

A Report to the Attorney General of New Mexico

AN EVALUATION AND RECOMMENDATIONS FOR IMPROVING
THE PRETRIAL EFFECTIVENESS OF THE
SPECIAL PROSECUTIONS DIVISION OF THE
OFFICE OF THE ATTORNEY GENERAL OF NEW MEXICO

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To The Honorable Toney Anaya,
Attorney General of New Mexico:

I.

INTRODUCTION

The prosecution of public officials for corruption represents one of the most challenging and frustrating efforts any prosecutor can undertake. Some of the reasons for these difficulties are readily apparent. The uncovering of such crimes is usually beyond the expertise of the police. The development of evidence requires extraordinary amounts of time of lawyers, and other experts. But, while these reasons contribute to the difficulty of handling such cases, they are nevertheless not the most significant reasons. The real difficulty arises rather from one of the central realities of the American political system; namely, that a conscientious prosecutor stands to lose more than he gains by undertaking such cases.

There are two major reasons for this situation:

1. Other political office holders and political figures are frequently not supportive of efforts to uncover and prosecute political corruption cases.

2. The attitude of the public is frequently ambivalent toward such cases and is subject to a degree of manipulation.

Because the effects of these factors are only poorly understood, the subject is worthy of some further detail at the outset of this report.

It may seem incongruous to some that a prosecutor would be faced with the problem of lack of support in ferretting out corruption from other political figures. This lack of support is not necessarily motivated by feelings of guilt by other political figures. Rather, it is the fear that any public scandal will upset the political balance in a community or in a state. The record is well-documented that public reaction to accusations of scandal and corruption is to oust incumbent politicians in favor of the "outs." And, the "outs" take little solace from the presence of a vigorous prosecutor because they are just as susceptible to scandal as their opponents.

Neither can the public be relied upon for consistent support of the efforts of a prosecutor of public corruption.

While opinion polls regularly show that a substantial percentage of the populace is concerned about such misbehavior in office, nevertheless there is a substantial amount of cynicism toward such prosecutions. Some of this cynicism is an understandable consequence of the Watergate revelations. The public is painfully aware of the existence of "enemies lists" of persons to be harrassed by prosecutions. Such knowledge makes the prosecution of any political official open to the accusation of harrassment. And, nearly every major political figure prosecuted since Watergate has been quick to claim just such political persecution.

The result has been to confuse and divide attitudes toward corruption prosecutions. The more adept the accused politician has been at attacking the motives of the prosecutor, the more divided and confused has been the public attitude toward such prosecutions.

Despite these disturbing factors, the Attorney General of New Mexico undertook to establish in 1975 what is now known as the Special Prosecutions Division. One of the major functions of this unit was to undertake the investigation and prosecution of cases of political corruption. The office was funded through grants from the Law Enforcement Assistance Administration.

In early 1977, the Attorney General determined that a review should be made of steps that could be taken to

enhance the effectiveness of this unit. The author of this report was retained as a consultant pursuant to Law Enforcement Assistance Administration funding, and under a consultant services agreement with the Department of Justice of the State of New Mexico, Contract No. 65-11.

After preliminary consultations, it was determined that the consultant would give specific attention to evaluating the effectiveness of the techniques used by the SPD in the following areas:

- a. Selecting cases for prosecution;
- b. Evaluating cases for prosecution;
- c. Jury selection in political corruption cases.

The report represents the conclusions of the consultant based upon his work over the period of May through September, 1977.

The consultant will remain available to the Attorney General's office after the submission of this report for whatever further assistance that may be desired in implementing recommendations.

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II.

THE NEED FOR INCREASED STAFF FOR THE SPECIAL PROSECUTIONS DIVISION

The professional staff of the SPD at the present time consists of three attorneys. One of the attorneys is the chief of the office. He handles all complaints that come in by telephone and most of those that come by mail. In addition, he has administrative duties in connection with the operation of this office. A second attorney is assigned to the office, but he continues to be involved in a long-running investigation not directly connected with the present work of the SPD. The third attorney is currently involved in a major corruption prosecution and in conducting several on-going investigations.

The very small size of the professional staff of the SPD places a heavy burden on the individual attorneys. The scope of the responsibilities given to their office is far greater than can be effectively handled by three lawyers. It is impossible for them to plan a program of systematic investigations. It takes all of their efforts to handle cases that are simply referred to them by other responsible sources.

There are a number of potential remedies for this problem, and they are discussed hereafter.

Recommendations

1. Every effort must be made to expand the present professional staff of the SPD by the addition of new full-time attorneys.

2. An early decision should be made whether to continue the long-run investigation which is not directly connected with the SPD and which continues to involve one of the SPD attorneys. The services of this attorney may be potentially more productive if he is able to devote himself exclusively to SPD assignments.

3. The professional personnel of the SPD could be substantially expanded through the use of law students as aides. Programs should be established that would bring in law students to work with the Attorney General. These students would not be paid but would receive credits in school and would obtain valuable legal experience. Two types of programs are now in use in other jurisdictions which should be explored with the law schools in New Mexico.

a. Externships: A law student spends the entire semester working full-time for an attorney general's office. The student receives the same number of academic credits as he would if he were enrolled in conventional classes.

b. Clinics: A law student enrolled in a

clinical course could work 12 hours per week in the AG's office and receive credit for this work as part of a clinical course program. The student is also enrolled in other academic courses, and the clinic course is only one part of the student's curriculum in a given semester.

The law students working under an externship or clinic assignment could perform a number of functions that would relieve some of the burden on staff attorneys. They could perform legal research, prepare drafts of briefs, interview witnesses and assist at court hearings.

III.

INTERNAL PROCEDURES OF THE ATTORNEY GENERAL'S OFFICE FOR PROCESSING COMPLAINTS ABOUT CORRUPTION

Under present procedures, the Chief of the SPD receives all incoming information concerning corruption allegations. Such complaints are referred to him by the Attorney General, other staff attorneys, and from members of the public. This approach of centralizing the complaints is a useful one. However, one aspect of the procedure needs immediate improvement.

When telephone complaints are received by the Attorney General's office, they are routed directly to the chief of the office. The result is that he receives an inordinate number of interruptions in his work during the course of the day to deal with such telephone calls. The reason for this procedure is a laudable one; namely, to have a responsible official talk directly with a citizen who has a complaint. However, the rationale does not always result in specific immediate responses to the public because frequently it is necessary for an investigation to be undertaken to determine all the pertinent facts. Thus, the chief of the SPD is required to spend considerable time answering telephone complaints, which inevitably require follow up. This preliminary information could just as well be taken by a person other than the chief of the office.

Recommendation

1. A member of the clerical staff of the Attorney General's office should be trained to function as a "Complaint Specialist." All routine telephone calls relating to allegations of corruption should be referred to this person first.

2. A form should be developed to ensure that all pertinent information is obtained by the Complaint Specialist. These forms should be referred to the chief of the SPD, who can give the Complaint Specialist further directions for follow-up of the complaint, or may undertake to handle the matter himself.

All complaints should be answered either by the Complaint Specialist telephoning the citizen to explain the outcome of the review of the complaint, or by a letter from the chief of the SPD.

3. In another section of this report, a recommendation has been made for the greater use of law students in the work of the Attorney General's office as part of externships or clinical training. Such students could ideally perform the function of Complaint Specialist, and there would be no cost to the state government. A number of law schools in California provide students to handle complaints in consumer fraud units of prosecutors' offices, and this program has proven mutually beneficial to the students and the prosecutors.

IV.

TYPES OF CASES HANDLED BY THE SPD

Sources

The present procedures of the Attorney General's office require that all information, concerning possible misconduct in office by public officials, be routed to the chief of the office of Special Prosecutions.

Such information is obtained from varied sources including letters and telephone calls from members of the public; information developed by news media; and information referred by other governmental agencies.

Types of Cases

During the course of the past 20 months, the SPD has received widely varying complaints or reports concerning potentially improper conduct by public officials. While the facts of each complaint are unique, the overall conduct reflected in these reports tends to fall into three broad categories. These categories can be identified as follows:

1. Violations of law resulting from ignorance of legal requirements or obligations.
2. Violations of law under circumstances where there is no significant actual detriment to the community by reason of the conduct.
3. Violations of the law for personal gain or power.

Each of these categories is examined in further detail in the following subsections.

Violations of law resulting from ignorance of legal requirements or obligations.

This category has produced by far the largest number of complaints concerning public officials. In this category are frequent complaints concerning violations of purchasing procedures and travel reimbursement procedures. Cases in this category do not usually involve substantial sums of money. However, inadequate financial controls have resulted in misuse of tax moneys.

Examination of these complaints show two interesting patterns of explanation of how they take place. First, the local officials are able to show that they have "always handled it this way." Second, accountants retained for audits by local governments often have allowed such improper transactions to continue because of their lack of qualifications to conduct municipal auditing.

This group of cases represents the least suitable type for criminal prosecution. The burden of proof upon the prosecution in most of these cases requires that it be established that the improper conduct was the knowing and willful act of the public official. While there is a presumption that a public official knows the law applicable

to his duties, in practice that rule is often less than persuasive to juries in view of the limited training or education of some public officials.

Despite the general unsuitability for prosecution, the fact that public officials are violating the law and are not being prosecuted tends to have a demoralizing effect upon some segments of the public. Studies have shown that such a situation tends to foster a belief that public officials are "above the law"; that ordinary citizens would not be as readily excused for breaches of legal responsibilities; and, that the failure to prosecute is proof that the criminal justice system is not functioning properly.

In order to better deal with this type of case, the recommendations in the following section are made.

Recommendations

1. The Attorney General should take the initiative and organize jointly with other appropriate agencies of the state government special periodic training sessions for county and local officials. The focus of these special sessions should be to deal precisely with those issues which a review of SPD investigations reveals to be the source of widespread noncompliance or inadequate compliance.^{1/}

^{1/} While other state agencies periodically supply memoranda to county and local officials concerning some of these very same practices, it is apparent that this procedure has failed to achieve the desired degree of compliance because the memoranda are either not fully understood or their legal significance appreciated.

2. When a determination has been made by the SPD that there has been a violation of the law but there will not be a prosecution, there is need for a strongly presented statement of such conclusions. Such a statement could be contained in a letter of "Advice and Warning" to the offending official(s). The purpose of a letter of "Advice and Warning" would be to make clear that if the particular official(s) continues to ignore legal requirements, a criminal prosecution will be instituted and there will be no defense of "ignorance" available.

Violations of law under circumstances where there is no significant actual detriment to the community as a result of the conduct.

This is the second most numerous category of complaints against public officials, and is exemplified by the following episode:

A complaint was made by a citizen that county employees and equipment had been used to repair and improve a road located on private property. An investigation determined that the county had needed to acquire a large quantity of gravel for road repairs. The owner of the gravel had offered to "trade" the gravel to the county in exchange for the improvements to the road on his land.

The transaction, of course, violated numerous

statutes pertaining to the acquisition and purchase of supplies by a county. However, the investigation also revealed that the county more than obtained "good value" in the gravel it acquired.

The conduct of the county officials could have been the subject of a criminal prosecution. Their conduct tended to increase distrust in public officials because of the irregular manner for making purchases and the appearances of political favoritism. However, an evaluation of the "prosecutability" of the case indicated very uncertain prospects for obtaining a conviction.

A prosecution in such a case would have been faced with three serious defense contentions in a jury trial: (1) since the county received more than adequate compensation in the exchange, why should the officials be convicted of a technical criminal breach of duty; (2) how can the prosecutor prove beyond a reasonable doubt that there was criminal intent in the conduct of the officials; and, (3) these are "outsiders" (the Attorney General's staff) who are trying to prosecute local people who only had good intentions.

In view of such arguments, it is clear that the limited staff of the Attorney General's office should not be devoting its resources to such a case. However, it is equally clear that steps short of criminal prosecution need to be

taken to have local officials conduct their public business in a manner which encourages greater confidence in their behavior. The same type of recommendations made for the preceding section could prove very useful in obtaining greater compliance with the law and in minimizing public distrust of local government officials.

Violations of the law for personal gain and/or power. This category is used to describe the most serious and most difficult type of political corruption case to prosecute. In this category are all those acts of misconduct wherein the principal motive of the public official is personal gain or profit, either in terms of money or power.

Examples of this type of case are bribery and embezzlement prosecutions. During the course of my study of the SPD, the most significant case of this type being handled was the prosecution of Charles Davis and Rudy Ortiz.

The scheme through which these particular defendants are alleged to have unlawfully obtained and shared in large sums of public moneys was one which was only uncovered during the course of the prosecution of another individual. Despite the availability of an alleged participant in the scheme, the investigation of the case consumed several months of work by the SPD and additional months of grand jury proceedings. Although the initial indictments in this case were returned more

than six months ago, the case has still not been tried because of the persistent efforts of defense counsel.

Following the institution of this prosecution, the defendants brought several civil lawsuits, including one against the AG and his assistant. Every effort has been made by the defendants to divert attention from the principal charges against them into a series of side issues. The prosecution of this case has substantially occupied the time of one attorney of the SPD, with periodic assistance from other members of the AG's staff.

The Davis-Ortiz case vividly illustrates the extreme difficulties in prosecuting this particularly serious category of case. The efforts of defense counsel only serve to emphasize the need to assure that the SPD is adequate to the task of carrying such cases through to a successful conclusion. The recommendations set forth in this report are directed toward indicating techniques that can enhance the effectiveness of the SPD.

EVALUATING CASES FOR PROSECUTION

One of the most critical problems in dealing with political corruption cases is the process by which the decision is made to proceed to accusation with a given case. The decision calls for a higher degree of sensitivity by the prosecutor than in most other types of criminal cases. The reasons for this are twofold.

First, bringing a political corruption prosecution which has not been subjected to a very careful analysis by the prosecutor of all relevant factors presents a greater likelihood that such a case will be lost than does the ordinary criminal case.

Defendants in political corruption cases tend to be persons with greater financial resources than ordinary criminal defendants. They are frequently persons of considerable influence in the community. And, the nature of these crimes frequently involves complex schemes, the proof of which is often very difficult. The combination of these factors makes political corruption cases the most difficult that a prosecutor can undertake.

The loss of a political corruption case has a far greater impact on the public than does the loss of an ordinary criminal case. As has been pointed out elsewhere in this re-

port, studies indicate that there is an ambivalent public attitude toward corruption prosecutions. And, when such a case is lost, part of the public reaction is a loss of faith in the criminal justice system and in the very political system itself.

Second, the bringing of a political corruption prosecution also poses a special problem for the prosecutor because the effect of an accusation against a political official can be greater than an accusation against other individuals. Nearly any political corruption accusation will produce publicity and notoriety for the accused, while only a small number of usual criminal charges result in publicity. And, even where an accused is acquitted, it is difficult for such a person to return to public life because the stigma of the accusation is often long-lasting.

Because of these twin consequences, it is essential that every prosecutor's office develop methodology for the systematic evaluation of this sensitive type of case. This is not to suggest that such evaluation is not done now. There are two levels of evaluation presently used. One is the internal examination of a case within the prosecutor's office. Second, there is the grand jury, which reviews the evidence before returning an indictment.

Each of these present devices, however, has serious

limitations from the standpoint of determining whether "this case has a significant likelihood of resulting in a conviction." The grand jury, for instance, usually does not hear the bulk of the evidence that an accused is likely to present at trial. And, the internal examination of a case within the prosecutor's office is of limited value because of the following factors:

First, such a review is made by persons who are of the same staff and who start with sympathy for the general goals of the assistant Attorney General assigned to the prosecution of political corruption cases.

Second, there is a tendency for other members of the staff to defer to the opinions of the individual prosecutor who has been handling the particular investigation.

Third, the perspective of all the reviewers is a one-sided one -- namely that of a prosecutor. There is no review of the case from the standpoint of an independent non-prosecutorial judgment.

In order to assure that political corruption prosecutions are only brought in instances where there has been the type of evaluation that takes due regard for the public attitude and for the rights of the accused, the following recommendations are made:

Recommendations

1. When an investigation has reached the stage

where a decision must be made whether charges should actually be filed, it should be subjected to internal evaluation in the Attorney General's office as is the present procedure.

Specific, written criteria should be established by the AG's office for its own internal guidance in evaluating such cases.

2. If the review described in "1" above results in a conclusion that a prosecution is warranted, the case is one which should be subjected to a critiquing by an attorney not involved in the SPD. Such an attorney could be a member of the staff of another division of the Attorney General's office. His role in such a critiquing would be to examine the evidence that has been assembled as if he were a defense lawyer planning to defend an accused in the case. His function would be to point to any potential weaknesses in the proofs and to suggest what approaches might be taken by the defense. Based upon this type of critique, it might be determined that further investigation is needed in the case. And, such a procedure would also be an aid to the SPD in preparation for the actual trial of the case.

As part of the evaluation of the SPD, I have demonstrated to your staff how such a technique would actually work. I have prepared sample flow charts and evidentiary evaluations and these have been left with your

staff as examples. These materials can serve as models for future case evaluations in appropriate cases.

VI.

PROBLEMS OF JURY SELECTION IN
POLITICAL CORRUPTION CASES

In my discussion with the staff of the SPD, it became apparent that one of the most critical issues to be faced in the pretrial preparation of political corruption cases is preparation for jury selection. There are special problems in jury selection in this type of case for the reasons that have been generally discussed earlier in this report. These special problems require the use of a more sophisticated approach to jury selection than has been previously used by prosecutors. Defense lawyers in criminal cases have recognized this and are ahead of the prosecution in the use of scientific jury selection methods. Such scientific methods have been used by defense lawyers for more than seven years. And, there are no persuasive reasons why such techniques should not be used in the types of cases handled by the SPD.

Scientific jury selection techniques have many advantages over the usual methods applied to this problem. The scientific method does not invade the privacy of anyone. No intentional effort is made to contact persons who may actually be called for duty in a specific case. Rather, scientific jury selection seeks to measure the attitudes of

the community and then to correlate such attitudes with demographic data to make jury-selection decisions.

In order to demonstrate how such techniques work, and in order to enable the SPD to utilize this technique in appropriate cases in the future, a pending case being handled by the SPD was chosen for a demonstration project. The case chosen was the prosecution of Charles Davis and Rudy Ortiz. It was a uniquely appropriate case for the use of scientific jury selection techniques because it is one of the most difficult types to successfully prosecute.

One of the keys to scientific jury selection is the determination of community attitudes relating to the particular type of case to be tried. This is done through the use of an attitudinal survey of the community. It is genuinely unfortunate that because of reckless and uninformed accusations, it has been alleged that the survey conducted was a "political survey" for the benefit of the Attorney General. This is total and complete nonsense. It is totally false.

What is particularly sad is that such an accusation has been given any credence at all. The accusation has been made by persons who had no personal knowledge of the survey whatsoever.

I have attached to this report a summary of the

questions used in the survey. And, I have reproduced verbatim a single question (number 3), which is the only conceivable question which may have allowed some persons to allege that the survey was for political purposes. It is a question that is regularly used in scientific jury selection work when the lawyers involved are likely to be well-known to the community.

I want to point out that the names that were used in question number 3 were chosen by myself and my colleagues. They were never shown to the Attorney General nor to any member of his staff before the attitudinal survey was made. The question was used not for political significance but in order to determine whether the public held strong personal feelings for or against the prosecution or the defense lawyers, whose names were also used in this question.

I have attached hereto a summary of the survey questionnaire that was used. However, I must request of you in the strongest possible terms not to release the actual survey questionnaire itself. The reason for this is very simple. I do not wish to allow other persons to take for free the questionnaire which is the work product of my colleagues and myself and which has been developed by us over a number of years. It is just as unfair to release the questionnaire as it is to ask the Coca-Cola Company to

disclose to the State of New Mexico the formula for its drink just because the State purchases cola for its institutions. The work that I have done for the State of New Mexico under my present contract has been to demonstrate new ways to do the important work of the SPD. This does not mean that I have agreed, nor that I should be forced to give away the "formula" for my work.

In the following sections of this report, you will find supplementary materials relating to the use of scientific jury selection by the SPD. I am also submitting herewith the results of the computer analysis that was done on the attitudinal study.

VII.

SUMMARY OF ATTITUDINAL SURVEY QUESTIONNAIRE

- Question 1. Requests opinion as to most significant problems faced by the United States today.
2. Same as above except applied to New Mexico.
3. Attitudes toward certain prominent New Mexicans. (The verbatim question is attached hereto.)
4. Attitude toward political corruption.
5. Attitude toward crimes by public officials.
6. Attitude toward authority.
7. Attitude toward political leaders in general.
8. Attitude toward presumption of innocence in criminal cases.
9. Attitude toward defendants in criminal cases in general.
10. Attitude toward various types of crimes.
11. Attitude toward insurance.
12. Attitude toward payments made to public officials.
13. Question concerning rigidity of opinions.
14. Attitude toward believability of different types of witnesses.
15. Attitude toward prosecution witnesses who have made plea bargains.

16. Attitude toward Davis and Ortiz.
17. Question as to whether prosecution of Davis and Ortiz is politically motivated.
18. Attitude toward television coverage of Davis and Ortiz case.
19. Same as 18 except applied to newspapers.
20. Ability to set aside preconceived attitudes toward Davis and Ortiz.
21. Should an accused have to prove his innocence.
- 22-
24. Newspapers read and types of news.
25. Interest in television news.
- 26-
27. Occupational data.
- 28-
30. Marital data.
- 31-
34. Demographic data.
- 35-
36. Interest and activities.
37. Length of residence in New Mexico.
- 38-
42. Additional demographic data.

Question No. 3

"Now I'm going to read you the names of some prominent people. Please tell me how you.

feel toward each one.

Do you feel very favorable, somewhat favorable, somewhat unfavorable, or very unfavorable toward each one?"

Archbishop Robert Sanchez

David Norvell

Harrison Jack Schmidt

Charlie Davis

William Marchiondo

Toney Anaya

Joseph Montoya

Rudy Ortiz

Jerry Apodaca

Dolores Martin

VIII.

SUMMARY OF TECHNIQUES OF
SCIENTIFIC JURY SELECTION
DEVELOPED FOR CASES HANDLED
BY THE SPECIAL PROSECUTIONS DIVISION
OF THE NEW MEXICO ATTORNEY GENERAL'S OFFICE

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September 1, 1977

The case selected for the demonstration of how the SPD could utilize scientific jury selection methods was that of State v. Charles Davis and Rudy Ortiz. The major steps in this demonstration involved the following: (1) a social psychological analysis of the potential issues, attitudes and personal characteristics likely to affect individual jurors' verdicts in the above-captioned case; (2) a mini-survey of attitudes in the population from which jurors would be drawn; (3) data analysis of the mini-survey which enabled us to gain a better estimate of which of the many potential attitudes and personal characteristics were most likely to affect jurors' verdicts, and (4) the creation of a mathematical model which would enable the trial lawyers to reduce the uncertainty regarding the inclinations (or biases) of every juror in the special venire drawn for this trial before the potential juror even appeared in court. When the estimates from this mathematical model were combined with information obtained during voir dire, we could have an estimate of each potential juror's bias (for or against the prosecution)

with a degree of precision that would exceed anything based only upon lawyers' biases, hunches and intuition. Variants on this approach have been used in a number of criminal cases, most frequently by the defense.^{1/}

The Social Psychological Analysis

It was conceivable that almost any characteristics of the defendants, the prosecution, the case or the potential jurors could have affected the jurors' verdicts. For example, slim jurors might identify with slim defendants or with slim prosecutors and be biased against those who were overweight. Since we had very limited time and very limited finances, we (Mr. Segal, Ms. Astle, Ms. Simmons and I) spent as much time as possible consulting with Mr. Farber about the case and the major issues involved in order to eliminate the possible but not probable factors (such as juror's weight) and to include as many of the possible and probable (nontrivial) factors in our analyses as we could. The mini-survey and subsequent mathematical models told what the most important factors were, but we had to do a great deal of hard thinking and consulting before developing the survey instrument. Factors in the instrument could be eliminated when the mathematical analysis revealed them to be irrelevant (that was what the survey and model building were all about). However, factors that we omitted from the mini-survey would never find their way into the final model and that was why the pre-survey consultation and social psychological analysis was so crucial.

On the basis of this consultation and discussion with Farber and with persons knowledgeable of New Mexico, it was

decided that the survey instrument should include at least the following measures:

- 1) The salience of political corruption to the average potential juror and his or her attitudes toward corruption.
- 2) Jurors' general law and order concerns and attitudes.
- 3) Potential jurors' attitudes toward plea bargaining and their perceptions of the credibility of witnesses who have plea bargained.
- 4) Attitudes toward authority in general and toward important personal symbols of legal authority (e.g. the governor, the respective defense lawyers).
- 5) Race and ethnicity of the juror or respondent.
- 6) Attitudes of potential jurors toward persons of other racial and ethnic groups.
- 7) Knowledge of the particulars of this case.
- 8) Attitudes toward the prosecution and defense.
- 9) Potential jurors' preconceptions of the defendants' guilt.
- 10) Reading and social interests of the potential jurors.
- 11) Demographic characteristics of respondents (age, gender, employment and marital status, party registration, religiosity, etc.).

The questions designed to tap these factors were put into the mini-survey instrument (see Appendix A). The questions were either standard items used by most survey researchers or were specifically formulated to incorporate the issues raised by the Davis-Ortiz case.

In formulating the latter questions, I drew upon my experience teaching statistics and research design and my extensive experience in applied and scholarly survey research (see my Vita in Appendix D).

The Mini-Survey

Following my direction and under my supervision, Ms. Ruth Astle drew a sample of persons who had telephones and who would be eligible for jury duty in the Davis-Ortiz trial. The sample was drawn using a chance technique which made everyone in Albuquerque and the surrounding county equally likely to be interviewed. For the money, this is the best approach to insure that the sample is representative. Three aspects of this sample must be emphasized:

- 1) We sampled persons who were eligible to serve as jurors in the pending case i.e. registered voters in the venue of the trial.
- 2) Because of cost limitations, we had a sample of only 200 persons which is a much smaller sample size than is normally used.^{2/}
- 3) Though the sample size limited what we could do in the way of data analysis (see below), it was drawn by the best possible methods for telephone surveys given the current "state of the art"^{3/} and the interviews were conducted according to the highest standards of rigor. Costs were cut by limiting the size of the sample, but not by lowering the quality of the interviews.

Data Analysis

The effectiveness of the data analysis and the resulting mathematical model in choosing jurors rests upon two assumptions. First, we assumed that the jury pool would be close to a random sample of those eligible to serve in the Davis-Ortiz case. Second, we assumed that those characteristics of the survey respondents which enabled us to predict (mathematically) opinions regarding the defendants' guilt in the mini-survey sample would also enable us to predict them in the jury pool.

However, before we could test these assumptions, we had to code the survey responses and punch them onto computer cards and then program the computer to give us this information. Two graduate students (now Ph.D.'s) in the Department of Psychology of Duke University coded and punched the data under my direct supervision, working from codes I developed.

Once the data were punched, we had to develop a dependent variable, actually a series of dependent variables. That is, we had to construct a scale or choose an item that we could use the demographic and other characteristics to predict to.

A question was selected that constituted our best and most direct estimate of whether, in the absence of all the social pressures of the voir dire, the respondent had a belief as to whether Ortiz and Davis were guilty. However, given the small sample size and the social desirability of giving the "presumed innocent" response even to our survey interviewers, we expected another question we had included to be less

than perfectly reliable.^{4/} Thus, we developed several other dependent variables to compensate for this.

To develop these additional dependent variables, we performed a factor analysis with varimax rotation.^{5/} This is a complicated and very sophisticated statistical technique which uses the correlations between all possible pairs of questions that might form a segment of the dependent variable to search out clusters or factors within the data. This technique enabled us to reduce 30 items, each a potential dependent variable, to 4 scales and each scale would be more reliable than any single item. Before the invention of the computer it took statisticians as long as a year to perform one of these factor analyses. It did not take us that long, but it did take us a great deal of programming and computer time to accomplish.

The results are shown in Printout B. On the basis of them, we chose four dependent variables. The first was question 16A by itself and the other three were scales of negative attitudes toward the defendants which could be combined with question 16A. For example, the scale labeled DEFUNFAV in the various printouts was composed of items 3B, 3D, 3E and 3H (see Appendix A and Printout A). The other two scales were labeled COMPSCAL and COMP2 in the various printouts of the analyses. (There were other scales in the printouts of the analyses, but they proved worthless for our purposes.)

In our subsequent analyses, these four dependent variables were treated separately. This was because we had no clear theoretical or empirical indication that one was superior to the other. Hence, a number of mathematical models were developed.

The Mathematical Models

What might be regarded as the standard, big budget methods of mathematical model building for systematic or scientific jury selection have been described by Schulman and his associates^{6/} and by McConahay, Mullin and Frederick^{7/}. We followed this procedure where we could, but our small sample size forced us to make modifications and substitute "informed" and "intuitive trial and error" in some instances. For example, the standard first step after the dependent variable is constructed is to run the data through a computer program known as AID (for Automatic Interaction Detection) in order to partition the sample into attitudinally homogeneous groups of 150 to 200 respondents. Since we only had 200 respondents to begin with, we had to skip that phase and try some interactions that seemed intuitively plausible rather than those that the computer could have searched out for us.

Our goal in building the mathematical model was to develop an equation of the following form

$$\hat{Y} = b_0 + b_1X_1 + b_2X_2 + \dots + b_iX_i + \dots + b_kX_k$$

Where: \hat{Y} = the dependent variable

b_0 = a constant

b_1 = the regression coefficient of the first independent variable

X_1 = the first independent variable

b_2 = the regression coefficient of the second independent variable

and so forth to

b_k = the regression coefficient of the last independent variable

X_k = the last independent variable.

I have already discussed the dependent variables for this equation. The independent variables would be the demographic factors such as ethnicity, age, gender, or education or the attitudinal factors such as authoritarianism or ethnic attitudes.

The various b's that we would have used to weight the demographic factors in our decision would have been the best linear unbiased estimators of the true values of the regression coefficients. I obtained these estimates by using a technique known as ordinary least squares multiple regression analysis.^{8/} In this instance I used the variant known as stepwise, best predictor criterion multiple regression.^{9/}

As was indicated above, though the procedures I used were standard and straight forward in the era of high speed computers, the small sample size forced me to use a great deal of trial and error guided by my intuition and my experience in a great deal of previous scholarly and applied work. All computer runs are included

with this report, but for the convenience of the reader, only the ones that are most important for understanding the final model are lettered.

A Final Word

The mathematical models give us information about what juror characteristics to consider during the voir dire and they also give us some information about what characteristics to ignore or disregard (political party identification, for example). However, the budget constraints on our sample size limit the value of these models unless they are combined with intelligent use of the voir dire.^{10/} All parties knew this when we began the project, but I want to issue a warning against trying to use them by themselves. There is a strong temptation, once you have a mathematical model developed, to think that observations made during voir dire are not significant.

FOOTNOTES

- 1) Most of these are reviewed in D. Kairys, J. Schulman and S. Haring (Eds.) The Jury System: New Methods of Reducing Prejudice, 1975. See also Yeisel and Diamond, The Jury Selection in the Mitchell-Stans Conspiracy Trial 25 American Bar Foundation Research Journal, 151, (1976) and McConahay, Mullin and Frederick, The Uses of Social Science in Trials with Political and Racial Overtones, 41 Law and Contemporary Problems, 1977 (In press--copy attached at Appendix B).
- 2) For Joan Little's survey we interviewed almost 1,000 persons, but we spent almost \$35,000 to do it. See McConahay, et al., id. and in Appendix B.
- 3) Schulman, Kairys, Haring and Christie, Systematic Jury Selection in Kairys et al., supra, note 1. The relevant portion is attached as Appendix C. Also see McConahay, et al., Appendix B.
- 4) All scales or items in a survey have some error in them. The respondent may not understand the question and say "yes" when he or she means "no" or the respondent might lie or there might be something about the way the question was asked that distorted the response. To the extent that an item or scale is error free, it is called reliable, a perfectly reliable question would not have any error in the response for any respondent. There is never a perfectly reliable item or scale, but to the extent that it is carefully worded and administered an item's reliability can be increased. The other way to increase reliability is to combine several items into a scale.

In general, scales are more reliable than individual items, but that can only be determined by a scaling technique such as factor analysis.

See Scott, Attitude Measurement in G. Lindzey and E. Aronson (Eds.)

2 The Handbook of Social Psychology (2nd ed.) at 204.

- 5) R. Harris, A Primer of Multivariate Statistics (1975) and also see N. Nie, C. Hull, J. Jenkins, K. Steinbrenner and D. Bent. Statistical Package for the Social Sciences 2 ed., 1975.
- 6) See Schulman, et al., Appendix C.
- 7) McConahay, et al., Appendix B.
- 8) Harris, supra, note 5; N. Draper and H. Smith, Applied Regression Analysis (1966) and F. Kerlinger and E. Pedhazur, Multiple Regression in Behavioral Research (1973).
- 9) Draper and Smith, supra, note 8.
- 10) McConahay, et al., Appendix B. See also the Authoritarianism rating sheet which is Appendix E attached.

APPENDIX

VITA

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Date & Place of Birth:

December 24, 1938
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Marital Status:

Married, 3 children

Education

B.S., Engineering, 1958, Illinois Institute of Technology (with distinction)
B.D., Religion, 1965, Yale University
M.A., Social Psychology, 1967, University of California/Los Angeles
Ph.D., Social Psychology, 1968, University of California/Los Angeles (with
distinction)

Employment

1974- , Associate Professor of Policy Sciences and Psychology, Duke University.
1969-74, Assistant Professor of Political Science and Psychology, Yale
University.
1968-69, Instructor, Claremont Graduate School and School of Theology.
1967-68, N.I.M.H. Research Fellow, University of California/Los Angeles.
1965-67, Research Assistant, Los Angeles Riot Study, University of
California/Los Angeles.
1962-65, Teaching and Research Assistant, Psychiatric Aide, Yale University.
1958-62, Engineer, Administration, Indiana Rating Bureau, Indianapolis,
Indiana
1959, Field Artillery, U.S. Army.

Administrative Experience

Director, Psychology and Politics Graduate and Post-Doctoral Program, Yale University, (1969-1974).

Director of Research, High School in the Community Evaluation, Educational Research Service, New Haven, Connecticut (1971-1974).

Assistant Director of Engineering Administration, Indiana Rating Bureau, Indianapolis, Indiana (1959-1962).

Professional Activities

Memberships: American Psychological Association, American Political Science Association, Society for the Psychological Study of Social Issues, Society for the Scientific Study of Religion, American Association for the Advancement of Science.

Committees: Academic Freedom and Elections (chair) Committees of the Society for the Psychological Study of Social Issues. Division 8 Program Committee, American Psychological Association.

Editorial Boards :

Journal of Conflict Resolution, 1972-1978.

Contemporary Psychology, 1974-1979.

Editorial Consultant to The American Political Science Review, Journal of Personality and Social Psychology, Journal of Social Issues, Journal of Politics, Political Methodology, Journal for the Scientific Study of Religion, American Journal of Political Science, Experimental Study of Politics, Political Science Quarterly, Journal of Personality.

Grants :

Director, Program of Advanced Training in Psychology for Political Scientists, National Institute of Mental Health, \$305,000, Yale University, 1969-1974.

Co-principal Investigator, Racial and Political Socialization and Urban Violence, National Science Foundation, \$13,500, UCLA, 1968-1970.

Co-principal Investigator, Religion and Racial Prejudice, Irwin, Sweeney, Miller Foundation of Columbus, Indiana, \$10,000, School of Theology at Claremont, 1968-1969.

Co-principal Investigator, Racial Attitudes and Busing in Louisville, Ford Foundation, \$165,000, Duke University, 1976-1978.

Lectures at Other Universities:

All major universities including Columbia, Harvard, Princeton and various campuses of the University of California. List available on request.

Consulting:

Project Understanding, Claremont, California. Sampling and evaluation design for a nationwide project to combat racism in Protestant Churches (1969-1970 and 1972-1973).

Claremont, California, Public Schools. Survey to assess attitudes toward schools and property taxes for support of schools (1968-1969).

New Haven Public Schools. Evaluation design for High School in The Community (1971-1974).

New Haven Housing Authority, Sampling Design and Opinion Questionnaire to Survey Residents of Housing for Low Income and Elderly Persons (1972).

Time-Life Books, Social Sciences Series (1974-1976).

Juror Selection and change of venue in the trial of Joan Little, Raleigh, North Carolina Superior Court (1975).

Juror Selection and change of venue in the trial of Dessie X. Woods and Cheryl S. Todd, Wheeler County, Georgia, 1976.

Durham Urban Observatory, Sampling Design and Survey of Citizen attitudes Toward Durham City Services (1976).

Change of Venue Survey for Frederick N. Woods, Oakland, California (1977).

Honors and Prizes

NIMH Predoctoral Fellowship, 1967-68.

Edward L. Bernays Psychology and Social Issues Book Award given by The Society for the Psychological Study of Social Issues for the book The Politics of Violence (see below), 1975.

Publications

Dissertation:

The Effects of Cognitive Closure and Confidence in Ability to Make Attributions Upon Affiliation Under Threat. Ph.D. Dissertation, University of California, Los Angeles. (Ann Arbor, U. Microfilms, 1968) No. 69-7253.

Books:

Sears, D. O. and J. B. McConahay, The Politics of Violence: The New Urban Blacks and the Watts Riot. Boston: Houghton Mifflin, 1973. (Winner of the Edward L. Bernays Book Award, 1975, see above.)

Ashmore, R. D. and J. B. McConahay, Psychology and America's Urban Dilemmas. New York: McGraw-Hill, 1975.

Book Chapters:

Sears, D. O. and J. B. McConahay, "Riot Participation" in Nathan Cohen (ed.), The Los Angeles Riots: A Socio-Psychological Study. New York: Praeger, 1970, pp. 258-287.

Sears, D. O. and J. B. McConahay, "The Politics of Discontent: Blocked Mechanisms of Grievance Redress and the Psychology of the New Urban Black Man." In Nathan Cohen (Ed.), The Los Angeles Riots: A Socio-Psychological Study. New York: Praeger, 1970, pp. 413-479.

McConahay, J. B., "Experimental Research." In J. Knutson (Ed.), Handbook of Political Psychology. San Francisco: Jossey-Bass, 1973, pp. 356-382.

McConahay, J. B., Frey-McConahay, S., Trickett, E. J., Gruber, J. E., and Hawley, W. D., "Evaluation of High School in the Community, New Haven, Connecticut." In M. D. Fantini (Ed.), Alternative Education: A Source Book for Parents, Teachers, Students and Administrators. New York: Anchor/Doubleday, 1976, pp. 313-327.

McConahay, J. B., "Nonconventional Political Behavior." In B. B. Wolman and L. R. Pomroy (Eds.) International Encyclopedia of Neurology, Psychiatry, Psychoanalysis and Psychology. Vol. VIII, New York: Human Sciences Press, 1977, pp. 429-432.

Journal Articles:

Sears, D. O. and J. B. McConahay, "Participation in the Los Angeles Riot." Social Problems. 1969, 17, 3-20. (Reprinted by the American Sociological Association Committee on Problems in American Democracy in Helen MacGill Hughes (Ed.) Crowd and Mass Behavior. Boston: Allyn and Bacon, 1972 and in R. P. Lowry and R. P. Rankin (Ed.), Sociology: Social Science and Social Concern. New York: Scribners, 1972.)

McConahay, J. B., "Religion and Discontent I: Attitudes of Negroes Toward the Church Following the Los Angeles Riot." Sociological Analysis, 1970, 31, 12-22.

Sears, D. O. and J. B. McConahay, "Racial Socialization, Comparison Levels, and the Watts Riot." Journal of Social Issues, 1970, 26, 121-140. (Reprinted in S. A. Kirkpatrick and L. K. Pettit (Eds.), The Social Psychology of Political Life. Belmont, California: Duxbury Press, 1972. Also reprinted in J. H. Hamsher and H. Sigall (Eds.), Psychological Research and the Problems of Society. New York: McMillan, 1973.)

Johnson, P. B., D. O. Sears, and J. B. McConahay, "Black Invisibility, the Press and the Los Angeles Riot." American Journal of Sociology, 1971, 76, 698-21.

McConahay, J. B., "Psychological Testing in Evaluation and Guidance of Seminary Students." Theological Education, 1971, 7, 109-120.

Kraut, R. E. and J. B. McConahay, "How Being Interviewed Affects Voting: An Experiment." Public Opinion Quarterly, 1973, 37, 398-406.

McConahay, J. B. and J. C. Hough, Jr., "Love and Guilt Oriented Dimensions of Christian Belief." Journal for the Scientific Study of Religion, 1973, 12, 53-64.

McConahay, J. B. and J. C. Hough, Jr., "Symbolic Racism." Journal of Social Issues, 1976, 32, 23-45.

Frey-McConahay, S.A. and J.B. McConahay, "Sexual Permissiveness, Sex-Role Rigidity and Violence Across Cultures." Journal of Social Issues, 1977, 33 (In Press).

McConahay, J.B.; C.J. Mullin and J. Frederick, "The Uses of Social Science in Trials with Political and Racial Overtones: The Case of Joan Little." Law and Contemporary Problems, 1977 (In Press).

Book Reviews:

McConahay, J. B., Review of Anthony M. Platt, The Politics of Riot Commissions. New York: Macmillan, 1971. In Public Opinion Quarterly, 1972, 36, 482-484.

McConahay, J.B. "Personality, Politics and Path Analysis" a review of Paul Sniderman's Personality and Democratic Politics. In Contemporary Psychology, 1976, 21, 263-265.

McConahay, J.B., a review of K.T. Chun, S. Cobb and J.R.P. French, Jr., Measures of Psychological Assessment in The American Political Science Review, 1977 (In Press).

McConahay, J.B. "The Ultimate Attributions of Americans," a review of W.C. McCready and A.M. Greeley, The Ultimate Values of the American Population in Contemporary Psychology, 1977, 22, 431-433.

Unpublished Convention and Conference Papers:

- McConahay, J.B. and D. O. Sears, "Negro Socialization and the Watts Riot." Paper read to the International Congress of Psychology. London: July, 1969.
- Hough, J. C. and J. B. McConahay, "Love and Guilt Oriented Religious Beliefs and Their Relationship to Attitudes on Race, Police Brutality and Political Involvement." Paper read to the Society for the Scientific Study of Religion. Boston: October 1, 1969.
- McConahay, J. B., "Religion and Discontent II: Negro Attitudes Toward the Church and Participation in the Los Angeles Riot." Paper read to the Society for the Scientific Study of Religion. New York: October, 1970.
- Kraut, R. E. and J. B. McConahay, "An Experimental Study of the Effects of 'Public Opinion Polling' and Alienation Reduction Upon Turnout in Primary Elections." Paper read to the American Political Science Association. Chicago, 1971.
- McConahay, J. B., "Experimental Design in Political Science." Paper presented at National Science Foundation sponsored Conference on Research Standards for Political Science. Lake Lawn Lodge, Wisconsin, May 13-15, 1974.
- McConahay, J.B. "The Implications of Psychology for Survey Research." Invited address at the spring convention of the American Association for Public Opinion Research, Asheville, N.C., May, 1976.
- Bishop, G.D., D.L. Hamilton, and J.B. McConahay, "Attitudes, Non-Attitudes and the Nature of Political Belief System." Paper delivered at the Annual Convention of the American Psychological Association, Washington, D.C., September, 1976.
- McConahay, J.B. and W.D. Hawley, "Is it the Buses or the Blacks? Self-interest Versus Symbolic Racism as Predictors of Opposition to Busing in Louisville." Paper delivered at the Annual Convention of the American Psychological Association, San Francisco, California, August, 1977.

Technical Reports:

- Hawley, W. D., J. B. McConahay, S. F. McConahay, K. Nelson, and J. Gruber, "What if They Had a High School Where They Tried Out All the New Ideas in Education?: An Evaluation of New Haven's High School in the Community." New Haven: Working Paper of the Center for the Study of Education, Yale University, 1973.
- McConahay, J. B. and Hough, J. C., Jr., Value Roots of Symbolic Racism (Working Paper No. 1075) Durham: Duke University, Institute of Policy Sciences, October, 1975.

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Bishop, G.D.; D.L. Hamilton and J.B. McConahay, Attitudes and Non-Attitudes in the Belief Systems of Mass Publics: A Field Study (Working Paper No. 4772) Durham: Duke University, Institute of Policy Sciences, April, 1977.

END