

The Honorable
Hugh R. Jones
Fifth Memorial Lecture

Cogitations Concerning the Special Prosecutor Paradigm:
Is the Cure Worse than the Disease?

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Is the Cure Worse than the Disease?

My tribute to the Honorable Hugh R. Jones starts with a borrowed first word. The title of my exertion here this afternoon begins with “Cogitations.” It is the word Judge Jones so carefully chose as the first word in the title of his masterful Cardozo Lecture in 1979 – “Cogitations on Appellate Decision Making.” However, after my imitative highest form of compliment, using his same first word, everything else that follows is my much more modest contribution to our jurisprudence on the subject of special and independent prosecutors. (For my thesis, I use the terms special prosecutor, independent counsel and the like interchangeably, although I recognize that there can be some important structural and operational differences).

At the outset, please let me say that I am deeply grateful especially to Chief Judge Judith S. Kaye, and also to all my former and the present Colleagues on the New York State Court of Appeals, for the privilege of serving with them here, and for allowing me today to present the Hugh R. Jones Memorial Lecture in this sacred space – our secular sanctum sanctorum - this most beautiful Courtroom of the Court of Appeals. I am thrilled and honored to deliver this Lecture in Judge Jones’ esteemed name and cherished memory.

By the way, isn’t “Cogitations” a splendid word – not surprisingly, from a fastidious wordsmith and mind like Judge Jones’? It is derived from the Latin, *cogitare*, to think, to ponder – or as a favorite Synonym Finder of mine suggests, to meditate and even to brood over. These seem apt images for what I am about to do right before your very eyes – and ears, too. Judge Jones’ fabulous word, therefore, starts me on this somewhat brooding, but I hope constructive, journey with you concerning this theme. I trust you will find it of some interest.

I also thank the Fund for Modern Courts, the principal sponsor for the last five years, for extending the honor and privilege of this invitation to me. I thank Albany Law School as the co-sponsor, and the Institution affording CLE credit. They instructed me, by the way, to speak long enough to qualify for the credit – as if my speaking long enough were ever a problem. You can check with Mary on that subject. This will be an abridged version of what I have prepared for the article to be published – eventually.

And I particularly thank Kim Troisi-Paton who picked up where she left off as my law clerk in 1998-2000 to assist me in a myriad of excellent ways throughout this project, as my research assistant extraordinaire. This renewed collaboration came about, in part, thanks to a generous grant I sought from my former judicial colleague, retired Supreme Court Justice Joan Marie Durante, whom I acknowledge on behalf of Kim and myself for being so immediately supportive and instinctively collegial.

Now, this is not an Oscars night so I must end the litany of thank yous – though my family and dear parents, of beloved memory, do spring to mind and heart in deep gratitude. I will instead now turn to Judge Jones and the subject at hand, my lecture theme: the purpose and dangers of Special Prosecutors in our criminal justice and jurisprudential universe. As you may have surmised from the rhetorical query I posed as my subtitle, it is my personal opinion that, generally and usually, the cure is worse than the disease!

Before I go on, I ask you to gaze up at Judge Jones' portrait for a moment of silent tribute. You will see an accurate representation of this fine man and outstanding jurist. His portrait reflects many of his fine qualities: intelligence, intellectual discipline and ramrod rectitude in his erect posture and in his refined habits of mind and conduct. Those of us privileged to work alongside Judge Jones in various capacities over many years came to know how he loved charts and color coded pens and pencils, denoting the stages of his and the Court's deliberative regimen and decision-making steps. These personal protocols reflected a disciplined analytical progression – a thoroughness to a fault - that his colleague and Chief for the '70s era, described as the work of a micrologician. Chief Judge Breitel meant it as a compliment, and Judge Jones loved to laugh hardest of all at the characterization. His wonderful sense of humor was always inner-directed, but that was no surprise because Judge Jones was a very kind and thoughtful man. Former Chief Judge Wachtler describes him as the "Perfect Judge," the finest jurist among the many with whom he had the privilege of service here – and that is saying a lot – present company included, by the way.

Judge Jones was a Judge of the Court of Appeals for just over one year when I first met him in 1974 as part of the interview process with each of the seven Judges that led to my appointment as Clerk and Counsel to the Court. It was mutual respect at first sight. Mine for him was truly instantaneous, and I am not being presumptuous about earning his respect for me. He later told me so. One might say that our first meeting was the "start of a beautiful friendship," with kudos for that memorable phrase to Bogart, as Rick, in *Casablanca*.

The unparalleled devotion of Judge Jones to the Institution of the Court of Appeals is memorably inspiring. I recall that it gently nudged everyone, Judges and Staff alike, also to aspire to excellence and the collegial common good that he so earnestly heralded. He knew our Court's capacity to deliver really good works for people and society. His powers of concentration towards what he saw as the sacred trust of the work of the Court are legendary. He spared no time and showed no patience for the collateral cacophony and distractions that sometimes surrounded or intruded on the Sessions of Court. Instead, he enthusiastically loved and methodically enjoyed the pure rhythmic three-step dance of (1) Chambers work, (2) Conference work and (3) Courtroom work - each day of every Session. It was a razored concentration, and if you doubt my recollection and testimony, go read his Cardozo *Cogitations* Lecture.

Yet, let me emphasize that this was no automaton, operating with some assembly-line methodology. The charm of the man at work included his humanity, grace, and good humor - all laced with an unerring sense of dispassionate perspective and genuine concern for all the people around him – the lawyers, the litigants, the staff, and the general citizenry. His patrician bearing and demeanor exuded a professional classiness. That camouflaged the delightfully impish human being within. In a capsule, I could say he had character, and was a character.

Some true anecdotal illustrations help me to make the point. He could shrug off, for example, having someone steal his shoes from the Albany Hotel around the corner, while Court was in session, as “just one of those things.” He could announce he was going off to a sound sleep on his own election night before the returns were in on his sharply contested election to the Court of Appeals in 1972, because as he said to his running mate, friend, and soon-to-be Colleague, Judge Wachtler, there’s just nothing else we can do now anyway. He could drive from Utica to Manhasset, through a horrendous snowstorm, to spend a day with that dear former Colleague at a time of that friend’s most dire need of companionship, and think nothing of it – because Judge Jones valued true friendship and acted on it selflessly and with aplomb.

In addition to the adjudicative side of Judge Jones’ contributions to and values in our jurisprudential universe, let me also give you a glimpse of this excellent jurist from the administrative side. You will see, through that angle of the prism, what a consistent person he was – no surprise there, I guess, for a micro-logician!

As a few of you know from intimate experience at this marvelous Court, its executive work, as distinguished from its primary adjudicative role, is administered through discrete Committees of the Judges, appointed by the Chief Judge, and pulled together under collegial leadership skills of the Center Chair Presider at plenary Conference Sessions of the Court in its other sanctum sanctorum – the Conference Room upstairs.

In part because he came to the Court in 1973, after the 1972 election, as a former State Bar President with no prior judicial experience, Judge Jones was appointed and remained for his entire term of judicial office the Chair and Sole Member of the Court’s Bar Relations Committee, with jurisdiction for all such matters and relationships, including the Bar Associations and Admission to the Bar. The unfolding of two major administrative issues demonstrate his skill and undeviating dedication to the Institution First. To him, subordination of persona, which is countercultural in our day and age where glorification of personality seems to be paramount, was critical to the well being and proper operation of the Court because the greater common good of the Institution would thereby be better served.

For years in the '70s and early '80s the organized Bar pressed the Court to inaugurate, by Rule-making, a "Lawyers' Fund for Client Protection," with a biennial lawyers' registration fee. The Court, under Judge Jones' Committee tutelage, demurred on the ground that this substantive step must come about by legislation – a demonstration of his respectful core value for the distribution of governmental powers. In the early 1980s the Legislature was finally persuaded to act, but the negotiations of details became quite entangled. Suddenly, as so often happens in the legislative process, its Session was about to end, when, as Clerk, I received a late night call from the chief legislative counsels of the two Houses – Ken Shapiro and Jack Haggerty. A single direct question, allowing no time for reflection or consultation, was put to me: In the bill about to be passed at that moment, along with hundreds of other last minute items, should they put "Chief Judge" or "Court of Appeals" in as the appointing entity for the 7 members of the Board of Trustees of this new Client Security Fund? Though I knew that the then-Chief Judge wanted "Chief Judge," in the bill, my long association and discussions with Judge Jones in his Committee role on this matter prompted me to answer: "Court of Appeals." And as they say in Scriptures, "So it came to pass." Well, when the dust settled and that bill, with the Court of Appeals as the appointing authority, emerged as the law, the then-Chief Judge was livid - especially with me when he found out how came to be. Judges Jones, as always a stand-up guy, took all the heat and told the Chief and the Court that was his direction to me. Besides, he added, it was the right Institutional choice because the new Board should be answerable and accountable to the full Court, not just the person who happened to be Chief at any given time. One of the delightful twists of history is that a charter member of that new body in 1981 was no other than the present Chief Judge, appointed then by the Court on the nomination of her predecessor Chief Judge, Lawrence Cooke, both of Monticello!

Judge Jones was also the astute sole Committee operative on another key development directly affecting this Court's docket. He engineered the selection of ABA President Robert MacCrate, Columbia Professor Maury Rosenberg and App. Div. Justice James D. Hopkins as the three member Committee, under the auspices of the American Judicature Society, to work with me as Clerk and produce the independent documentary report, "Appellate Practice in New York," without which I could not have successfully negotiated Chapter 300 of the Laws of 1985 when I was by then Chief Administrative Judge.

As all us insiders know, that law profoundly changed this Court's docket from over 700 argued appeals per year to fewer than 200 on a wise *certiorari* re-allocation of judicial resources and power. It gave virtually total control to the Court of Appeals of its own civil case docket. The linchpin and selling point in the negotiation of this reform were quality over volume, and Judge Jones saw how to help get this legislation passed over heavy opposition from the Bench and Bar and among the Legislature itself. He smartly used independent forces, external to the Court, to validate the merits of the case for the result the Court deemed desirable. It took years but, in the end, we succeeded, thanks to a very SAVVY fellow – the Honorable HRJ. He demonstrated his

administrative acumen to forge an adjudicative benefit – always with his eye on the ball of Institution First.

Frankly, dear friends and audience, the many sweet and instructive anecdotes, and also the list of serious stories about significant cases that I could personally recount involving Judge Jones' unique contributions and personality would keep us here long enough to earn some extra CLE credits! Indeed, our honoree and my dear friend's spirit - ever present in this Courtroom and especially this afternoon - is no doubt becoming impatient with me. I can feel his brooding presence in the air, as though he were channeling me. He wants me to get on, already, with the serious business of the lecture theme. I suppose if Judge Jones were to speak the language of my heritage, he would crisply utter the words "Basta!" and "Avanti!", or some Welsh variation of same. Unmistakably, it would be: "Enough, and Get on With It, Joe." I will obey because I sense Mary is thinking the same thing. And then there always lurks the deterrent of last resort – the Chief Judge's red light!

* * *

The topic I have chosen seems ripe because over three decades of time for reflection have passed since the 1970's era of the State-appointed New York City Special Prosecutor who was charged with investigating corruption in the criminal justice system. There has been opportunity for some dispassionate reflection and detailed assessment – qualities Judge Jones liked.

Discussion of this topic requires a contextual appreciation of one of Judge Jones' favorite principles and overarching themes – the distribution and allocation of governmental powers and responsibilities – checks and balances – accountability. Call it what you will. Some call it separation of powers; the latter, however, is a phrase not favored by Judge Jones. He preferred the positive semantical nomenclature: the embracive power of collegiality and complementarity – the working together of individuals among distributed duties and powers in a respected, tested Institution, designed to render a common good, larger than the mere sum of separate, individual parts.

I initially set the table of the presentation of my views to you with some helpful allies. I invoke: (1) a couple of paragraphs from United States Attorney General, Supreme Court Justice, and Special Prosecutor at Nuremberg, the Honorable Robert Jackson; (2) some pithy extracts from a dissenting opinion of Supreme Court Justice Antonin Scalia; and, (3) most importantly, some comments and thinking from Judge Jones himself. I really liked working with the materials of these three outstanding jurists, all New Yorkers – Jamestown, Queens and Utica, respectively! The only thing better would be someone from Brooklyn; but, hey, that's where I hail from.

In proper order, then, first, I turn to Judge Jones. In his 1979 “Cogitations” Cardozo Lecture, he remarked on his own “very healthy respect . . . for the distribution of powers in our governmental polity.” This was not simply a turn of phrase – a function of terminology - that sounded lovely for his lecture, or even to be used as a quickie sound-bite quote. Rather, the genius of that succinct guiding star finds resonance and application in his judicial opinions for the Court. For example, in *Levittown v. Nyquist*, the Court examined the constitutionality of the state school finance system, to be sure - in a context different from the presently pending school financing controversy argued on the docket right here just last week.

Judge Jones wrote in *Levittown*: “With full recognition and respect ...for the distribution of powers . . . among the legislative, executive and judicial branches, it is the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches. That because of limited capabilities and competencies the courts might encounter great difficulty in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action on the part of the Legislature or the executive is neither to be ignored on the one hand nor on the other to dictate judicial abstention in every case” (57 NY2d 27, 38-39 [emphasis added]). That is a brilliant, cohesive, and comprehensive articulation – succinct, too, for all it portends.

There, Judge Jones explicitly encapsulated the respectful limitations and expansive potentialities of checks and balances, and the deliberate distribution of power. Indeed, I have not discovered a demarcated separation of powers established by the federal and state laws of our land. Instead, one often finds interdependence and interplay, rather than metes and bounds segmentation. That is the foundation stone and genius of our system.

So, what happens when one branch within the cogwheels of the distribution goes awry? Today, I propose that when that happens, when special prosecutors are appointed and exercise their mandates beyond the structure of the distribution of power calibrations to the executive branch, of which they are a part, then a serious flaw in the harmonious system is exposed. Special prosecutors are often given a kind of pass and seeming immunity from well-tested restraints on regular officers, and are perceived and empowered to be free agents pursuing their own notions of good and even pursuing a preconceived objective or a targeted person. The seeds of trouble are embedded in that Dodge City Marshal calculus because it is antithetical to the neutral pursuit of fair and objective justice.

Justice Scalia recognized much of this in 1988. He famously and forebodingly, dissented alone in *Morrison v. Olson*, a case in which the Supreme Court upheld the enormous power of a federal independent counsel. Justice Scalia wrote, “That is what

this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish.” Justice Scalia “feared” that the institution of a special prosecutor or independent counsel would destabilize this balanced allocation of powers. To buttress his concerns, Justice Scalia summoned words of Justice Robert Jackson, my third key source in this threshold section of the lecture.

Then-Attorney General Jackson in 1940 admonished the United States Attorneys of this great Nation as follows:

“There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. *** One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can ever investigate all of the cases in which he receives complaints. *** What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. *** [It] is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm - in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.” (Scalia, J. dissent in *Morrisson*, at 727-728 quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940).

Indeed, Justice Scalia’s premonitions and Justice Jackson’s admonitions have rung true – both with respect to the federal Independent Counsel miscarriages that would occupy our attentions toward the end of the twentieth century, and now into the twenty-

first, as well as under the Special Prosecutor regime in New York State which ran through the 1970s.

Let me say right here, I do not intend by my criticisms of the Paradigm to demonize Maurice Nadjari or Kenneth Starr or similarly situated special prosecutors or independent counsels, in some ad hominem manner. Rather, my focus is on the culture and operations of their, and like, Offices where officious self-righteousness can take hold under misguided leadership. It can infuse such staffs, too, with an excessive zeal, an inflated sense of importance, and a kind of hubris, driven with the energy of enormous power, that blinds them to their own human fallibilities and institutional self-restraints.

Thus, I tender another key corollary to my overall thesis. I am referring to the acknowledgment of institutional humility. This modest virtue recognizes and respects the human element in the discharge of the powers of all branches and the charisms provided by other gifted persons – differently experienced members of any of the various spindels of government. This elementary rubric acknowledges the nature of temporary entrustments, and the interrelationship and dependence on other institutions, wherein each is in league and in collaborative efforts to perform the public business of the people. The pact rests on mutual respect. Avoidance of macho individualism, with ready acceptance of the time-tested, balancing mechanisms underpinning our system of governance are what make the system work well – most of the time.

The genius of the common law process can be tapped into to appreciate this methodology of trial, error, correction, and interstitial small steps supported by healthy respect for the principle of *stare decisis* – the wisdom of those who have gone before and what they have had to say. This recognition is the counterpoint to big gigantic leaps and sweeping forays and silver-bullet solutions to problems and crises, dealt with by some as though on a *tabula rasa* – as though the world begins anew with each of them – an institutional immaturity. Within the reality-based and time-tested system that I endorse, humility connotes strength, not weakness. The common law process and the distributive system of powers of governance, therefore, march to a similar drumbeat in a procession that all people can gracefully join and appreciate.

Let us now consider power itself for a few moments, as a component and manifestation of the human experience, insofar as it bears on our subject. Power offers an additional backdrop to the further particularized assessment of the Special Prosecutor role and experience, especially in New York's jurisprudence. History teaches that pure power can be a dangerous intoxicant, and its unchecked exercise can generate exponentially expanded and unintended deliriums. The Latin word is *imperium*.

Machiavelli instructed: "[The Prince] must stick to the good so long as he can, but, being compelled by necessity, he must be ready to take the way of evil."(Machiavelli, *The Prince*, Ch. 18 [emphasis added]). That's a classical utterance of the adage that "ends justify means."

When Special Prosecutors are awarded their enormous power, the appointing agents enjoy an easy way out of their personal accountability for navigating and solving crises on their own watches. They feel "compelled by necessity" to so act, and fail to "stick to the good." Shakespeare places a pointed literary reference – a ready rationalization - in Bassanio's voice in the *Merchant of Venice*, when he utters that there is: "justification for little wrongs to reach great rights and ends." Lord Acton summarized the adage as "Power corrupts, and absolute power corrupts absolutely."

For me, nothing in relatively recent New York history dramatizes the pitfalls of potential and actual abuse of power more than the special prosecutorial machinations exhibited during the Nadjari era - because I was involved in it closely in my own professional life and career. I witnessed a significant part of it first-hand, from distinct overlapping roles as a lawyer, academician and court official.

The particular Special Prosecutor I speak of was appointed by Governor Rockefeller because of corruption uncovered, in the criminal justice system of New York City. The Knapp Commission investigation, in 1972, recommended the appointment of a Special Prosecutor. That Office and the Person selected to lead it was authorized by Executive Order to supersede the five elected District Attorneys of New York City's five counties. This new, somewhat unique Office was given enormous jurisdiction and feared power, on a virtually open-ended scale, with almost on-demand resources in money and personnel. The recommendation was implemented with the appointment of Maurice Nadjari and even a special Judge, John Murtagh, also appointed by the Governor by Executive Order, authorized under an unusual provision of the State Constitution, not by the assignment within Judiciary itself, as is customary and wise. That one Judge was to preside over all matters coming out of the Nadjari envelopment – a problem of even deeper dimension and concern for the fair administration of justice because they appeared to exist and operate as a sort of "Team."

Within a few years, matters had spun badly out of control with bad cases that did not hold up under scrutiny and appellate review, with press releases, press conferences, and leaks of Grand Jury investigations of an inflammatory, tenuous and unfair nature seeming to flow all the time. Ironically, a later Commission on Investigation, in a study of the operations of the Special Prosecutor's Office itself, would find that the Special Prosecutor had made false and unauthorized disclosures to the media and public about investigations of public corruption, including unfounded public attacks on the Judiciary and the Judicial Process itself. Meanwhile, as the various cases brought by that Office

wound their way through the independent court system – independent at least at the appellate level - both the Special Prosecutor’s Office and many targets of its investigations jostled, and jockeyed, with their respective advocacy efforts, to gain the upper-hand or some advantage of the justice system in service of their own ends. This unseemly tension, not the healthy, professional adversarial system, created an atmosphere for a perfect storm of further irony - considering the initial purpose and intent of the Knapp Commission’s recommendations which was to clean up corruption and restore integrity and confidence to the system. Irony does not, however, do justice as a characterization of the corrosive harm done to presumptively innocent people and to the loss of respect and dignity in the administration of justice – by the very Office and Person charged, specially to root out the old corruption! The incarnation of this Special Prosecutor’s Office seemed to me to implode on itself and spawn a new, and different form of breakdown of process.

For example, in *People v. Mackell*, the Special Prosecutor succeeded at a jury trial in convicting a local District Attorney of misdemeanors. When the Special Prosecutor decisively lost the intermediate court appeal, based in part on massive prosecutorial misconduct at the trial, he then proceeded to bring an appeal to this Court of Appeals. The jurisdictional limitations at the time concerning “law and facts” reversals by the Appellate Division did not allow such an appeal – or at least not review of the issues with any legal consequence – an important procedural limitation and technicality, if you will. Judge Jones’ customarily tempered approach to the distribution of powers is reflected in the four Judge majority opinion of the Court. It said: “Needless to say, a procedural law, adopted after careful legislative consideration of competing public policy considerations, is not to be disregarded at will simply because its impact on a particular case precludes additional appellate review after both parties have already enjoyed the advantages of a full and lengthy trial and of an equally exhaustive appeal. * * * [E]ven the State’s highest court may not refuse, as the [solo] dissent [in support of the Special Prosecutor] would have us do, to apply the plain import of an applicable statute, which, until and unless amended or repealed, must be respected as the law for all our people, no matter where positioned.” (40 NY2d 59 [1976], at 63). Chief Judge Breitel concurred separately with two Judges joining his opinion, and Judge Jasen dissented alone. As a footnote of sorts, the jurisdiction-limiting statute was later amended to provide a bit more review flexibility.

I happen to be intimately familiar with the egregious Special Prosecutor machinations in that case because I was one of the appellate counsel at the Appellate Division. By the time that the final litigation chapter was written, I was Clerk of the Court of Appeals. To avoid even the appearance of a conflict of interest and role, Chief Judge Breitel instructed me to take a walk in the park on the day that appeal was argued here – literally, “leave the building,” said he to me.

As another lazer ray through the prism of this subject and case, let me also share with you a disturbing emanation, revealed here for the first time publicly. I had agreed to collaborate with two outstanding lawyers on the appeal to the Appellate Division in the *Mackell* case. My esteemed co-counsels were former Chief Judge Charles Desmond [his portrait is up there on the wall, too, just above Judge Jones’], and my classmate at St. John’s, Robert McGuire [later to be a great New York City Police Commissioner in the Mayor Koch Administration, and my lifelong dear friend]. As we were working on the brief back in 1974, one day a student of mine [as I was then a Professor of Law at St. John’s] asked for an appointment to see me after class. He proceeded to describe to me his job interview at the Office of the Special Prosecutor. It concentrated heavily on questions to him about me – what was I like in the classroom? did I have strong opinions about prosecutorial tactics like entrapment? and the like. I was shocked that, apparently because I had dared to join the appellate defense team against that Office, my academic viewpoints and I then became a subject of this kind of collateral inquiry. Worst of all, the student was being misused in this misguided, clumsy effort to scope me out, or try to intimidate me. This incident angered me, and fueled my passion to defeat something I then came to see as even more dangerous and, frankly, a bit malevolent, as well as flat-out wrong on the law. Fortunately, we went on to win the case, and in the ultimate “high-fiver”, we not only beat the bad guys on the law in court, but we also helped to get them fired. The undertones of McCarthy-era-like tactics, however, with their foreboding clouds of incursions on right to zealous and independent representation by counsel of choice, and prosecutorial dirty tricks like fake cases and improper entrapments, have always stayed with me as deep concerns and reminders of how fragile our balanced criminal justice process is, and how easy it is to tip it over.

Another case saga of that period is instructive. In *Matter of Dondi*, the prosecuted party switched his defense back and forth between civil and criminal forums with differing procedural strategies. As a result, the indicted attorney, accused of bribing police officers in order to obtain testimony favorable to clients in civil cases, ran a crazy-quilt procedural race to different courtrooms that eventually had to be sorted out by this Court.

The Majority opinion by then-Judge Cooke granted a writ of prohibition. It was a 4 to 3 decision. At the time, in my role as Clerk and Counsel to the Court, I privately agreed with the Majority – largely based on my academic background and Practice Commentaries publications in the criminal procedure area, and also based on my personal experience in the *Mackell* case. Frankly, I so intensely disliked the odious brand of justice that seemed to be emanating from the Special Prosecutor’s tactics, that I saw a need for him and his tactics to be stopped – by any means available. That view might warrant some personal recrimination, as a reflection of my own knee-jerk version of ends justifying means. During my review and work for this Lecture, I came away still convinced that the Majority was right. I must, however, again acknowledge the weighty reasons expressed in the Breitel-Jones dissent in that case that legitimate process was possibly being distorted and manipulated, in part, to overcome or neutralize the Special

Prosecutor's first-strike abuses. *Mackell* and *Dondi*, among the blizzard of Nadjari cases grinding through the courts during that era, prove to me once again, as described by Chief Judge Cardozo in the *Nature of the Judicial Process*, how hard and how close these cases and this justice business can be.

A significant afterthought in Judge Cooke's majority opinion is: "By this determination we do not free Dondi. Rather, his prosecution for the crimes charged, either under the present indictment or any superseding indictments, should be undertaken by the District Attorney of Queens County" (40 NY2d 8 [1976], at 12). In other words, the Court underscored the value of letting the regular, measured, time-tested processes, with all their known warts, work their way through and around issues.

Indeed, New York jurisprudence reflects the evolution of another nuance in this area. Seven years after *Dondi*, Judge Jones joined the majority opinion for 5 Judges, with two recusals, in *Matter of Schumer v. Holtzman*, which stated: "[The D.A. and Spec. Pros.] argue that prohibition should not be available to prevent the investigation before it even starts. The short answer to that contention is that we are not stopping the District Attorney from pursuing her duties. She or her subordinates may exercise all the powers of her office to investigate and, if the evidence warrants it, to prosecute petitioner [then-Assemblyman Charles Schumer] or those involved with him. . . . [Prohibition will] lie to void an *ultra vires* appointment by the District Attorney (60 NY2d 46 [1983], at 54) * * * The embarrassment of respondent Holtzman or the fact that she may be accused of a vendetta because of prior political differences [with Schumer] are considerations which she must weigh in either proceeding with the matter herself or moving for the judicial appointment of a special prosecutor" (at 55-56). In other words, fulfill the elected responsibility and be accountable for it. That is a very good and simple rule, as I see it, and stopping a Special Prosecutor from even starting up sure helped then-Assemblyman Schumer's career by keeping his record and reputation clean, thanks also in part to the smart advocacy of his outstanding lawyer, my friend and former colleague in other pursuits, the late Arthur Liman.

The consequences of the Nadjari blizzard of public broadsides and troublesome cases (and I have barely scratched the surface with my selected illustrations) demonstrate the preferred imperative: trust should be invested in the regularized, tested processes, entities and institutions to maintain and develop respect for and confidence in them, not disrespect and cynicism by diversion and superseder. By the time Nadjari was "fired" by Governor Carey after the *Mackell* case debacle, and many others, with the eventual and needed acquiescence of the New York State's Attorney General Louis Lefkowitz (a different check and balance mechanism), the Special Prosecutor's office had done a lot of damage to individuals, and to the torn tapestry of the law [it indicted 296 people on various accusations of corruption. Some guilty verdicts were obtained against low-level government officials; one guilty verdict against a local District Attorney (Thomas Mackell) was eventually overturned and all charges dismissed; at least 500 investigations

were underway.] (An Abrupt Exit for the Superprosecutor, *Time Magazine* Article Archive [Jan. 5, 1976]). Despite a scant record of successful prosecutions, the annual budget of that exceedingly privileged Office averaged about \$2 million (Kurlander and Friedlander, A Symposium on Special Prosecutions and the Role of the Independent Counsel: Perilous Executive Power – Perspective on the Special Prosecutors in New York, 16 Hofstra L. Rev. 35, at 53-54 [1987]).

The wreckage left behind in the wake of this prosecutorial hurricane was enormous: lives and reputations were wrongly ruined; regularized and legitimate criminal processes, including innocent judicial officers and the judicial system itself, were scarred with cynical suspicion; and some corruption intended to be rooted out, instead, festered, with a nefarious new form of official mischief fostered. That is one lousy legacy!

Ironically, after Governor Carey ousted Nadjari, the Special Prosecutor audaciously and publicly suggested that some of Governor Carey's appointments were also being investigated. Nadjari even asserted that he fell out of political favor because he was getting too close to the hard core of corruption – high level Democratic judges and public officials. He even tried to subpoena the Governor before a Grand Jury, as a press and media stunt to hold onto his waning power. His desperation tactics thankfully failed. In an effort to clear the air, Governor Carey ironically appointed a successor Special Prosecutor, of all things, to investigate the allegations made by Nadjari. No substantiation was found. The Assembly also investigated the Nadjari Office and concluded it was out of control. Later, Governor Cuomo tried to reform the whole process with a comprehensive review and a regularized regime, with direct-line accountability. Unfortunately, it never fully materialized with any legislative *imprimatur*.

The graphic history lesson of the 1970's with the New York laboratory of its Special Prosecutor experience, sadly, did not prevent some similar mistakes – some might say worse ones - from recurring with some of the experiences of Federal Independent Counsels of the '80s, and '90s. Our inability to learn from past mistakes condemned us to suffer the same mistakes anew, as George Santayana warned, by my paraphrase.

History is studded with some bad Special Prosecutor analogies – e.g., the French Reign of Terror and Revolution; the British Star Chamber; the Spanish Inquisition; Senator Joseph McCarthy's House Unamerican Activities Committee. On the other hand, I note some really good Special Prosecutor prototypes of integrity and effectiveness: – e.g. the N.Y.S. Office of Special Prosecutor for Nursing Homes, my friend and jurisprudential trailblazer in that field, Charles "Joe" Hynes, now five times elected District Attorney of Brooklyn; Gov. Dewey and his groundbreaking prosecution

of racketeers like Lucky Luciano in New York County with the help of two young assistant prosecutors who went on to become Chief Judges, Stanley H. Fuld and Charles D. Breitel; the Judge Seabury Commission chasing Judge Joseph Crater and Mayor Jimmy Walker in corruption of the 1930s; Archibald Cox.

A lesson I would draw from these few comparisons is that the Special Prosecutor Paradigm ought to be the rarity, reserved for truly exceptional situations, when a crisis renders ordinary process and officers powerless to act – totally unavailable and inoperable - *functus officio* - in fact or in effect. Let regular process run its course, even if bumpy at times. Appointing entities should, first and persistently, search to find any alternative, other than a Special Prosecutor; and even when an alternative is found, go back and try yet another truly Jonesian touch of genius, a *deus ex machina* that keeps the crisis in house, so to speak. This device is found in *Morgenthau vs. Cooke* with its famous FN 3 in the *Per Curiam Opinion*, applying the Rule of Necessity that allowed the Court to rule on its own powers.

I cannot resist sharing with you one of my favorite recollections from my Clerk years. It revolves around that case. The Manhattan DA Robert Morgenthau had sued the Chief Judge, Lawrence Cooke. This Court did not punt, vouch in or otherwise avoid its duty in that extraordinary case. It acted – and did it ever! That Rule of Necessity allowed the Court to rule on some of its own administrative – consultative – approval powers under the State Constitution, as a check and balance restraint against unilateral Chief Judge rule and policy-making powers for the management of the Unified Court System. Remarkably, the six remaining Associate Judges ruled in favor of their own administrative role and function. They decided that the then-Chief Judge had exceeded his authority because he did not consult and gain their approval on a judge-assignment policy and rule that he had promulgated. In one of my more memorable functions as Clerk of the Court, I had the unique privilege (gulp) of leaving the Conference Room to inform the Chief Judge in his Chambers across the hall that his Colleagues had just unanimously ruled against him on the ground that **He** had acted unconstitutionally. Try to imagine that private exchange! The case is historically and precedentially important with respect to Judicial Branch check and balance governance, of course, but it is the Rule of Necessity aspect, found in of all places – a footnote - that allowed the permanent Court to rule on its own powers, rather than by some substitute entity or vouched-in Justices. And it was Judge Jones who engineered the idea and footnote as a solution for how the permanent Court could retain the case and rule on that issue, despite the manifest conflict.

In another of Judge Jones' extraordinary exhibitions of Institution First (the subordination of Ego to the sublimation of Institution), I recall the case of *People vs. Warner Lambert* in 1980, also when I was Clerk of the Court. Two Judges were recused, and the remaining five split 3-2 in favor of sustaining an indictment against corporate defendants in a criminal prosecution for manslaughter. The State Constitution requires a

minimum quorum of 5 Judges to hear a case, and a separate additional requirement of 4 Judges to rule one way or the other. No one of the five Judges could find a justifiable way to budge, so the case had to be set down for reargument, with 2 Justices of the Appellate Division, selected by the Court itself, vouched in to participate. That made a full complement of 7 Judges. At Conference after reargument, the two vouched - in Judges voted with the former minority of two Court of Appeal Judges. That made 4 votes for throwing out the indictment. Judge Jones who had written the original draft (internal only) opinion for the three Judges voting to sustain it, immediately offered and strongly recommended abandoning the majority-turned-minority position. His rationale: the greater Institutional interest, called for unanimity in this unusual circumstance, especially since the very significant precedent would otherwise ironically be established by and comprise only a minority number of the permanent members of the Court. He further explained: the reliability and stability of the rulings of this Court of last resort would otherwise be placed at risk and questioned in renewed challenges. Judge Jones instinctively saw the higher value and purpose in having the Court speak with only one definitive voice in this extraordinary circumstance, readily sacrificing the strongly and personally held belief that he and two other members of the permanent Court had previously believed to be the correct outcome. In an exclamation recalled from my early classical education – *Mirabile dictu!* – the unanimous signed opinion for the Court is by no other than Hugh R. Jones, J. That evolution is a transcendent lesson for all time, of the class of this great Jurist and his dedication to a principle higher than himself. The simple toast used at dinner by the Judges of Court every night in session “To the Court” was truly honored and given life.

Returning to my main theme, I acknowledge a part of my own judicial reputation, for better or worse as they say, that includes a strong belief in the avoidance of absolutes – so did Judge Jones, so I am in very good company. Because I do not want my effort today to be understood as urging total avoidance of the Special Prosecutor Paradigm, I need to supply some semblance of balance, for the rare times that the device may be unavoidably needed. Indeed, my “caveats” are designed mainly to raise a cautionary bright orange flag. My effort might serve to alert appointing entities or individuals, and their key advisors (*e.g.* any President, Attorneys General US or NYS, Governors, or the like) to the dangers of using the canon (pun intended) of Special Prosecutor. Unfortunately in my view, an almost knee-jerk invocation seems to be a style too much evident and at play in our modern political landscape and culture, though the Federal Independent counsel statute was allowed to lapse. In any event, the use of this Special Prosecutor Model tends to generate more hype and heat than is appropriate to the deliberative, careful handling of public accusations of wrongdoing. It is result – oriented and result - driven which is at odds with the pursuit of neutral justice, wherever that may lead.

In that connection, I offer also a word here about future mutations - as something to watch for, on a parallel track or offshoot of some of these notions and concerns about Special Prosecutors. We are witnessing a modern offshoot and phenomenon, a new wave

of the exercise of virtually unfettered powers, in the form of Federal Monitors supervising, and even seeming to direct, the actions of corporate Boards of Directors of public companies. These monitors are appointed or recommended by U.S. Attorneys or the U.S. Attorney General or powerful regulatory agencies. Some monitors in their most recent incarnation are accompanied, actually or in spirit by “their” U.S. Attorney, to Boardroom meetings and deliberations. Confidential reports and documents are exchanged among these “uber-Board members,” creating troublesome layers of different non-transparency and personal conflicts of interest. These newfangled public officials oversee corporate activities with an “Attention must be paid,” attitude, far more effective than Willy Loman’s woeful wail in Arthur Miller’s classic *Death of a Salesman*. What actually happens in this new dynamic is a substitution of authority, with unfettered, intimidating, and unilateral “suggestions” taken as directives. The Monitors to Boards replace the independent fiduciary responsibilities of the Boards to their shareholders. These situations, as publicly reported (the ones we know about), seem to be growing, and are sometimes based, not on wrongdoing or violations of deferred prosecution agreements. They seem instead to slip over into ordinary or grey business activities, or personal interests of the overseers. They can relate to close-call, marginal differing business judgments or even second guessings. What, I ask rhetorically, is going on here, and where is this stuff headed? Is this a trend, and is it justifiable, prudent or smart? I have considerable doubts and concerns - as you can sense by how I frame the questions I pose.

A fascinating scenario is described in a recent *Wall Street Journal* article on (p. B1 September 23-24) dealing with the ouster of a CEO and a Corporate General Counsel, essentially at the overnight direction of the retired Federal Judge serving as Monitor, with the apparent support of the New Jersey U.S. Attorney. The Board of Directors did as it was told – immediately. Maybe these leadership personnel changes were the right ultimate decisions. But is that the right way for them to be made? The precedent as to process, and the question for down the road, however, is this: Is this a Son of the Special Prosecutor? We shall have to wait and see. But let us either beware, or be aware, because this modality, this so-called cure could also turn out to be a worse beast than whatever disease is generating this newest and growing phenomenon.

Let me now return to another prescient and I think helpful observation by Justice Scalia in his *Morrison* dissent: (at 713-714) “Nothing is so politically effective as the ability to charge that one’s opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, ‘crooks.’ And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. * * * The [Ethics in Government] statute’s highly visible procedures assure, moreover, that, unlike most investigations, these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations. That they could not remotely be described as merely the application of ‘normal’ investigatory and prosecutory

standards is demonstrated by * * * the following facts: Congress appropriates approximately \$50 million annually for general legal activities, salaries, and expenses of the Criminal Division of the Department of Justice * * * By comparison, between May, 1986, and August, 1987, four independent counsel (not all of whom were operating for that entire period of time) spent almost \$5 million (one-tenth of the amount annually appropriated to the entire Criminal Division), spending almost \$1 million in the month of August, 1987, alone. * * * For fiscal year 1989, the Department of Justice has requested \$52 million for the entire Criminal Division * * * and \$7 million to support the activities of independent counsel.”

Those raw numbers are stunning and the bottom-line political and personal impact should be disturbing to any studious observer. The time and money wasted – relatively - and reputations ruined or damaged in many of these investigations and prosecutions present a real, modern-life spectacle, reminiscent of Charles Dickens’ infamous *Bleak House* description of justice at Chancery Court: “Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why (at 4) * * * To see everything going on so smoothly, and to think of the roughness of the suitors’ lives and deaths; to see all that full dress and ceremony, and to think of the waste, and want, and beggared misery it represented; to consider that, while the sickness of hope deferred was raging in so many hearts, this polite show went calmly on from day to day, and year to year, in such good order and composure; to behold the Lord Chancellor, and the whole array of practitioners under him . . . as if nobody had ever heard that all over England the name in which they were assembled was a bitter jest (at 320).”

My theme and concern have summoned for me the spectacles of Dickens in *Bleak House*, and Franz Kafka in *The Trial*. Why? Well, I try to imagine myself or a client or any good citizen caught up and chewed out in pieces from some seemingly endless special prosecution, either as a witness or worse, a target. The process of pursuing justice becomes so distorted and “spectacularized.” Literary references and actual experience fairly depict the psychological trauma involved. In fact, I recently read “American Prometheus, The Triumph and Tragedy of J. Robert Oppenheimer,” by Kai Bird and Martin J. Sherwin. It describes the “veritable kangaroo court” in which “the head judge [of the Atomic Energy Commission] accepted the prosecutor’s lead” to destroy Dr. Oppenheimer’s national security clearance and reputation as an American. That recent Pulitzer Prize biography describes painstakingly a relatively modern-day horror story of what could be a parody of the Paradigm, I severely critique today. Ah, but there is the rub for we are witnessing not a parody, but a harsh reality and real history – in both

Oppenheimer's case, and in too many of the myriad Special Prosecutor scenarios, lately and throughout recent history.

Notably, in *Bleak House*, it was the "regularized process" that had gotten so entangled. A good aspect of our regular systems is that they seem to enjoy, for the most part, a self-correction mechanism to prevent the whole legal system from total collapse or dysfunction. Indeed, Justice Scalia was wrong (happily so, I am sure) in his further dire prediction in *Morrison*, that Congress would never let the Ethics in Government Act lapse. In 1999, Congress did that very thing and let the Independent Counsel authorization expire. Therefore, the imperfections that inhere in the human agents who operate our system of governance that occasionally allow faults to seep into our institutional processes, also function to resuscitate the primary virtues, by acknowledging error and correcting it – another marvelous exertion of check and balances and another borrowed (moral lesson) of the common law decision process.

The laboratory of the very bad New York State Nadjari experience should have been a stop – in-your-tracks red flag, or at least bright orange caution light to the Feds, and especially to President Clinton, when he opened the Ken Starr Independent Counsel Whitewater channel (pun intended). In a recent September 18 *New Yorker* article by Daniel Remnick p. 42, at 66, President Clinton told the author that the Special Prosecutor decision and appointment was "the worst decision of his Presidency". I suppose this personal appraisal was made not just because of the personal hell it unleashed on him and the country, but maybe also because of a belated and anguished historical awareness of the massive distractions from elementary governance and from other enormously pressing issues of the day that that Independent Counsel investigation and period caused. When those dam (DAM) gates were opened, few could have envisioned the unintended tributaries of investigation it cut into the land and through many lives. Again, honest history will tell, in due time and course.

At this point, I feel the need to inject a cautionary comment about the media role in these situations. Often media beat the drum towards special prosecutor appointments, investing their own interest in the outcomes of recurring "scandals," and then "collaborating" with the appointed Javert in an inimical and conflicted way, for example, by accepting and publishing unauthorized leaks. This is yet another of the great dangers of the Fourth Estate promoting the Special Prosecutor opportunity, with their own journalistic agenda and facile formulation of ends justifying means. This manifestation, when it occurs, distorts process and creates other bad unintended consequences, e.g., dilution, ultimately, of First Amendment free press protections because the abuses tend to breed other new abuses, while justifying questionable actions as informing the public. Polonius gives us another Shakespearean admonition about the human condition in this regard: "By pious actions we do sugar over the devil himself."

Just because the lore of history shows that the Government got Al Capone on IRS charges, when they couldn't prove any of the substantive mob stuff, doesn't warrant Modern Day Javerts and other Untouchables, being pumped up by the press to go after and get the really "Bad Guys," (Jean Valjeans whoever they happen to be at a given historical moment) by questionable or indirect methods, or by leaks just to weaken or destroy the "bad guys" and their reputations - when a provable crime in a court of law happens to be unavailable.

While I'm on this press/media beat, so to speak, I think we might agree to deplore the leaks and maybe even the tabloid-driven perp walks as unwholesome – even possibly unethical. Personally, I don't even like press conferences conducted in advance of and on indictment announcements because they seem to me to be prejudicial enterprises. These practices are employed really to gain an improper edge, though the public's right to know is always trotted out as the justification. They are a modern day exhibitionism – a latter-day *Circus Maximus* – pure and simple. The media plays the role of whipping up largely uninformed public fascination. It produces a fevered atmosphere of Frontier-type justice. Folks are encouraged (enticed) to revel unthinkingly in tabloidal gossip, in extreme and unfounded inferences, and in utter speculations. Individuals are hung out to dry, with a smug assumption that reliable, credible, relevant and appropriate facts and evidence, if any, can come later – long after ruination of lives and reputations, to say nothing of the pocketbooks being emptied to cover costly defenses against deep-pocket, virtually unlimited prosecutorial resources. Is this too dismal a portrayal? I stand ever ready to be cheered up with a prettier, more reassuring picture.

As a fantasy counterpoint to this dark picture, for example, I ask you to imagine with me for a moment, a Special Prosecutor standing up shortly after appointment and after some preliminary work, before a bank of microphones, and declaring humbly and after such a responsible look-see: "There's no case here. We are now closed for business!" That unheard of or rarely seen fantasy would, of course, take real courage and power, contrasted to the hubristic puffing that goes on in press settings, implying the typical "*J'Accuse*." By the way, such a fantasy announcement, if it were ever to occur, would probably be met by a media-public "sturm und drang" of unfulfilled expectations, and would be placed in three or four lines on the obituary pages; the accusatory blast, of course, would be placed on a "Hear Ye, Hear Ye, Read All About It" page one headline - followed by chattering bobbleheads pontificating over at least a 72 hour news cable cycle.

To support this personal fulmination, as not entirely unrealistic, let me remind ourselves of the still quite vivid and recent clamorings outside the Washington, DC Courthouse, as certain targets of interest were repeatedly paraded into and out of Grand Jury deliberations in pursuit of a national security leaker's name – recently revealed as known all along by the Special Counsel. To be sure, his mandate also included an investigation of a potential high level obstruction of justice concern.

While the media's own dissatisfaction with some of Special Counsel Fitzgerald's actions in pursuing and jailing journalists, and it may have its own agenda as to him and his future work, the recent revelations cannot have framed the future issue any more dramatically than by the journalistic lead in *The New York Times* story on September 2, 2006, "Leak Revelation Leaves Questions." The story lead-in began:

"An enduring mystery of the C.I.A. leak case has been solved in recent days, but with a new twist: Patrick J. Fitzgerald, the prosecutor, knew the identity of the leaker from his very first day in the special counsel's chair, but kept the inquiry open for nearly two more years before indicting I. Lewis Libby Jr., vice President Dick Cheney's former chief of staff, on obstruction charges.

Now, the question of whether Mr. Fitzgerald properly exercised his prosecutorial discretion in continuing to pursue possible wrongdoing in the case has become the subject of rich debate on editorial pages and in legal and political circles."

We will at some point, I suppose, hear the rationalization, relevant theory and evidence, if any, for why this over-the-top scenario has been allowed to be played out as it has before the world and in the federal courts, over these now several years. My cogitation has become very skeptical. Was the Deputy Attorney General, the Chicago U.S. Attorney, a public official of impeccable reputation, who was directed to serve as a kind of separate Special Counsel within the Justice Department for this particular matter, seduced by the circumstances or justified in these various actions? Is this yet another Special Prosecutor mutation? Will the public spectacle - to the extent this Special Prosecutor fed into it - be rationalized, and the obstruction indictment of a high Executive Branch public official, who was (now we know) not the initial source of the so-called CIA operative leak, be upheld? Was the penumbral crime, obstruction - (it could be conspiracy, perjury, official misconduct, or a host and variety of others that always orbit a core crime investigation, if there ever was one) - just another of the available pressure points and mechanisms in the powerful prosecutorial playbook? Sometimes these collateral pursuits are justified and legitimate, to be sure. But when they become the staple designed to reach a desired or predetermined result, that causes me again to ask: Is this cure also worse than the suspected disease? History may tell, but you can gauge my answer by my queries and this mischievous quip: It has been my experience that those whom the gods will destroy, they first make foolish at press conferences. In the instant situation, the insistence at the Fitzgerald-Libby indictment press announcement and extravaganza, where "process" was trumpeted as the preeminent value and trump card - rings a bit hollow in my ears and judgment in light of the most recent revelation. It sounds a lot like ends justifying questionable means, all over again.

My personal and professional experiences, and my academic study of the Special Prosecutor Model, thus, lead me to a very wary and grudging acceptance of the methodology, as something rarely to be employed and tolerated. Countervailing checks and balances must always be embedded in the exceptional investiture of such virtually unbridled power.

As a windup, I do not think it is too far a stretch to liken the Special Prosecutors to a Runaway Grand Jury – at least it has the potentiality to operate in somewhat like fashion. What I mean by that strong imagery is that they both presume to be unconstrained by the boundaries of ordinary and prescribed rules. They are often puffed up or blinded by their own purity of purpose and vision of the idealized end result. Their common thread may be described as a self-righteous “I alone know best” attitude. Fortunately, sometimes later – often too late, however – the ultimate guardian of fairness and justice, the Judicial Branch, may finally act with the neutral oversight to rein in renegade operations. Belated corrections, however, are like an apology in the back of a newspaper, weeks after a page one headline story. Tell Dr. Oppenheimer, for example, that his eventual redemption with a Medal of Honor from his country made up for decades of disgrace and excommunication. Latter-day efforts, apologies and recriminations do little more good than Lady Macbeth’s repeated hand-scrubbing in her unsuccessful effort to erase the spots and stains of her Macbethian-Machiavellian machinations.

For a summary of our exercise and time together today, I would like to try to gather a series of lessons, or admonitions (some might say, lamentations):

Consider:

- The inherent dangers of unaccountable power. Tacitus taught: “The lust for power is ancient and ingrained in the human soul.”

Consider:

- The easy-out tendency to substitute the Special Prosecutor modality for regularized process and institutional officers, with defined terms of office and accountability.

Consider:

- The “atrophy” and diminishment of respect and real power, actually and perceptually, for regular processes, by investing a superseding authority with unbridled power.

Consider:

- Enormous diversions and disproportionate re-allocation of resources, and loss of the currency of the realm: integrity – the trust, confidence and respect of the People, breeding cynicism and frustration.

Consider:

- The expectations of appointing agents and media-driven populist-desired results, akin to a John the Baptist’s “head on a platter” syndrome.

Consider:

- The perverse guilty ‘till proven otherwise syndrome.

Consider:

- Fallible human nature, at its most essential, which must be balanced and checked especially with respect to those to whom such enormous, unfettered power would be bestowed.

Consider:

- Hubris among the self-righteous – a fatal flaw, appreciated nicely in a dramatic Shakespearean setting, as when Cassius speaks of Brutus and Julius Caesar:

“Why, man, he doth bstride the narrow world,
Like a Colossus, and we petty men,

Walk under his huge legs, and peep about

Upon what meat doth this our Caesar feed,
that he is grown so great.”

Consider:

- Portia’s warning “Thou shalt have justice, more than thou desirest” – the reminder to Shylock and all those demanding a strict “pound of flesh.”

Consider:

- J. Scalia's caution against: "*Fiat justitia, ruat coelum*. Let justice be done, though the heavens may fall." The warning about extreme, disproportionate, unmeasured and inhumane demands playing to a mob psyche.

Consider:

- The Untouchables portrayals of an Eliot Ness, Gary Cooper - Clean up Dodge City melodramas that represent over-simplifications of complex and nuanced problems that instead require even-handed and level-headed fairness and justice.

Consider:

- Opponents who fear to criticize, and the extreme misuse of people and process, as with my student job interview story. Embedded or implicit here is the innate, human desire for fame, glory and advancement.

* * *

Well, consider this, too, dear audience: I thank you for your patience and attention to my effort in this extraordinary venue to celebrate Judge Jones. Together, we extend our crisp salute to the individual whose spirit and memory brought us together today – The Honorable Hugh R. Jones - a gentleman, scholar and jurist in the finest traditions of this fabulous Institution. He brought – and still brings I hope through my constructive cogitations, modest imitations, lovely reminiscences, and yes candid criticisms – great credit and honor to this Institution and its decision-making process, both of which he relished, loved and served so joyfully, and with such zest and distinction. God Bless Him in Revered Memory, and God Bless the work of this Court.

Good afternoon, and God Bless You All, too.