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Interview with Barnet D. Skolnik

by John M. Crabbs and George Martin Kripner

As Assistant U.S. Attorney for the District of Maryland, Mr. Skolnik was the chief prosecutor in the trial of Governor Marvin Mandel. He has recently had added to his duties that of Special Counsel to the Department of Justice for the investigation and prosecution of F.B.I. abuses.

Q: You've been involved as a prosecutor and you've seen different defense attorneys with different styles and approaches to the job. Can you make any general observations as to qualities that tend to be required in a prosecutor?

A: The most important thing that anybody on either side of the aisle ought to have is both general competence and a total familiarity with the case. An lot of lawyers in civil and criminal prosecution and defense fly by the seat of their pants because they have too many cases to prepare each one properly.

For example, a lot of prosecutors in state or local prosecution offices very often have such a volume of cases that they just can't spend close to the time on each one that it deserves; the pressure to plea bargain cases away to reduce the volume is very great and there are all kinds of problems that flow from that.

But in the situation that I have spent some time in, the federal courts, the volume isn't as bad and the quality of representation on both sides of the aisle is generally very high.

Q: Are there qualities which should be different in a prosecutor as compared to a defender?

A: In the majority of the important cases I've personally participated in, the defense lawyers have been former prosecutors. The only difference is they're a little bit older and they've gotten to that point in life where it's time to go out into the big bad world of private practice and

earn two or three or four or five times as much money as you earn working for the government.

The notion that prosecutors are all sort of single-minded, monomaniacs, sometimes worded in terms of putting everybody in prison or ridding the governmental halls of all the good men—that's basically nonsense. Similarly, I think some of the things you hear about defense attorneys that they're all only either mouthpieces and prostitutes who say whatever their clients pay them to say or that they're all noble champions of justice, protecting the poor little fellow against the big, bad government—you know all that's crap. People are people in every walk of life including the prosecution and defense of white-collar and public corruption cases. People vary a lot.

“ . . . the job that my colleagues and I have been doing is hardly cleaning up much of anything.”

Q: Do you see yourself as doing a job that has to be done, or do you get a sense of being a champion of justice, of cleaning up society?

A: Well, I think if I have to go with one of those two alternatives, I certainly go with the former. Let me put it this way . . . I consider myself to be a fellow who's being paid by the people to do a job that society has set up called the public prosecutor. It's a job that society wants done and they're willing to pay a certain amount of money to get it done. I have voluntarily chosen for a period of my life to do that job. The reason I do it is for the same reasons as most people who at least have the luxury of being able to choose

the job they want to do. Considering all the factors—what I'm good at, what I like, what I'm competent to do, the money, and the job satisfaction—it's the job I've wanted to do for a number of years.

To a modest degree I would acknowledge that I like it because I do have the feeling I'm doing something constructive and helpful for the community. But I would not say that the reason I'm doing my job is because it's my mission in life to clean up the streets or any of that nonsense. In fact, the job that my colleagues and I have been doing is hardly cleaning up much of anything. All we've really done is to prosecute a relatively small number of cases. That's really all you can hope to do over a period of several years in a field as complicated as the one we're in.

Q: Your self-image is at least one of being a public servant doing a job that society requires. Does it go beyond that? Especially in the context of the last several years, have you come to any sort of self-realization through this job other than just fulfilling societal needs as far as being a professional is concerned?

A: There's nothing else I have been aware of that I would have enjoyed doing as much. It's intellectually very challenging. A lot of the statutes are being applied, or applied in a new way, for the first time or the second time or the third time. There's still a lot of ground being broken. There are some new things that are either being created for the first time, or being brought into the 4th Circuit for the first time out of some other area of the country where they originate. It's not just the routine.

In the white collar and public corruption area, there haven't been that many cases, and those that there have been generally are complex and sophisticated enough so that each one of them raises new issues of law that have never been dealt with before. The point is that it's a very real factor both to me and to any young lawyer who is looking for a way to challenge himself intellectually and to just enjoy the work he's doing.

But there is the separate factor of the satisfaction of believing that you are doing something constructive. You can do something intellectually very challenging

and novel and feel that you're being an absolutely brilliant legal craftsman in some area of law that you didn't think was of any great consequence to the fate of the republic. When you can do both—have real intellectual challenge and it's being done in an area where you think it's damn important for the community and you're contributing something—that's a hell of a job. It's a hell of a job not only for a lawyer, but for anybody.

Q: Are there qualities that you think are necessary or desirable for a lawyer in this particular field?

A: If you're talking about intellectual qualities, I'm not really sure that there are, other than the obvious ones. I mean any lawyer who is so set in his thinking that what he likes to do when he has a question is go to a book and find the answer and parrot that book probably shouldn't go into this field because he not only is not going to be very successful in this field but he's going to spend a lot of time sitting on his hands. Generally speaking, cases in this area never exist unless somebody, usually a prosecutor with subpoena power, takes a very substantial amount of initiative to go turn over some rock that nobody else is turning over.

Q: What sort of considerations do you have then when you're choosing a jury to hear this type case?

A: It's a lot of nonsense that you hear all the time that, "In this kind of case you want people from this religion, or this race, or this economic background."

If the prosecutor doesn't believe that the evidence is sufficient to justify a reasonable man beyond a reasonable doubt that the defendants are guilty of doing what they're charged with doing, he shouldn't have brought the case in the first place. So in picking a jury you begin with the premise that the evidence is there, that you are persuaded of that yourself, that you are persuaded that any reasonable group of people especially conferring with one another to clear up any doubts or ambiguities that any one of them may have, will agree. So you're looking for twelve reasonable people, none of whom is an oddball who enjoys, perhaps without realizing it consciously,

the notoriety, or spotlight, or whatever satisfaction he gets out of telling eleven other people, "you go to hell; whatever you say, I say the opposite". There are such people in the world and a prosecutor dearly wants to avoid having one of them on his jury.

Some of the fellows I work with are slightly more enamored with some of the stereotypes, racial or religious or ethnic or age or something else. There are all kinds of things that lawyers play those games over, but I think you'd find, especially among experienced criminal lawyers, it's mostly defense lawyers who play these games. What a prosecutor who believes in his case wants is twelve totally dispassionate, totally reasonable, totally normal people.

In recent years we've had the benefit of an individual voir dire process. Each potential juror gets called into a room privately with the judge and the lawyers and is asked a series of questions. We often conclude at the end of these little sessions that this juror could be the kind of juror that could cause the kind of problems I've spoken of, and therefore strike such a juror. Obviously, we don't know how often we're right, but you feel a lot more comfortable making your strikes after having seen each person handle questions. It almost doesn't matter what the questions are, because you're looking for personality types rather than substance. It's really the kind of people they appear to be rather than the substance of anything they're saying.

"... sequestration for a case which lasts longer than a week or two is a damn shame."

Q: Do the large sums of money often involved in white collar criminal cases affect jurors?

A: While it is certainly true that jurors are people just like you and I, and they certainly do very often have great difficulty identifying with million dollar figures, it's certainly not a fact as far as I'm concerned that jurors who have that



photo by George Martin Kripner

difficulty will translate it into holding somebody guilty of a crime even though the evidence is not there. That's not to say that jurors don't do a triple-take when they hear 6 or 7 digit figures tossed around. They do. They're very impressed by that. Some percentage of them, perhaps a significant percentage, are impressed with it in a way that is negative for the defendant. But for that to translate, when the crunch comes and it's time for the juror to say yea or nay, into, "Yeah, well there ain't much evidence but \$100,000, \$1,000,000, the hell with that! He's guilty." I just don't think jurors do that.

I not only don't buy it, I don't come close to buying it. I think it's just some stuff that some people who once in a while find it in their self-interest to talk about, sometimes talk about.

Q: In connection with the Mandel case there was much talk of coercion of the jury. Would you care to comment?

A: What happened in the Mandel case, what I think happens quite often, is that you get one juror, or two or three who are not persuaded when deliberations begin become persuaded over the course of deliberations. Of course, the other nine, ten, or eleven people who are there are saying to them in what is obviously an intense way, "Look, jerk, it isn't that way,

it's this way. Here are the reasons." But that's the system. The system says that they sit in that room and scream at each other until they've got a verdict, assuming they can reach one. If all they were doing is calling them names and not making rational arguments, I don't think minds would change. People genuinely change one another's minds and if you think about it objectively it makes sense.

In the Mandel case you had the sort of added fillip of a juror who was a holdout for a long time and then finally voted guilty, telling the press things like, "I really didn't feel they were guilty," and so on. Aside from the fact that legally you can't impeach a juror's verdict after the act unless the allegation is of improper outside influence, if you read carefully the interviews that particular juror gave to the press, he says, "The evidence says they're guilty, I'm convinced the evidence says they're guilty," and then he goes on, "I still feel they're innocent." To understand that in context, if the man is saying, as he does every time he talks about the thing, the evidence says "they're guilty", then that's all she wrote.

Q: Another aspect existed in the Mandel case and exists in other notorious cases, that the jury was sequestered for several months. What about the effects of sequestration on jurors?

A: I think sequestration for a case which lasts longer than a week or two is a damn shame. I think it's extremely rough on the jurors and their families. After all, unlike the lawyers who don't get sequestered, the jurors have not opted for this life. All they did was to have the misfortune of being on the voting rolls of the state and have their names pulled at random off the lists to become jurors. If they are really unfortunate, they may find themselves in a jury pool for a case that's going to go on for weeks and weeks, maybe months and the jury's going to be sequestered. I think that to sequester a jury under those circumstances is something to be avoided if at all possible.

There are times, and the second Mandel trial was certainly one, where there's no rational way to persuade me that anything other than sequestration was a possible way to go. With hindsight I wish that we

"... arguments in favor of keeping the routine grand jury are rather theoretical, and they're thin..."

had sequestered the first jury because then we probably wouldn't have had to have a second.

Q: Also, there's a theory that sequestration may tend to act in opposition to the interests of the defendants in that the defendants may tend to be blamed by the jury consciously or unconsciously for this happening to them—If these guys hadn't gotten themselves in trouble we wouldn't be here.

A: Well I think frankly, my attitude toward that one is exactly the same as I expressed a little earlier with respect to large amounts of money being tossed around a courtroom. I think it does sometimes with some jurors, cause reactions that are adverse to the defendants. That jurors don't like the defendants for that reason, I think that's true. I do not think jurors decide that people are guilty of felonious criminal activity, in spite of an insufficiency of evidence, just because they're pissed off about being sequestered.

Q: There's been a lot of criticism of the grand jury system. The power of the grand jury to subpoena would be one of your major tools, I would imagine, in the investigation.

A: Well, I couldn't do my job without it or something like it. This question is very current of course, it has a lot of activity in Washington, both in Congress and the halls of the Department of Justice and elsewhere. I think the whole analysis has to begin with an immediate, clear distinction between regular grand jury and special grand jury; or the routine grand jury and the investigative grand jury. The vast majority of criminal cases, statistically, involve almost no meaningful grand jury activity at all. They're investigated by police, by the FBI, Secret Service or IRS or other relevant agency. No subpoenas are used, it's all interview and scientific testing. Evidence is gathered, put together, in a nice neat package, and

presented to a prosecutor—"Here it is; here's the case."

You asked me if there is any need to retain that grand jury. My answer is clearly "no." I think it's a waste of an awful lot of money and an awful lot of people's time. I think that the arguments in favor of keeping the routine grand jury are rather theoretical, and they're thin if you assume that prosecutors are honorable men to begin with.

Everything I've just said you throw out the window when you start talking about an investigative grand jury. It's a whole different ballgame, and it's an unfortunate fact that the whole issue gets terribly complicated and muddled up by the fact that we don't have two different names for these two very different institutions. The routine grand jury is always called a rubber stamp and in many ways it is. Well you know, when you start talking about investigative grand juries, to call it a rubber stamp is incredible nonsense.

An investigative grand jury works totally differently. The investigation extends over a period of weeks, often months, sometimes years. The witnesses are interviewed not by a policeman or an agent out on the street or in their homes, but in the grand jury room. Somebody takes down every word. It's all under oath. Documents, of course, are subpoenaed under grand jury process and this is the single most important tool in the investigation of cases—the compulsory process. Without that, in the cases I work with, you can forget it—go home.

Q: There is the fact that anybody who knows anything has a vested interest.

A: That's what I was talking about before, and even the other people who have a little bit of information or a document, or whatever may help you. They're hostile. Unless you can say to those people politely but firmly, "You must answer these questions," or "You must deliver these documents or go to jail for contempt of court." Unless you can say that to them they're not going to give you the time of day. And so, that's far and away the single most important tool now.

Q: Compulsory process, probably is the most important part to you and the part most subject to criticism.

**“... an oddball who enjoys
... telling eleven other
people, “you go to hell. . .”**

A: Well, anybody can criticize the compulsoriness of the process and suggest that investigations of the white collar and public corruption area should be conducted with only voluntary processes. The fact is that without compulsory process these investigations would not only not be successful, they would in almost all cases be a waste of time.

Q: Is the only thing that stands in between the investigation being a fishing expedition or being a legitimate investigation the intelligence and discretion of each individual federal prosecutor?

A: If you ask somebody who is the target of such an investigation, he would in essence tell you, although he wouldn't put it in these terms, that unless the prosecutor has proof beyond a reasonable doubt to begin with he shouldn't issue a single subpoena or it's a fishing expedition. Obviously, I don't find that persuasive, but the point is that unless you define your terms there is a substantial elasticity within the phrase “fishing expedition.”

But let's talk about where I live, which is the investigation and prosecution of those kinds of cases in which the investigations do not initiate from a third party that is a non-governmental external person making a complaint. In that category “fishing expedition” is a terribly loaded phrase because the fact is, by almost everybody's definition, everybody outside of government, the investigation of such cases is a fishing expedition. Because if you don't even know for sure that a crime has been committed, then by almost everybody's definition you're fishing. To say that, “Aha, in that case, that's improper, you shouldn't do that” is to say that no one should ever investigate and prosecute these kinds of cases.

As a practical matter, what that means is that no such investigation will even begin, let alone uncover the fact that there has been a crime. Nothing begins unless somebody, usually a prosecutor,

says, “We are not sure that anybody has committed any crimes, we're not sure there have been any crimes, and we're sure as hell not sure who committed them, but let's look at it, let's try and find out anyway.” Unless somebody says that—forget it. Just close up the whole area on this kind of investigation and prosecution of this kind of criminality.

Most people, once they realize that those are the stark facts of life, would say “Oh, wait a minute now, I'm not in favor of totally doing away with the investigation and prosecution of public corruption and other such white collar crimes, so let's find some way around these problems.” If society wants such criminality exposed and prosecuted, then society must allow its prosecutors to engage in some fishing. And if society is so offended by the phrase “fishing expedition” that it simply will not allow something it sanctions to be so labeled, then fine, redefine your terms and play the semantic game. But the fact is if you assume that prosecutors are not in office for the purpose of harrasing innocent people and needlessly making people's lives miserable, then you can assume that prosecutors in most cases are there because they feel some responsibility towards their work and they think it's of some importance, and benefit and so on and are trying as hard as they can to do a job and do it right. Then much of the concern melts away.

Q: What about abuse of prosecutorial discretion?

A: Sure it's always possible you will get a prosecutor who is either corrupt or incompetent or over-zealous or any other adjectives that are often thrown around. Of course that's possible, it happens. And when it happens it's a damn shame and hopefully the guy gets exposed and, if not disbarred, at least he's no longer a prosecutor. But, as in every other field of human endeavor, you can't throw out a system of procedures, especially if it's the only viable one around, simply because occasionally it's subject to misuse. I don't believe that any of the experience in recent times, certainly with respect to the federal investigations in Maryland and with respect to investigative grand jury situations in this country in recent years, I don't think anybody can point to very many of them and say “This was mishandled; this was improperly conducted.” A few, sure—many, no.

Q: What role, if any, should the press play in investigative proceedings?

A: The press ought to make it its business to find out what they can about criminal investigations so they can make as informed a judgment as possible, as to whether or not, in their outside disinterested perception, the process is being handled with integrity. If the investigation is proceeding with what they believe to be corruption: cases being swept under the

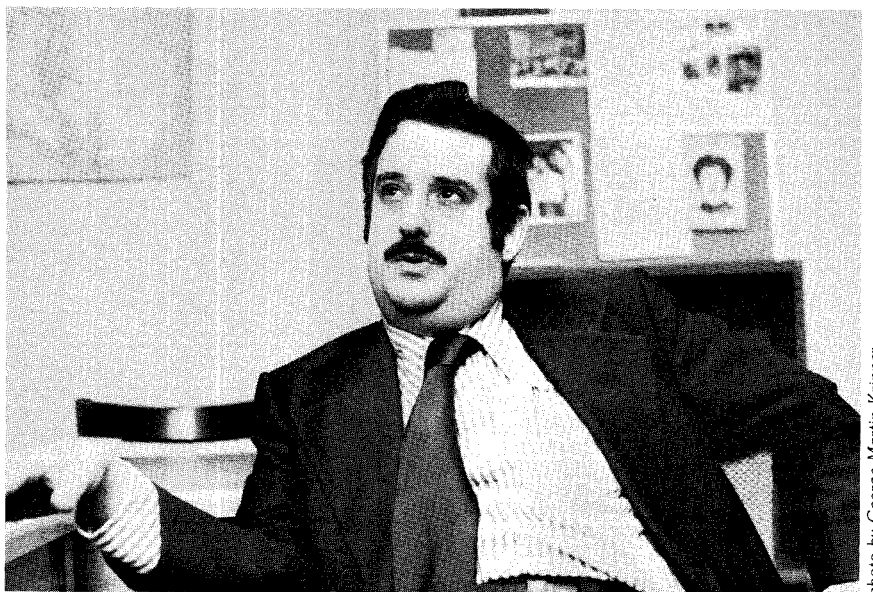


photo by George Martin Kripner

rug, political influences being brought to bear; as far as I'm concerned they can print the whole thing. One of the great checks upon the possibility of corruption in criminal investigation is the possibility that the press will expose it. But, the more common case is that the press learns what it can about the investigation and ends up concluding the investigation 'is going along in its normal proper course, and it either will or will not lead to a prosecution depending upon whether or not there's enough evidence, etc. I think they should print not a word about it because if the ultimate consequence of a properly run investigation is an indictment then it's all going to be in the newspaper anyway when there's been a public charge filed. And if the ultimate consequence of a properly run and conducted investigation is that no charges are brought, then by God, the people who are under investigation deserve to have that matter kept secret.

Q: At the trial level in these notorious cases you've been handling, the press has been omnipresent. Does this affect your professional work habits? It must affect your personal lifestyle.

A: Well, the degree to which it affects personal life I suppose varies, you know, you're talking about the prosecutor's personality. I have an unlisted phone number, for example. You know, the press just doesn't call me at home, and when they call me at work, generally, I just don't take the call. They know that so they don't call. But if they're just calling to find out stuff they're entitled to know, then of course I'll tell them. As far as whether their brooding presence during trials, hearings, sentencing, and so on, where they're absolutely entitled to be present, affects anything, I think the answer is "no, not once you get used to it."

When you realize that the only way the public is going to learn about the work you're doing—and we happen to feel that it's important for the public to learn about the work we're doing, not because we want to be famous superstars, but because we believe in its significance to the community—is because of those guys back there scribbling it all down, you know, you're glad to see them.

Q: Do you get a reading of public reaction to your work on the Mandel case?

A: It comes in different forms. What you might call the formal reaction, newspaper editorials and so forth, has been uniformly commendatory. We're doing a good job, and so on, and that's gratifying. In terms of direct input or feedback from people we know, it varies. Most people at the very least say, "congratulations, that was a hell of a fight," and so forth. Some people, depending upon their own views about the defendants or other things may say things like, one judge of my acquaintance said after the verdict, "Well, you know, I don't think you ever should have brought that case in the first place, but having brought it, congratulations, you won it." I think for a judge to say that is

“ . . . if the people don't believe in the integrity and worth of what you're doing, then what the hell's the point of doing it . . . ”

absolutely disgraceful, but that's the way it goes.

As far as the people out there, people I don't know personally, we do get calls and letters, some of which, usually the negative ones, are anonymous. Generally what they say is either "thank you very much for doing a job for the citizens of Maryland, who have put up with this crap for too long," or "well, you must really be proud of yourself, you son of a bitch, having ruined the lives of some good people just because you want to become famous, or because you want to run for governor." You get letters like that and you feel bad about it in the sense that, if the people don't believe in the integrity and worth of what you're doing, then what the hell's the point of doing it.

Q: Do you find a segment of the population which seems to believe there's a certain level of acceptable criminality?

A: That's really a cute thing, there really are people who believe, that if in

fact somebody is only doing what everybody else does and has been doing for a long time, then, at the very least, he certainly shouldn't be punished very severely when he gets caught, and a lot of people would go further than that and say, "you know, you really ought to spend your resources on bank robberies and muggings, and not bother our corrupt but often competent public officials." I think that's crap, I really don't buy that at all. A lot of people are selling their offices, and only a few of them are getting caught, well I think that's a bad situation. What we ought to do is to devote resources so that more of them are getting caught, rather than what people seem to suggest, which is that unless you can catch all of them, don't bother to catch any of them. That's not only crazy from a theoretical standpoint but also as a practical matter. It's a self-fulfilling thing. If you say that the fact that a lot of them are getting away with it means you shouldn't even bother the ones you can catch, what you end up doing is encouraging more of it.

The whole reason for doing the work that we do, certainly a major reason, is that if the proportion of people who engage in this kind of activity who do get caught is anything more than miniscule, so that the risk of engaging in this activity is anything more than miniscule, a lot of people are going to be deterred. It's impossible to quantify, but a certain number of people will say, "well, I probably wouldn't get caught, but I might be, and if I am, devastation to my life, and my family's life and so on would be so severe that whatever the chance of getting caught the risk isn't worth it. I think that to whatever degree we deter, that's doing a service.

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