THE COURT
Legacy

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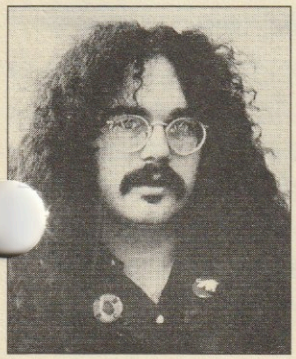
The Keith Case

By Samuel C. Damren

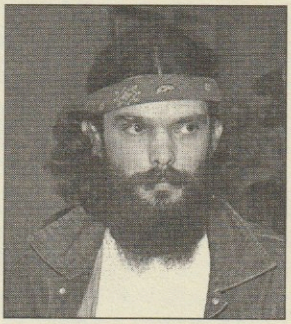
On January 25, 1971, United States District Court Judge Damon J. Keith issued an opinion in what later became known as the "Keith Case." The opinion rejected Attorney General John N. Mitchell's assertion that the Executive Branch had the inherent right to conduct warrantless electronic surveillance on domestic groups that posed a threat to national security. The decision achieved landmark status when the United States Supreme Court unanimously affirmed the decision on June 19, 1972.

The affirmance of the Keith Case caused the government to dismiss a conspiracy case arising out of the September 29, 1968 dynamite bombing of a Central Intelligence Agency ("CIA") recruitment office located in Ann Arbor, Michigan. No one was injured in the blast. According to Federal Bureau of Investigation ("FBI") expert analysis, the 12" by 7" wide by 6" deep crater in the sidewalk outside of the CIA recruitment office was caused by an explosion of "straight dynamite." The bombing was one of eight anti-establishment bombings that had occurred in the Detroit area at the time. A sealed indictment was returned by a grand jury on October 7, 1969. The named defendants were John Sinclair, Laurence Robert "Pun" Plamondon, and John "Jack" Waterhouse Forest.



John Sinclair, 1969

The defendants were all members of the radical White Panther Party. Sinclair was the Chairman of the party, Plamondon was the Minister of Defense, and Forrest was Deputy Minister of Education for Detroit.



Robert Plamondon, 1971

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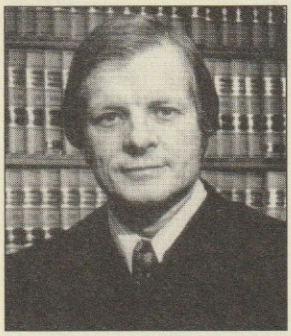
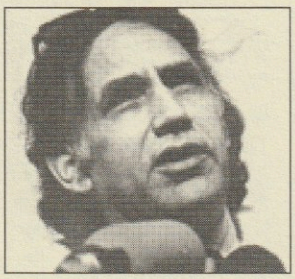


Judge Ralph B. Guy

The government attorneys involved in the prosecution were United States Attorney Ralph B. Guy, and Assistant United States Attorneys J. Kenneth Lowrie and John H. Hausner. In 1976, Guy was appointed to the United States District Court for the Eastern District of Michigan. He was appointed to the United States Court of Appeals for the Sixth Circuit in 1983. Defendants Sinclair and Plamondon were represented by Leonard I. Weinglass and William Kunstler, who had previously represented radical defendants in the infamous chaotic trial of the Chicago 8 before Judge Julius Hoffman. Hugh M. Davis, a 27 year old lawyer with the Detroit branch of the National Lawyers Guild, represented Forrest.



William Kunstler

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THE COURT LEGACY

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The case was originally assigned to United District Court Judge Talbot Smith, but was randomly reassigned to Judge Keith when Smith recused himself for personal reasons. Upon learning that his good friend Damon Keith had been assigned to preside over this highly contentious litigation between the "law and order" Justice Department and the leaders of the anti-establishment radicals, E. Donald Shapiro, the director of the Practicing Law Institute in New York, wrote a short note to Judge Keith which began "(A)ren't you the lucky guy? Good luck!"[1]

Judge Damon J. Keith

Judge Keith was appointed to the federal bench of the Eastern District of Michigan in 1967. At the time, he was one of only a handful of African American judges in the federal judiciary. A graduate of Howard University Law School, Judge Keith began his legal career in private practice in 1950. In 1977, he was appointed to the United States Court of Appeals f the Sixth Circuit. During his distinguished career on the bench, Judge Keith was appointed by Chief Justice William Rehnquist of the United States Supreme Court in 1987 to serve as the National Chairman of the Judicial Conference Committee on the Bicentennial of the Constitution.[2] In 1969, the promise of so illustrious a career was only a possibility.

As a relatively young jurist, Judge Keith had presided over politically volatile cases before, including the Pontiac desegregation case in *Davis* v *School District of Pontiac.*[3] However, none of his prior experience portended the national exposure presented by *United States* v *Sinclair.*[4] Indeed, none of the principals in the case, Judge, lawyers and defendants alike, could have foretold the true extent of the national exposure the case would ultimately secure; because, when the case began, not one of the principals, including the United States Attorney and his assistants, knew that the FBI had been secretly monitoring the defendants' phone conversations for months.

As was his habit, Judge Keith scheduled an early pretrial conference for the lawyers to get together prior to the development of any litigation driven acrimony. Judge Keith served coffee and warm buns. In this uncontentious setting, the participants first discussed the case. To the prosecutors, it was a "bricks and mortar" case since the prosecution was based on tangible damage to a building operated by an agency of the United States government. To the defense, it was a case of political reprisal that threatened the rights of every American. Judge Keith did not want a repeat of the antics that confounded the Chicago prosecution where the defendants staged inflammatory outbursts of politically tagged content during the proceedings and where the court, in response, ordered the defendants gagged and physically restrained. On that, he was clear.

Following this conference, the defense launched a series of motions emblematic of the times. The first defense motion asked Judge Keith to require the government's main witness, David J. Valler, to submit to a psychiatric examination. At the time, Valler was serving a 7-10 year sentence for the unlawful possession of marijuana and a 2-5 year sentence based on a guilty plea to a state bombing offense. Valler had admitted to supplying the explosives for the Ann Arbor blast and was identified in the media as the bomber in other Detroit area attacks. He never denied these accusations. Valler was also described in media accounts as a dilettante radical who had taken more than 300 "trips" on LSD. According to the defense, Valler also made statements shortly after the dates of the alleged conspiracy in which he doubted his sanity and was making arrangements to commit himself. He had previously run (without party affiliation) for the Presidency of the United States. In one of the state prosecutions, Valler's defense attorney requested a sanity hearing and the state court had ordered Valler to submit to a forensic examination.

In a series of rulings issued in early December of 1970, Judge Keith denied the defense motion to require Valler to submit to a psychiatric examination finding that, although he had the power to do so, the matters that the defense raised concerning Valler's credibility were for the jury to decide and did not relate to his competency as a witness.

WHITE PANTHER MANIFESTO
By John Sinclair, 1968

Not to be confused with any white supremacist or white power groups – quite the contrary. Our program is Cultural Revolution through a total assault on the culture, which makes us use every tool, every energy and any media we can get our collective hands on. We take our program with us everywhere we go and use any means necessary to expose people to it.

Our culture, our art, the music, newspapers, books, posters, our clothing, our homes, the way we walk and talk, the way our hair grows, the way we smoke dope and fuck and eat and sleep – it is all one message, and the message is FREEDOM!

We are the mother country madmen in charge of our own lives and we are taking this freedom to the people of America, in streets, in the ballrooms and teenclubs, in their front rooms watching TV, in their bedrooms reading underground newspapers, or masturbating, or smoking secret dope, in their schools where we come and talk to them or make our music, in their weird gymnasiums – they love it – We represent the only contemporary life-style in America for its kids and it should be known that THESE KIDS ARE READY!

They are ready to move but they don't know how, and all we do is show them that they can get away with it. BE FREE, goddamnit, and fuck them old dudes, is what we tell them, and they can see that we mean it. The only influences we have, the only thing that touches them, is that we are for real. We are FREE. We are a bunch of arrogant motherfuckers and we don't give a damn for any cop or any phony-ass authority control-addict creeps who want to put us down. For the first time in America there is a generation of visionary maniac white motherfucker country dope fiend rock and roll freaks who are ready to get down and kick out the jams – ALL THE JAMS – break everything loose and free everybody from their very real and imaginary prisons – even the chumps and punks and honkies who are always fucking with us. We demand total freedom for everybody! And we will not be stopped until we get it.

We are bad.

There's only two kinds of people on the planet: those who make up the problem and those who make up the solution. WE ARE THE SOLUTION. We have no problems. Everything is free for everybody. Money sucks. Leaders suck. School sucks. The white honkie culture that has been handed to us on a silver platter is meaningless to us! We don't want it! . . .

ROCK AND ROLL music is the spearhead of our attack because it is so effective and so much fun. We have developed organic high-energy guerrilla bands who are infiltrating the popular culture and destroying millions of minds in the process. With our music and our economic genius we plunder the unsuspecting straight world for money and the means to carry out our program, and revolutionize its children at the same time. . . .

We have no illusions. Knowing the power of symbols in the abstract world of Americans we have taken the White Panther as our mark to symbolize our strength and arrogance.

We're bad.

One of the series of defense motions that Judge Keith did grant before the issue of the government's warrantless electronic searches came to the forefront, and a motion that the prosecution did not oppose, concerned the defendants' appearance – more particularly, the length of their hair. It seemed that prison officials had sheared the defendants' shoulder length hair while they were in custody. The defense objected to the prison official's conduct on the grounds that it was inconsistent with the defendants' hippie identity which was essential to present to the jury as part of the defense theory that the defendants were the victims of an establishment conspiracy aimed at stifling political rights. The long haired appearance of the defendants at trial would, of course, be consistent with both the defense and prosecution theory. For the government, their hippie appearance was an indicia of anti-establishment animus. To the defense, it marked the defendants as proponents of the counter-culture movement that the law and order government was bent on crushing.

Sinclair's immediate family attended every public hearing in the case. His father, Jack, wore a suit and tie and his mother, Elsa, wore a conservative dress. Sinclair's wife, Leni, on the other hand, was attired in a t-shirt with the peace sign and was always accompanied by the Sinclair's 3 year old daughter.

Consistent with its theory of establishment conspiracy, the defense in a separate motion requested that Judge Keith dismiss the government's indictment on the grounds that it targeted the defendants' political activities as leaders of the White Panther Party in a manner that violated their First Amendment rights of association and free speech. While premised on the authority of *United States* v *Spock,*[5] in which an indictment and conviction of Dr. Benjamin Spock for conspiring to assist Selective Service registrants in evading military service was reversed on appeal by the United States Court of Appeals for the First Circuit because the government failed to show that Dr. Spock had the specific intent to engage in extra-legal, rather than legitimate, political activity, the motion in the Sinclair case was destined to fail. The government argued that the Sinclair indictment was based on the bombing of a building, an activity not protected by the First Amendment. Judge Keith agreed.

In addition to their motion to disclose electronic surveillance, the defense filed another motion that caught Judge Keith's attention. In this motion, the defense challenged the composition of the jury pool for criminal cases in the Eastern District of Michigan alleging that the defendants, as members of the youthful counter culture, were under-represented by the older jury panel of the court. In support of this motion, the defense called Julian Bond, a former member of the Student Non-Violent Coordinating Committee and then a Georgia state legislator, to testify. Judge Keith had his own questions for Bond. He asked Bond whether, as a black man, he would prefer to be tried by twelve black jurors over the age of forty or by twelve white jurors under twenty-five. Bond testified that the ages of the jurors would be more important to him than their race and that he would rather be tried by twelve white jurors under twenty-five than twelve black jurors over the age of forty.

In support of their motion, the defense also filed affidavits attesting to the fact that, although the population of potential jurors aged 21-29 years in the nine counties that comprised the group from which jurors would be selected to hear a trial in Federal court in Detroit was nearly 18%, the jurors from this age group that were qualified for actual jury service by the court's screening system was only 9%. In addition to Julian Bond, the defense offered other experts on the subject of "young people", including poet Allen Ginsberg, University of Michigan Professor Gerald Kline, and State Representative Jackie Vaughn. Judge Keith was troubled by the disparities, but rejected their motion because, among other reasons, the defense had not demonstrated to his satisfaction that the jury selection process in the Eastern District of Michigan had sufficient time to "reflect" on these disparities and to take appropriate corrective measures.

On October 5, 1970, the defense filed a motion for the disclosure of electronic surveillance. The motion was supported by an affidavit by attorney Kunstler in which he stated that, although he had no knowledge of whether electronic surveillance had been conducted by the government in the *Sinclair* case, he was familiar with prior instances in which the government had conducted illegal surveillance against so-called counter-culture radicals.

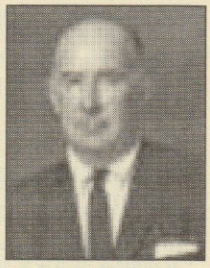
In response to the motion, the prosecution and defense entered into a stipulation. In the stipulation, the prosecution represented to the court that it had no knowledge of any electronic surveillance of the defendants and that the local office of the FBI was also unaware of any electronic surveillance. The United States Attorney's Office also stated that it had asked the Justice Department to conduct an inquiry of the FBI in Washington, D.C. to check its records regarding electronic surveillance of the defendants. The prosecution further stipulated that it would turn over any electronic surveillance that might come to its attention as a result of this inquiry to Judge Keith for inspection.

On December 14, 1970, the government's "bricks and mortar" case suffered its first real set back. In response to the defense/prosecution stipulation, Attorney General Mitchell filed a sworn affidavit with the court stating that:

> Defendant Plamondon has participated in conversations which were overheard by government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of government.

Accompanying this affidavit, sealed records and files were submitted for the review and inspection of the Court *in camera.* Simultaneously, the government filed a motion to dismiss the defendants' request for disclosure of the surveillance evidence. In his affidavit and in the government's brief, the Attorney General certified that public disclosure of the facts concerning surveillance of the defendants would prejudice the national interest, and requested that the Government be notified prior to any decision requiring disclosure of the surveillance so that it could determine whether to proceed with the case. Oral argument on the defendants' motion for disclosure was scheduled for January 14 and 16, 1971.

In his decision granting the defendants' motion to disclose government surveillance, Judge Keith rejected the government's position, known as the "Mitchell Doctrine," which asserted that the Attorney General, as a representative of the Executive Branch, had the inherent constitutional power both to authorize electronic surveillance in "national security" cases without judicial warrant and to unilaterally determine whether a particular circumstance falls within the scope of a "national security" concern.


John N. Mitchell

> The great umbrella of personal rights protected by the Fourth Amendment has unfolded slowly, but very deliberately, throughout our legal history.
>
> . . .
>
> The final buttress to this canopy of Fourth Amendment protected is derived from the [Supreme] Court's declaration that the Fourth Amendment protects a defendant from the evil of the uninvited ear.
>
> . . .
>
> It is to be remembered that the protective sword which is sheathed in the scabbard of Fourth amendment rights, and which insured that these fundamental rights will remain inviolate, is the well-defined rule of exclusion. And, in turn, the cutting edge of the exclusionary rule is the requirement that the Government obtain a search warrant before it can conduct a lawful search and seizure. It is this procedure of obtaining a warrant that inserts the impartial judgment of the Court between the citizen and the Government.[6]

Judge Keith, in words that would ring for decades after his decision, concluded: "We are a country of laws and not of men."

The Keith Case drew a line consistent with the checks and balances in the American political landscape first established by *Marbury* v *Madison,* but continually challenged by succeeding residents of The White House. In the volatile political ferment of the late 60's and early 70's, it was a dramatic and eloquent restatement of these principles. Whether it would stand up on appeal was another matter.

In its appeal, the government sought a writ of mandamus against Judge Keith to require him to release the surveillance tapes of the Sinclair defendants that he had impounded. As a result, Judge Keith found himself a party to the appellate litigation and in need of his own counsel.

William T. Gossett, the lawyer that Judge Keith chose to represent him, was not the first lawyer whose name might have sprung to mind to litigate an appellate issue involving a matter of constitutional exclusionary principles in a criminal case. Gossett was, nevertheless, a prescient selection.

Gossett was a name partner in the Detroit law firm of Dykema, Gossett, Spencer, Goodnow & Trigg. He was a highly regarded corporate lawyer with whom Judge Keith had become acquainted while serving on the board of the Michigan Civil Rights Commission. Gossett was also the 1968 President of the American Bar Association. In that capacity, he had delivered a commencement address at the University of Michigan entitled "The Politics of Dissent," subsequently published in the Michigan Quarterly Review. Judge Keith kept a copy of Gossett's speech in his personal files. For a quintessential member of the establishment, Gossett's encouragement of vigorous dissent in the speech was passionate. In his copy of the commencement address, Judge Keith bracketed Gossett's unswerving support of Senator Fulbright's observation that "(i)n a democracy, dissent is an act of faith." In support of this perspective, Gossett stated:

> That viewpoint is vital to remember against the voice telling you that to dissent is to betray your country; vital to remember against the voice seeking to identify your dissent with a commitment against the United States. To speak according to conscience, consistently and firmly, is the best way for a man to honor the heritage of this nation.[7]

Gossett's presence as an advocate for Judge Keith effectively neutralized any establishment/anti-establishment division that the government might have sought to exploit in its petition for a writ of mandamus against Judge Keith. The petition was denied by the United States Court of Appeals for the Sixth Circuit[8] in a two to one decision.[9] The Government then sought and was granted certeriori by the Supreme Court. Although in retrospect it may seem that the Supreme Court decision affirming the Keith Case almost wrote itself, at the time the result was startling. In an 8-0 opinion,[10] with Justice Rehnquist abstaining because he had been a member of the Justice Department that originally formulated the government's position, the Court not only rejected the Mitchell Doctrine, but entirely stripped away its veneer of legitimacy.

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of 'ordinary crime.' If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.[11]

The Keith Case stands today, as it has for over 30 years, as a beacon to the judiciary to vigilantly guard against attempts by the Executive Branch to secure an "uninvited ear" to the private conversations of citizens, especially when those attempts are premised on an opaque assertion of national security. The opinion honors the heritage of the United States District Court for the Eastern District of Michigan and the independence of the Federal Judiciary.

> As Joseph C. Goulden states in his book, *The Benchwarmers:*
>
> Keith's action … is a prime example of an independent Federal Judge interposing his authority between an executive action and the general citizenry. As the public knows through the various Watergate-released disclosures, the Nixon administration had grandiose schemes for surveillance of domestic "enemies," political and otherwise; warrantless wiretapping of the sort used against [one of the plaintiffs in *Sinclair*] was a key weapon. But Judge Damon Keith, a jurist not answerable to a presidency which likened itself to a "sovereign," had the courage to say "no" …
>
> * * *
>
> The strength of the judiciary is rooted in just such independence as that displayed by Keith.[12] ■

Sources

1. The Damon J. Keith Historical Collection, Archives of Labor & Urban Affairs, Wayne State University.
2. In recognition of Judge Keith's service on the Bicentennial Committee, more than 300 Bill of Rights plaques commemorating the importance of this constitutional anniversary bear his name and adorn the walls of all federal courthouses, law schools throughout the United States and Guam, as well as the FBI Headquarters and the Thurgood Marshall Federal Judiciary Center in Washington, D.C.
3. 309 F. Supp. 734 (E.D. Mich. 1970).
4. 321 F. Supp. 1074 (E.D. Mich. 1971).
5. 416 F. 2d 165 (1st Cir. 1969).
6. 321 F. Supp. at 1077-78 (citations omitted).
7. William T. Gossett, *The Politics of Dissent,* 8 MICH. Q. REV. 263, 264 (1969) in The Damon J. Keith Historical Collection.
8. United States v. United States District Court, 444 F. 2d 651 (6th Cir. 1971).
9. Judge George C. Edwards wrote the majority opinion and was joined by Chief Judge Harvey Phillips. Judge Paul C. Weick dissented.

407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972).

11. 407 U.S. at 320, 92 S. Ct at 2138, 32 L. Ed 2d at 768.
12. J. Goulden, *The Benchwarmers, The Private World of the Powerful Federal Judges,* 351 (1974).

Author's Note

Samuel C. Damren, of Dykema Gossett PLLC, is a practicing attorney and the author of a number of published articles discussing the intersection of jurisprudence with other disciplines. He also serves as a board member for the Board of Trustees of the Historical Society for the United States District Court for the Eastern District of Michigan. From 1978 to 1981, he was an Assistant United States Attorney for the Eastern District of Michigan.

Keith Case: The Participants

By Judy Christie

Ralph B. Guy, Jr., U.S. Attorney

Ralph Guy was born in 1929 and attended University of Michigan, receiving both his A.B. in 1951 and his J.D. in 1953. He was in private practice for a short time and in 1955 he was appointed Assistant Corporation Counsel for the City of Dearborn. He went on to become Corporation Counsel until 1968 when he was appointed Chief Assistant U.S. Attorney by U.S. Attorney James Brickley. He was appointed U.S. Attorney in 1970 in time to oversee the Sinclair case for the government. He remained in that position until 1976 when he was nominated by President Ford and confirmed by the Senate as a United States District Judge for the Eastern District of Michigan. In the district court Judge Guy presided over notable cases including the Young Boys trial for drug trafficking. In 1985 Judge Guy was nominated and confirmed for a seat on the Sixth Circuit Court. He assumed senior status on the court in 1994. Judge Guy currently serves as Chief Judge on the Foreign Intelligence Service Court of Review (FISCOR) which on November 18, 2002, issued an important opinion about the Patriot Act (see *In Re Sealed Case No.02-001 Consolidated with 02-002* which can be found at http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf).

John Sinclair, Defendant

John Sinclair was born in Flint, Michigan in 1941, and attended University of Michigan in Flint, receiving a B.A. in American Literature in 1964.

Courtesy Bentley Historical Library

John and Leni Sinclair

He moved to the Detroit area to study for a masters degree at Wayne State University, married his first wife, Leni, in 1965, became involved in the arts community, founded the Detroit Artists Workshop and managed the MC5, a rock group. During this time he was arrested several time for sale and possession of marijuana. In 1968 Mr. Sinclair moved to Ann Arbor and founded the White Panther Party (later renamed the Rainbow Peoples Party). His sentence in July 1969 of 9-10 years for possession of two marijuana cigarettes drew national attention when John Lennon and Yoko Ono held a huge rally on his behalf on December 10, 1971. Ruling that Michigan's marijuana laws were unconstitutional, the Michigan Supreme Court ordered his release three days later. Meanwhile the U.S. government filed an indictment charging Sinclair, Plamondon and Forrest with conspiracy to bomb a government building. The dismissal of charges against Sinclair and his co-defendants in the federal case allowed him to devote his time again to the arts eventually becoming editor of the *Detroit City Arts Quarterly* and serving on many community boards including the NAACP, the Friends of Belle Isle and the DIA Founders Society. In 1991 Mr. Sinclair and his second wife, Penny, moved to New Orleans where he continued to write poetry and research blues and jazz. They plan to move abroad to Amsterdam this month. Mr. Sinclair has donated his papers, which provide a rich source of the history of the 1960's and 70's, to the Bentley Historical Library at the University of Michigan in Ann Arbor (see http://www.umich.edu/~bhl/bhl/refhome/jls/John.htm).

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John Sinclair, right visited Lawrence Plamondon at his home recently.

Lawrence Robert "Pun" Plamondon, Defendant

Pun Plamondon was born in Traverse City and adopted when he was eighteen months old by the Plamondon family. He had a turbulent childhood, dropping out of school and hitting the road at age seventeen taking odd jobs to support himself. He began to take an interest in political activities when the AFL-CIO hired him to organize farm workers in 1965. He ended up in Detroit in 1967 where he met John Sinclair, became a part of the Detroit Artists Workshop, and moved to Ann Arbor with the group in 1968. Along with Sinclair he co-founded the White Panther Party, serving as Minister of Defense with Sinclair as the Minister of Information. In 1969 Plamondon was indicted for the 1968 bombing of the CIA recruiting office in Ann Arbor along with Sinclair and Forrest. It was the warrantless wiretapping of Plamondon's telephone which was found to be illegal and caused the government to finally drop the charges against him, Sinclair and Forrest. Plamondon's later life remained unsettled because of his alcohol addiction but he finally overcame that after a long struggle. After discovering that his birth parents were American Indians, he became interested in the culture and began to tell Indian legends and stories. He now lives in southwestern Michigan and is writing his autobiography. For more information on Plamondon, refer to the article, "Former 60s Radical Finds Peace" by Pat Shellenbarger in the Grand Rapids Press, September 28, 2003.

John Waterhouse "Jack" Forrest, Defendant

Jack Forrest is the least-known of the three defendants in the case. He was associated with the White Panthers as a party member and was arrested for harboring Pun Plamondon while the latter was a fugitive. He had been convicted and put on probation in 1969 for felonious assault when he threw a brick which struck a police officer who had been following him. He received a five year term for harboring a fugitive and an additional one and a half to two years for violating the terms of his probation

which ran concurrently with the five year sentence. Forrest worked and "organized" in Alaska for over ...enty years where he raised a family. Attorney ...gh Davis says that Mr. Forrest currently resides in Indianapolis and works as an over-the-road trucker and slam poet.

Excerpt from "Poem for Bill Kunstler" by Jack Forrest, September 18, 1995 (online at http://www.echonyc.com/~poets/vol8/forrest.html):

> Bill wasn't a YIPPEE! anymore, he was the BADDEST attorney on the planet then,
> Lenny Weinglass tearing off case law support
> Buck Davis making his points, Bill reading it all into the record.
>
> Later you found a hole in the case, and when the judge made history,
> ruling against the Nixon just-us gang,
> you supporting it up to the supreme court,
> winning eight to zero,
> the prison doors OPENED
> out tumbled the Panthers, the Chicago Eight, the weathermen, the Berigan Bros, shucks
> the prison doors flew open. The Magician.

...eonard Weinglass, Defense Counsel

...onard Weinglass graduated from Yale Law School in 1958. He became nationally recognized beginning in the late 1960's as an advocate for many political dissidents who had run afoul of the law. Mr. Weinglass has served as counsel in notable cases, representing such clients as the Chicago Seven (conspiracy), Anthony Russo (the Pentagon Papers), Jane Fonda (government harassment), Bill and Emily Harris (Hearst kidnaping), Mumia Abu-Jamal (death row inmate in Pennsylvania) and others too numerous to mention. In addition, Mr. Weinglass has traveled extensively throughout the world to investigate political violence and lecture on civil dissent. He has taught criminal trial advocacy and served as co-chair of the international committee of the National Lawyers Guild. Mr. Weinglass maintains a law practice in New York City.

William Kunstler, Defense Counsel

William Kunstler graduated from Columbia ...iversity School of Law in 1948. He became ...lved with the American Civil Liberties Union and various civil rights causes in the 1960's, coming to national attention with his flamboyant representation of the Chicago Seven in their conspiracy trial in 1970. Mr. Kunstler was known for becoming personally involved with his clients and their causes. Some of Mr. Kunstler's other controversial clients included black power activists Bobby Seale and Stokely Carmichael, antiwar protester Daniel Berrigan, some of the prisoners in the 1971 Attica prison riot and Sheikh Omar Rahman, accused of the 1993 World Trade Center bombing. He describes the Sinclair case in his book *My Life as a Radical Lawyer* (Birch Lane Press, 1974) and advances the theory that the Watergate scandal arose from the Supreme Court decision against the government use of warrantless wiretaps. He wrote that he believed that the decision was leaked to President Nixon who then decided to order the wiretaps removed from the Democratic National Headquarters before they were discovered and found to be illegitimate. Mr. Kunstler admits that his theory has not gained wide acceptance. Mr. Kunstler died in September 1995 at the age of 76.

Hugh "Buck" Davis, Defense Counsel

Hugh M. Davis, Jr. ("Buck") was born in 1943, received a B.A. from Hampden-Sydney College in 1965, graduated from Harvard Law School in 1968 and moved to Detroit shortly thereafter as a VISTA Volunteer with the Community Legal Counsel and later as Reginald Heber-Smith Community Lawyer Fellow assigned to Wayne County Neighborhood Legal Services Research Office from 1968 to 1971. At the time of the Sinclair case for which he served as local counsel, Mr. Davis was associated with the National Lawyer's Guild Detroit Chapter Mass Defense Office. He has served on the executive boards of both the National Lawyers Guild and the Michigan Trial Lawyers Association. He has written extensively on civil rights litigation and served as a member of the faculty for continuing legal education seminars in police misconduct and civil rights litigation. Mr. Davis is the co-founder of the firm Constitutional Litigation Associates located in Detroit where he continues his practice in civil rights, discrimination and criminal defense. ■

Author's Note

Judy Christie just retired as the Administative Manager of the Clerks office for the United States District Court for the Eastern District of Michigan. She is also a board member and one of the founders of the Historical Society.

U.S. District Courts and the Federal Judiciary: A Summary

By Russell R. Wheeler and Cynthia Harrison

This is the second in a series of articles about the federal judicial system and the creation of the Eastern and Western District Courts in the State of Michigan. The First article provided a summary of the history of the courts, and the context in which they were established. This article discusses the establishment of the federal judicial system and how the Judiciary Act and the Bill of Rights were developed contemporaneously in the House and Senate.

Establishing the Federal Judicial System

The Constitutional Convention's decisions in 1797 about the national government's court system were few but important. The framers agreed that there would be a separate federal judicial power and that to exercise it there would be a Supreme Court and there could be other federal courts. They specified the jurisdiction those courts could exercise, subject to congressional exceptions. They prescribed the appointment procedure for Supreme Court judges, and they sought to protect all federal judges from reprisals for unpopular decisions: Judges' compensation could not be reduced, and judges could not be removed from office other than by legislative impeachment and conviction.

Putting flesh on this skeleton fell to the First Congress. The same forces that contended over the writing and ratification of the Constitution in 1787 and 1788 sparred in the First Congress in 1789 over the nation's judicial system. Federalists generally supported the Constitution and the policies of President Washington's administration, and they wanted to establish a lower federal judiciary. Anti-Federalists opposed to the Constitution – or at least wanted significant changes in it – and favored at best only a very limited federal judiciary. After the Constitution went into effect in 1789, outright opposition to it diminished quickly. Democratic-Republicans, or "Jeffersonians," emerged as a counter to the Federalists in power.

The Judiciary Act and the Bill of Rights

In many states, supporters of the Constitution persuaded opponents to vote for its ratification by promising to seek amendments to it as soon as the government went into operation. The change most frequently sought was an itemization of rights that would be protected from intrusion by the new national government.

But many Americans also voiced concern of the potential danger of the federal court system authorized by Article III.[1] By one count, 19 of the 103 amendments proposed by the state ratifying conventions called for changes in Article III. Indeed, Anti-Federalists sought limits on Article III for much the same reason they sought a bill of rights (especially those protections relating to judicial procedures): They feared that courts – especially courts of the new and powerful national government – could become instruments of tyranny. Elbridge Gerry, who refused to sign the Constitution, said that his principal objection was "that the judicial department will be oppressive."[2] The star chamber of British legal history lingered in some people's minds, and many more remembered how state courts issued judgments against debtors during the economic turmoil under the Articles of Confederation.[3] Charles Warren identified four main changes that opponents sought in the Constitution's judiciary provisions: guaranteeing civil as well as criminal juries, restricting federal appellate jurisdiction to questions of law, eliminating or radically curtailing congressional authority to establish lower federal courts, and eliminating the authorization for federal diversity jurisdiction.[4]

Many who had supported the Constitution, however, believed a federal court system was necessary but doubted the need for a bill of rights. To them, the Constitution, in Hamilton's famous phrase, "is itself, in every rational sense, and to every useful purpose, a bill of rights."[5] The Constitution as ratified contained specific limitations on the national government (e.g., Article III's provision for criminal jury trials), and in a broader sense, it established an energetic national government, extending over a large republic, that would be capable of protecting people from the oppression of local factions.

Courts would also protect rights. As Chief Justice John Jay later told the grand juries of the Eastern Circuit, "nothing but a strong government of laws irresistibly bearing down [upon] arbitrary power and licentiousness can defend [liberty] against those two formidable enemies."[6] To many Federalists, state courts under the Articles of Confederation had too easily yielded to popular pressures; the Federalists believed that a separate set of federal courts was necessary to achieve "a strong government of laws."

Thus, the First Congress faced these interrelated questions: What provisions should a bill of rights contain? Should Article III's provisions governing federal judicial organization and jurisdiction be altered? How should Article III be implemented? From April to September of 1789, the First Congress addressed them all.

Early in the first session of the House of Representatives, James Madison, the principal architect of the Constitution, put together a proposed bill of rights drawn from state proposals and constitutional provisions. Madison had opposed a bill of rights a year earlier, claiming that "parchment barriers" were no protection against "the encroaching spirit of power,"[7] but he knew the importance of honoring commitments made in the ratification debates. Moreover, he told the House, if a bill of rights is incorporated into the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."[8] Madison guided his proposed amendments through legislative revisions and around colleagues who thought they were unnecessary or unwise, and he eluded other legislators who wanted to add provisions to curtail severely the contemplated federal judicial system.

Meanwhile the Senate quickly took up the organization and jurisdiction of the federal courts. The principal drafters of Senate Bill 1 were three lawyers: Oliver Ellsworth of Connecticut, William Paterson of New Jersey, and Caleb Strong of Massachusetts. Ellsworth and Paterson had served in the Constitutional Convention, and Ellsworth served on the committee of the Continental Congress that heard appeals in prize cases. He had a special appreciation of the role that a federal judiciary, properly constituted, might serve. (Ellsworth and Paterson went on to serve on the U.S. Supreme Court, Ellsworth as Chief Justice.)

On September 24, 1789, Washington signed "An Act to Establish the Federal Courts of the United States" and sent his nominations for the first federal judges to the Senate.[9] On the same day, the House accepted the conference report on the proposed Bill of Rights. The Senate followed suit the next day, and twelve amendments went to the states for ratification. Ten of them became part of the Constitution in 1791.[10] ■

Sources

1. Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 20 (3d ed. 1988) [hereinafter Hart & Wechsler].
2. Quoted in Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 54 (1923).
3. Late eighteenth-century attitudes toward judges and lawyers ran a wide gamut, including strains of decided hostility. They are explored in Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic, ch. 8 (1971).
4. Warren, *supra* note 2, at 56.
5. The Federalist No. 84 (Modern Lib. Ed., 1937).
6. Charge to Grand Juries, *in* 3 The Public Papers and Correspondence of John Jay 387, 395 (H. Johnston ed., 1891).
7. The Federalist No. 48 (Modern Lib. Ed., 1937).
8. *Quoted in* Warren, *supra* note 3, at 115.
9. Act of Sept. 24, 1789, 1 Stat. 73.
10. The eleventh, finally ratified in 1992 as the Twenty-Seventh Amendment, states: "No law, varying the compensation for the services of Senators and Representatives shall take effect, until after the election of Representatives shall have intervened;" the twelfth, dealing with the number of representatives, has never been ratified.

Author's Note

The text of this article is taken from the Federal Judicial Center publication, "Creating the Federal Judicial System," written by Russell R. Wheeler and Cynthia Harrison. The original publication was undertaken in furtherance of the Center's statutory mission to develop and conduct educational programs. The views expressed in the article are those of the authors and not necessarily those of the Federal Judicial Center, however.

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