will not be caught. Second, he responds to the question regarding the need to deter life prisoners from committing murders (the so-called “free murder” problem) by noting that the actual numbers of such murders are small, and in any case, murder by “takers” is not free because most have some hope of being released, and the rest must know that a prison has its own way of punishing multiple murderers. Professor Zeisel concludes his careful analysis of the statistics and arguments with this observation:

In the end one must remain skeptical as to the power of evidence to change ancient beliefs and sentiments. The greater hope lies in the expectation that with better times our sentiments will reach the “standards of decency that mark the progress of a maturing society.”

That observation brings us back to the beginning of this article. American legislatures, if not American culture, need to become more civilized before they can vote, as did Parliament in 1665, to abolish the death penalty. Until that day arrives, abolitionists can only take solace in how far we have progressed toward abolition while fighting the same fight for a change in values that has been fought for centuries. In the immediate future, which does not seem to include a change of heart or law to save many of those now on death row, I would suggest a change of tactics. For the time being, while myth and politics would seem to preclude total abolition, abolitionists ought to argue for an alternative position.

If the death penalty is to continue, it should only be permitted in those cases that are used as examples by proponents to appeal to our most primitive and deepest fears: (1) mass murderers, (2) murders by hijackers, (3) murders by life prisoners, and (4) murderers for hire. This would deal with Charles Manson, Gary Taion, the Baader-Meinhoff, Adolf Eichmann, and Don Bolles’ killers; it would also permit most of those on death row to receive a reprieve from death. Each of these suggested categories of capital murder can be defined with reasonable precision to avoid the problem of the death penalty being misused (if it must be used at all). The death penalty is about to be misused because the cases of most now on death row do not compare with the extreme examples that predominate during legislative debate . . . .

The death penalty is about to be misused because the cases of most now on death row do not compare with the extreme examples that predominate during legislative debate, but do fit within the broad legislative categories that emerged after the abolitionists lost their fight.

The United States will some day join the growing number of abolitionist countries. Until that time, we must keep in mind that 81.6 per cent of those murdered in the United States in 1976 were murdered by relatives, friends, neighbors, and acquaintances. And, 55 per cent of those murdered were killed by a gun, which is so available, quick, and effective method to vent anger, relieve frustration, and soothe passion.

Murderers must be punished effectively, but the death penalty is not necessary. Perhaps statistics will not persuade. However, the declining murder rate since 1974, the decline in the population most likely to fall (those under 25), and a reduction in the societal tensions that dominated the turbulent 1960s may well permit legislative reduction of the number of capital cases to narrower and more precise categories as a prelude to complete abolition.

NOTES
2. Quoted in B. Grenier, supra note 1, at 3.
3. For the purpose of this article, I am using a pristine definition of civilized relating to the rate at which people always kill unnecessarily or unnecessarily to achieve the killing of others.
5. Radnitzky, supra note 4, at 34, includes a comprehensive discussion of the death penalty — the laws, the practices, and the theory — that preceded the period 1750-1850.
9. Zeisel, supra at 353.
DeConcini to Speak At Annual Dinner

DeConcini, United States Senator from Arizona, will be the featured speaker at the 33rd Annual Law Alumni Law Society Dinner on Thursday, April 30, 1978. The dinner will take place at Mountain Shadows at 7 p.m., preceded by a no-host cocktail hour at 6 p.m.

DeConcini will speak on pending judicial appointments and legislation affecting the federal court system.

Reservations can be secured by contacting Mrs. Virginia Stewart at the College of Law, 965-5808.

In March, the Arizona State Law Journal hosted an Evidence Symposium at the law school honoring Professor Edward W. Cleary upon his retirement. The participants included many nationally-renowned scholars, including Irving Younger of Cornell, Albert Jenner of the Chicago bar, Dean John Strong (Nebraska), Dean Emeritus Mason Ladd (Iowa), Vaughn Bell (Georgia), Ronald Carlson (Washington University), Arthur Travers (Colorado), and Christopher Mueller (Wyoming), as well as Professor Michael Berch of ASU. Papers from the Symposium were published in a special issue of the Journal. Professor Cleary is shown above with Journal editors Judy Sirks and David Durfee.

In November, 1978, ASU hosted a Discovery Conference to consider the merit of proposed amendments to the Federal Rules of Civil Procedure. The Conference was organized and run by the students and instructors in a third-year, Advanced Civil Procedure Seminar at the law school; the instructors were Phoenix Attorney John P. Frank and Judge Mary M. Schroeder of the Arizona Court of Appeals. Among those participating in the two-day Conference were Dean Paul Carrington of Duke; Professors Ed Coor of Michigan, Maurice Rosensberg of Columbia, and David Shapiro of Harvard; federal judges from the Second, Third, Fifth, and Seventh Circuits; representatives from the Department of Justice and the Federal Judicial Center in Washington, D.C.; and attorneys in private practice or with public interest law firms in Los Angeles, Washington, Miami, Boston, Philadelphia, and Phoenix.

Discovery Conference organizers Judge Mary Schroeder, John P. Frank, Ron Kilburg, Thomas Irvine, Pat French, Susan Pimplton, and Nancy Beck are shown outside the U.S. District courthouse in Los Angeles.
Of Prosecutors, Presidents and Publicity

DAVID H. KAYE


Professor Kaye served as Assistant Watergate Special Prosecutor from June 1973 to December 1974. The views expressed here are nonofficial and do not necessarily reflect the opinions of any other members of the Watergate Special Prosecution Force.

For eleven frenzied, biting months, Leon Jaworski was the Special Prosecutor. During this period, four former Cabinet officers and various White House officials were charged with violations of the federal criminal code. A president, bounded by the sound of his own taped recorded voice, was driven from office and later paraded down the man he had named as his successor.

It is the story of The Right and the Power, Mr. Jaworski's best-selling history of his term as the second of four Watergate Special Prosecutors. Yet even the most exciting of plots cannot ensure a good book, and most reviewers have been unimpressed by Mr. Jaworski's skill as a raconteur. Facets of The Right and the Power that may be of particular concern to the legal community, however, have not received much critical attention.

It is true that Jaworski's book is a bit too obvious. He has avoided writing about the various episodes of Watergate as if they were a piece of soap opera. And the legal implications of theWatergate affair are itself an interesting legal story, which is precisely the story that Mr. Jaworski has written.

Mr. Jaworski does not attempt to support his conclusion with quotations from staff memoranda as he is wont to do elsewhere in the book, and the position he adopts is puzzling. He argues, "I did not believe the United States Supreme Court would permit indictment of a sitting President for obstruction of justice — especially when the House Judiciary Committee was then engaged in an inquiry into whether the President should be impeached on that very ground.

The meaning of this statement is not entirely clear. It is not a claim that a sitting president is immune from criminal process. Although such a view would seem to be mistaken, reasonable arguments could be adduced on its behalf. But Mr. Jaworski cannot have adopted this position, for he argued in United States v. Nixon, the Watergate tapes case, that the indicability of an incumbent president was an "open and substantial question." Furthermore, in The Right and the Power, he asserts that "legally an indictment could be returned against a sitting President for the offense of murder." Why murder but not obstruction of justice? Both offenses supply grounds for impeachment and indictment. Since Mr. Jaworski does not hold the view that impeachment must necessarily precede indictment — this would render a sitting president immune from criminal process — the answer must lie, not in the nature of the crime, but in the admissibility fact that a House committee was investigating impeachment for obstruction of justice. Thus, although he does not articulate his thinking, Mr. Jaworski is espousing a primary jurisdiction theory of impeachment.

It seems to be that a prosecutor should — indeed, must — delay an indictment until Congress has had sufficient opportunity to impeach and convict, presumably, if Congress fails to act, the prosecutor may proceed. On the other hand, if Congress does act — whether by rejecting impeachment, impeaching but not convicting, or impeaching and convicting — then the prosecutor may also proceed. Under this primary jurisdiction theory, all the Constitution requires of the prosecutor is that he delay the indictment to enable Congress to consider whether the President should be removed from office. As Mr. Jaworski put it, "[The] proper constitutional process would be for the Committee to proceed first with its impeachment inquiry." But why? As a matter of political pragmatism, of course, it may make sense for a prosecutor to await the verdict of the people's representatives. Maintaining public and legislative support was sine qua non to the political vulnerability and self-conscious Special Prosecutor's Office. Mr. Jaworski, however, purports not to have made only this kind of political judgment. Rather, he claims that he chose not to indict because he had done so would not have been "legally sound." While Mr. Jaworski provides only ex cathedra pro- nouncements to support his primary jurisdiction approach to presidential indictability, several considerations might be advanced in its favor. First, concurrent proceedings create some risk of conflicts in the scheduling of hearings and the availability of witnesses and evidence. Second, an indictment might prejudice Congress in its deliberations. Third, there is always the pos- sibility that dual proceedings will produce seemingly con- flicting results. But these arguments are not particularly overwhelming, and not one of them sheds any light on why the impeachment process should supersede the criminal process.

To justify Mr. Jaworski's primary jurisdiction theory, we must probe more deeply. We might look to the ration- ale usually invoked to support the homologous adminis- trative law doctrine. Typically, because of their assumed expertise, administrative agencies are deemed to have primary jurisdiction over certain issues that might other- wise first be adjudicated in court. This basis for the pri- mary jurisdiction doctrine, however, is plainly inappropriate here, since Congress is hardly better equipped than the courts are to initiate and evaluate charges of criminality. Nevertheless, Congress does possess a political sensitivi- ty and accountability not necessarily present in the institutions of the criminal law. Is this sufficient reason to construe the Constitution as leaving it to Congress to deal with presidential misconduct in the first instance? The short answer must be "No," for the Constitu- tion, according to the premises of Mr. Jaworski's argu- ment, creates more than one means of dealing with mis- cro political problems. This, of course, the awfully politics of the legislature should preclude Congress from delegating its impeachment power to an independent agency. Likewise, it should prevent anything short of a constitutional amendment from authorizing prosecutors and courts to conduct impeachments. An indictment is not an impeachment, however, and a criminal conviction is not a removal from office. A prosecutor may, of course, believe that the nation's priorities dictate first removing a criminal from office and branding him as a criminal later. If at all. Attorney General Elliot Richardson's willingness to allow Vice President Spiro Agnew to plead no con- tendere if only he would resign the vice presidency seems to exemplify this attitude. Similarly, a prosecutor, fearing that an indictment might impede the imperative process of removal (because of possibly invalidating prejudicial pretrial publicity or the logistics of dual proceedings), might conclude that it is better for the nation to defer any indictment and punishment of the officeholder while Congress devotes itself to cleansing the office. But a prosecutor who follows this course is exercising his dis- cretion. Depending on the circumstances, the choice may be wise or misguided, commendable or tragic. In any event, the decision to indict is the prosecutor's, and it must be justified on prudential — not legal — grounds. In conclusion, Mr. Jaworski, as he says he did, on the premise that he was legally foreclosed from prosecuting President Nixon while the Congress was considering impeachment, he开业ed a false assumption.

Furthermore, if the Special Prosecutor's analysis of the sustainability of the President to indirect seems questionable, his understanding of the law bearing on the decision to charge the post-Watergate Nixon — the Watergate obstruction of justice as immoral as an unindicted co-conspirator is surely untenable. Mr. Jaworski states that he did not want the grand jury to cite the President, even as an unindicted co-conspirator, for obstructing justice because he had been prejudiced before the House Judiciary Committee by the grand jury's findings. Nevertheless, Mr. Jaworski insists that it was essential to have the grand jury identify the Presi- dent on the record as an unindicted co-conspirator: We needed to name the President as a co-conspirator prior to trial in order to make admissible as evidence his statements in the tape recordings at the trial of those we planned to indict in the cover-up case. Without naming the President, some of his state- ments in the recordings would not be admissible as evidence.

Mr. Jaworski does not explain how a grand jury find- ing of membership in the conspiracy is related to the ad- missibility of the taped statements of President Nixon. And, at the oral argument in United States v. Nixon, Mr. Jaworski had no difficulty explaining the related issue of the significance of the grand jury's finding to the
enforcement of the trial subpoena for the tape recordings:

Justice Douglas: I don't see the relevancy of the fact that the grand jury indicted [sic] the President as a co-conspirator to the legal issue as to the duty to deliver pursuant to the subpoena that you are asking for. Mr. Jaworski: The only relevancy, Mr. Justice, lies in it being necessary to show under Rule 17(e), that there is some relevancy to the material that we seek to subpoena.

Justice Brennan: Would you be here, Mr. Jaworski, without the President having been named as an [sic] co-conspirator? That simply gives you another string to your bow — isn't that about it? Mr. Jaworski: It is true that it admits some evidence that would otherwise not be admissible.

Justice Stewart: Right. But even had the President not been named, you would still have subpoenaed at least part of this material.

Mr. Jaworski: I have no question about that. Mr. Justice. Stewart: And you would still be here.

Mr. Jaworski: That is right, sir. But in order to present the full picture, and in order to present — that also is a part of it.

Justice Brennan: You don't suggest that the grand jury finding is finding on the Court or not?

Mr. Jaworski: I do suggest that it makes a prima facie case. And I think under the authorities it so is.

Justice Brennan: Let me understand this, Mr. Jaworski. You don't suggest that your right to this evidence depends upon the President having been named an unindicted co-conspirator.

Mr. Jaworski: No, sir. Justice Brennan: And for the purposes of our decision, we can just lay that fact aside, could we?

Mr. Jaworski: Yes.

Justice Powell: Mr. Jaworski, as I understand your brief you go beyond what you have addressed so far. I think you say that the mere fact that the President was named as an unindicted co-conspirator forecloses his claim of privilege.

Mr. Jaworski: We certainly make that as one of the points which is the key here.

Justice Powell: That refutes him in and of itself to the status of any other person accused of a crime.

Mr. Jaworski: I don't say that it forecloses. What I think we suggest is that it does present a situation here that should not make the application of executive privilege appropriate. We do say that.

Justice Marshall: But only prima facie.

Mr. Jaworski: Prima facie — that is correct.

In The Right and the Power, Mr. Jaworski's recollection of this exchange seems clouded. He writes:

A Justice broke in: "I don't see the relevancy of the fact that the grand jury indicted [sic] the President as a co-conspirator to the legal issue as to the duty to deliver pursuant to the subpoena that you are asking for."

We then asked the question, and I made my point that the President's status as a co-conspirator made absolute our right to the tapes.

Thus, it is hard to know what Mr. Jaworski was thinking. He might have had two reasons for believing that a grand jury finding of membership in the conspiracy was crucial to the admissibility of the taped statements of President Nixon. The first is the co-conspirator exception to the hearsay rule. A grand jury finding that a person is a co-conspirator, however, is neither a necessary nor a sufficient condition for the admission of his out of court statements in a case against the other co-conspirators. In fact, numerous cases hold that the co-conspirator exception to the hearsay rule may be invoked even when no conspiracy has been charged.

The other thought that might support Mr. Jaworski's belief that President Nixon's tape recorded conversations would have been inadmissible without the grand jury's secretly naming the President as a conspirator concerns the fact that the President's statements were recorded on magnetic tape. This may sound a bit mysterious, but the Special Prosecutor apparently perceived a connection.

We subpoenaed Nixon because we thought at first that we would need him to verify the authenticity of the tapes. But James Nix, who was to prosecute, had a hunch that Nixon, for some reason or another, would not appear for trial. So he set his team to hunting another way to establish the tapes' authenticity, and the young lawyers found it in the law books. Recordings, they learned, are presumptively correct when they leave the hands of a co-conspirator provided certain facts can be established.

If the Special Prosecutor's staff actually made this discovery, it is strange that they did not inform the court when they sought to introduce the recordings at trial. The government's trial memorandum on the admissibility of tape recordings argued that the recorded conversations were admissible as declarations in furtherance of the conspiracy and were authentic and accurate. The government did not argue, however, that the fact that the conversations were recorded by a co-conspirator made the recordings, as Jaworski would have it, "presumptively correct." Authority and accuracy is one issue, and conspiracy, another.

In short, when Mr. Jaworski's explanation of his decision to have the grand jury secretly name President Nixon as a co-conspirator but not indict him for conspiracy is unpacked and inspected, one senses that Mr. Jaworski offers the court far too much a rationale for his decision as a rationalization. The Special Prosecutor, unfortunately, does not tell it like it is. He tells it as he would like it remembered. In this way, Mr. Jaworski tells us more about himself than the events he describes.
Faculty Activities

1977-78 School Year

Professor Michael L. Altman directed the conference "The Punishment of Death" at the law school and lectured at the National District Attorneys Association conference on "Proposed New Juvenile Justice Standards." During the Spring Semester, he was a Visiting Professor of Law at the University of South-ampton, England, and lectured at the University of Kent on legal education. He published a report on information systems for the ABA Juvenile Justice Standards Project.

Professor Richard W. Ellbom spoke on trends in probate law to numerous groups, including the ASU Law Alumni Symposium, the Estate Planning Institute, the National College of the State Judiciary, and at the National Conference on the Uniform Probate Code. He also spoke on the law of the aging to ASU's School of Social Work and on community property to the Wisconsin state bar. He is a member of the Arizona State Bar's Continuing Education Committee and of the ABA Section of Real Property, Probate and Trust Law Committee on Significant Current Trends.

Professor Dale B. Furnish spent the year as a Visiting Professor at the University of Illinois College of Law. He completed his introduction and annotated translation of Articles 1 and 9 of the UCC for the Institute of Judicial Administration at the National Autonomous University of Mexico. He lectured in Ecuador, Panama, Costa Rica, and Honduras, and presented a paper at a regional meeting of the American Society of International Law. He submitted a report on commercial arbitration to the International Congress of Comparative Law and served as one of the reviewers.

Alumni Association Elects 1979 Board Members

Members of the 1979 Board of Directors of the ASL Alumni Association are as follows: Gloria Aguilera, '71; Andy Bailey, '75; Dan Drake, '74; Sue Fisk, '75; Shirley Frenndt, '73; Mike Gallagher, '75; Fred Gamble, '74; John Grant, '71; John Holman, '75; Ted Jervis, '75; Susan Johnson, '75; Pat Massage, '76; Roslyn Moore, '71; Joe Most, '73; Steve Myers, '74; Pat Norris, '77; Linda Sitka, '72; and Mike Scott, '71.
seven foreign commentators invited by the Peruvian government to review the private international law provisions of the proposed new Civil Code. He is Chairman of the AALS Section on Creditor-Debtor Relations and President-elect of the Section on Comparative Law. He is a member of the Board of Editors of the American Journal of Comparative Law and wrote an article on commercial arbitration for that journal.

Former Professor Douglas Leslie was Visiting Professor of Law at the University of Virginia College of Law during the entire year and then accepted an offer to join that faculty permanently. During his year on leave of absence from ASU, he completed work on a case book which has been published by Little, Brown & Co., Cases and Materials on Labor Law: Process and Policy.

Professor Robert L. Misner was a featured speaker on the Speedy Trial Act at the Ninth Circuit Judicial Conference and spoke on the topic before several other associations. While on leave, he served as Assistant Attorney General and acted as Governor Babbitt's legislative liaison on prison matters. He continues as an advisor to the Arizona Attorney General and to the Department of Corrections, and serves on the Governor's Commission on Corrections, the Maricopa County Advisory Commission on Detention, and the Arizona Legislative Ad Hoc Committee on Corrections. In addition, Professor Misner published articles in the Stanford Law Review (on arrestees as informants), in the Arizona State Law Journal (on the Speedy Trial Act), and in the Journal of Legal Education (on teaching contracts with contracts).

Dean Alan A. Matheson presented a paper on the federal Administrative Procedure Act at the National College of State Judiciary. He was Chairman of a Study “Factual” Committee for the Temepe School District and a member of the Faculty Search Committee for Academic Vice President. He wrote the introduction to an administrative law symposium in the Williams & Ault Law Journal.

Professor John P. Morris was a Visiting Professor at the University of Western Australia and prepared cases and materials on the Australian Trade Practice Act of 1974. He lectured in Australia to various organizations under the auspices of the USIA. He has been nominated to the National Commission for the Review of Antitrust Laws and Procedures.

Professor Beatrice A. Moulton completed her casebook on clinical instruction. She is a director of the Society of American Law Teachers; is a member of the ABA Committee on Clinical Legal Education, Section on Legal Education, and of the Maricopa County Board of Community Legal Services; is a director of the Tempe-Mesa Chapter of the Arizona Civil Liberties Union, Vice President of the Arizona Center for Law in the Public Interest, and a member of the Budget Committee of the ASU Faculty Association. In addition, she was named as one of four public members to the National Advisory Committee on Training for the Legal Services Corporation; served on the Corporation’s Task Force on Recruitment, Retention, and Training; and assisted in preparing the training of 3,000 new lawyers for the Corporation in 1978-79.

Professor Jonathan Rose organized a program on Current Developments in Antitrust for the Arizona State Bar. He conducted special investigations on bidding procedures of the Department of Education and on occupational licensing agencies for the Attorney General and consulted with the New Mexico Attorney General on antitrust. He spoke to the National League of Cities and Towns and an American Public Powers Association seminar on antitrust.

Professor Willard H. Pedrick delivered the Julius Rosenwald Lecture at Northwestern University on "Death, Taxes and Living." He presented a paper on "Tort Law and the Accesibility of Suffering" to the AALS and lectured at numerous bar association meetings and estate planning councils. He is a Consultant to the Study Council on Trusts and Liability Insurance of the Arizona Legislative Council. He chaired the AALS accreditation committee for the Iowa Law School, is a consultant to the Pepperdine University Law School in its application for AALS membership, and is a trustee of Arizona Western Law School. He published on gran- tower powers in the Northwestern Law Review and on tax reform for Taxicetera Magazine, as well as putting out new editions of his torts and his estate and gift taxation casebooks.

Evans New Civil Clinic Director

Lynwood (Woody) Evans has been Director of the Law School’s Civil Clinic since August 1978. Evans was previously a lobbyist at the Arizona legislature for legal services and has also held positions in the Civil Rights Division of the Attorney General’s office and public defender’s office in Tucson. Evans received his legal education at the University of Missouri Law School and, prior to coming to Arizona, was a staff attorney for the National Juvenile Law Center at the St. Louis University School of Law.
New Faculty

Ira M. Ellman joined the faculty in January 1978. He received his undergraduate degree from Reed College, M.A. from the University of Illinois and J.D. from the University of California at Berkeley. Prior to joining the ASU faculty, he served as a consultant to the Assembly Select Committee on Revision of the Non-Profit Corporations Code for the State of California. He previously was associated with McCutchen, Doyle, Brown & Enersen, San Francisco; was an assistant to Senator Adlai Stevenson, Jr.; and served one year as law clerk for United States Supreme Court Justice William O. Douglas. His teaching areas include Civil Procedure, Legislative Process, Family Law, and Non-Profit Corporations.

Hannah Arterian Furnish joined the faculty in January 1979. She received her B.A. from Elmira College and J.D. from the University of Iowa. She was a Note and Comment Editor on the Iowa Law Review and is a member of Order of the Coif. From 1973 to 1978 she practiced with the New York firm of Dewey, Ballantine, Bushby, Palmer & Wood, specializing in corporate tax with an emphasis on exempt organizations. She was a visiting professor at the University of Iowa in the spring of 1977 and an Associate Professor there during 1978. Her teaching areas are Constitutional Law, Federal Tax Problems of Exempt Organizations, Property II, Employment Discrimination, and Labor Law. Other areas of interest are remedies available for harassment on the job and the overlap between the protection of Title VII and the NLR.A.

Dennis S. Karjala joined the ASU faculty in January 1978 and has taught Corporations, Securities Regulation, Federal Income Taxation, and Business Planning.

Professor Karjala received his undergraduate degree in electrical engineering/physics at Princeton and master's and Ph.D. degrees in electrical engineering from the University of Illinois (Urbana). He attended law school at the University of California at Berkeley, where he was Editor-in-Chief of the California Law Review. After graduation he joined the San Francisco firm of McCutchen, Doyle, Brown & Enersen, where he engaged in a general business and corporate practice.

He will spend most of 1980 in Japan on a Fulbright lectureship, teaching broad aspects of U.S. business law in American Studies programs.

Visiting Faculty

John J. (Jack) Barcello is visiting from Cornell Law School in Ithaca, New York. Professor Barcello received his undergraduate and law education from Tulane University, was a Fulbright Scholar in 1966-67 at the University of Bonn, Germany, and received the S.J.D. degree from Harvard University last year. His teaching areas are International Business Transactions, Conflicts, and Torts.

Professor Barcello observes that one difference between Cornell and ASU is the "more relaxed attitude of students at ASU, compared to the pressure which most students at Cornell appear to be under" and attributes this to the cultural differences between East and West. In addition, he notes, students at Cornell are "looking to employment across the nation and this probably increases their competitiveness."

Wendell P. Kay, visiting from Anchorage, Alaska, received an A.B. from DePaul University and J.D. degree from Northwestern University. His teaching areas are Trial Techniques and Remedies, and he is teaching Practice Court while at ASU. His areas of interest are trials, criminal law, and civil rights. About ASU he comments, "Great bunch of students in a great winter-time location! Much easier place to play golf in the winter than Alaska . . . ."

Charles Pulaski, visiting from the University of Iowa, received his undergraduate education at Yale College and law degree from Yale Law School. His teaching areas include criminal procedures, legal profession, trial advocacy. While at ASU, he is working with the Criminal Prosecutor Internship program. He reports being favorably impressed by the Arizona weather.

Samuel Sutton of the Phoenix firm Cahill, Sutton & Thomas, who was pictured in the last issue, is again teaching Property II.

James Treece is visiting from the University of Texas Law School in Austin. He received B.A., M.A., and J.D. degrees from the University of Illinois. Professor Treece's teaching areas are Torts and Copyright Law, and he is a co-author of the Torts casebook used in first-year classes at ASU. He comments, "The students at ASU are hardworking, eager and quick to learn, and very able. Arizona and the nation will be very well served by the graduates of this law school."

ARIZONA STATE LAW FORUM