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Jaworski's Record: A Dissent

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History will not be kind to Leon Jaworski. The question it will ask will not be, Was he an overcautious prosecutor? But rather, Was he a sham?

Leon Jaworski, whose resignation takes effect Oct. 25, was faced with three challenges while special Watergate prosecutor. He rose to none. If the so-called lessons of Watergate are truly to be learned by our generation, then we must scrutinize the nature of those challenges and analyze the reasons behind Mr. Jaworski's retreat in the face of each.

The first of the prosecutorial challenges Mr. Jaworski ducked was on the issue of whether to seek the indictment of Richard M. Nixon while Mr. Nixon was President.

It is the essence of our common-law tradition that a party with a sound factual, but an unclear legal, case can bring his problem to the courts for decisive determination. That there was solid evidence of criminal misconduct by President Nixon in Mr. Jaworski's hands cannot be disputed; the grand jury had named Mr. Nixon an unindicted co-conspirator in the cover-up case.

There was no precedent to prevent the indictment of an incumbent President, and at least some learned authorities indicated that such a course was constitutional. An aggressive special prosecutor in these circumstances would not have hesitated to put the matter to the test—by seeking not co-conspirator status but rather a full-fledged indictment against Mr. Nixon. The matter would then have been tested in the courts.

Instead, Mr. Jaworski arrogated to himself the functions of judge-of-first-instance, court of appeals and supreme court, by deciding that such a step was not legal. And so no indictment naming Mr. Nixon a defendant was issued.

Mr. Jaworski was lucky enough to have been given a second chance, and again failed to seize the opportunity. As soon as Mr. Nixon ceased to be President, even the supposed legal impediments vanished from the case.

There was then nothing in the law books even remotely sufficient to inhibit the prosecutor from seeking an indictment of Mr. Nixon. On the contrary, Mr. Jaworski had the most compelling grounds to support his own proceedings with such a prosecution without further delay.

In the first place, as a prosecutor, indeed as a lawyer, he must have been well aware of the rule that if immunity from prosecution is to be given in the context of criminal proceedings, it is customarily given to the lesser to catch the greater offender —to the accomplice, in order to convict the principal. Mr. Jaworski chose to ignore this rule of practice despite the relative positions of Mr. Nixon and his underlings.

In the second place, and almost of equal weight, was the crying need of the American people—of our own and future generations—to learn at last the whole truth of Watergate.

There cannot be many who would deny that Mr. Nixon's presence in the dock would at least increase the chance that the whole story would finally emerge. Yet even this consideration did not move Mr. Jaworski. Once again he retained his passive stance toward Mr. Nixon.

And then came President Ford's full and unconditional pardon of Mr. Nixon, followed, at the earliest moment decency would allow, by Mr. Jaworski's resignation.

In fact, that resignation is itself the mark of Mr. Jaworski's third great failure. President Ford's pardon is no more sacrosanct than any other executive action (in that it is as subject to challenge in the courts as any other executive act.

As several historians, journalists and lawyers with an eye for precedent have already begun to point out, the pardon is highly suspect. It appears to fall foul of Article II, Section 2, of the Constitution, which prohibits pardons "in cases of impeachment."

Once again, Mr. Jaworski was in a position to have the issue determined in the courts, by indicting Mr. Nixon, waiting for the pardon to be raised in defense, and leaving to the courts the final decision as to its constitutionality.

Once again he failed to test a legal uncertainty that it was his clear office to do. Once again he allowed his own view of the legality of an issue to preclude its determination by the courts.

It is hard to see how Mr. Jaworski could have done less during his tenure. Accordingly, the question we must ask —and if we do not, the historians assuredly will—is, Why did he do no more?

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