

Without Fear or Favor

Merrick Garland's Tragic Failure as Attorney General of the United States



Prosecution 101: The Watergate Paradigm. Garland's failure was not simply cautious delay. It was a craven abdication of his duty. I noted in an earlier essay that the mission, methods, best practices, powers and resources of DOJ remained remarkably consistent the half century since Watergate. (Trump 2.0 has, of course, taken a wrecking ball to DOJ.) Early in my career as a federal prosecutor the event that became known as the "Saturday Night Massacre" initiated the downfall of the president of the United States. On October 20, 1973, Nixon ordered the firing of Archibald Cox, the original Watergate Special Prosecutor, because Cox refused to drop a subpoena for Nixon's White House tapes. Attorney General Elliot Richardson and Deputy AG William Ruckelshaus (both Republicans) refused Nixon's order and immediately resigned. Solicitor General Robert Bork, third in line at DOJ, carried out Nixon's order to fire Cox. This act of raw presidential power led ten days later to the bipartisan impeachment process against Nixon. On November 1, Leon Jaworski was appointed the new special prosecutor.

I know from first-hand experience that high profile public corruption cases are complicated. There are no bodily fluids or other DNA evidence, exploding dye packets (bank robberies), or traditional fingerprint evidence. Proving these cases beyond a reasonable doubt is never certain. A successful prosecution is dependent on electronic surveillance, infiltration of the inner circle of corruption, and

obtaining the cooperation of coconspirators lower down the food chain of participation. They are also document intensive. "Follow the money" and "connecting the dots" are more than catch-phrases.

A successful investigation of a public corruption case also requires the prosecutor to separate wheat from chaff. In these cases, it is possible to become overwhelmed by the shear volume of documents and other evidence. A skilled prosecutor knows how to shape a case while maintaining the integrity of the case. A skilled prosecutor works closely with field investigators (typically the FBI in these cases), utilizes plea deals, electronic surveillance, consensual monitoring, search warrants, and combinations of these tools and techniques. A dedicated federal grand jury is essential. Garland had all these at his disposal and used none of them. To the extent, arguably, he may have employed some, it was sporadic, too little and too late. Instead, Garland outsourced his responsibility to local prosecutors and a congressional committee.

Leon Jaworski succeeded in ferreting out Watergate crimes and successfully prosecuted participants as high up as Nixon's Chief of Staff H. R. Haldeman, AG John Mitchell, and Advisor to the President John Ehrlichman, precisely because he employed the full resources available to him. Many may recall that White House counsel John Dean was prosecuted, sentenced to 8 years in prison, and became a cooperating witness whose testimony brought the Watergate criminals to justice. Congress had two special committees dedicated to Watergate, one in the House, one in the Senate. They played an important bipartisan role, but Jaworski ran the show. Garland on the other hand deferred to the Bipartisan Congressional Committee to control the investigation of January 6 crimes. The Bipartisan Committee had none of the powers of a grand jury. Consequently, Garland's reliance on Congress proved fatal to any effort to hold the suits accountable for planning and funding the January 6 assault on the Capitol.

So, why did Jaworski succeed and Garland fail?

Jaworski convened a dedicated Watergate federal grand jury. Garland did not convene a grand jury dedicated to investigating the suits and planners. Garland's failure to convene a grand jury to investigate the "suits," the planners and funders of January 6, hamstrung any effort to hold the suits accountable. John Scirica was the supervising judge of the Watergate grand jury. This meant that Jaworski and his team had immediate access to a dedicated federal judge to hear its motions for various actions; a judge who could compel appearances, approve immunity, compel immunized witnesses to testify, incarcerate persons for non-compliance with subpoenas, supervise indictments, issue arrest warrants, issue search warrants, and more; all without delay, and with real time consequences.

As a result of Garland's timidity and inaction, the January 6 suits faced none of this. For all its herculean effort and valiant pursuit of the truth, the Congressional Bipartisan Committee ultimately had to rely on Merrick Garland who proved to be a very tardy, unreliable, toothless tiger.