The Right and the Power: The Prosecution of Watergate

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BOOK REVIEWS


Reviewed by Robert S. Hightower\(^2\)

Life is made difficult for the reviewer when an author achieves his goals as well as Mr. Clay has in this estate planning text. The author's purpose, "to stimulate" and provide exposure to the "infinite alternatives and possibilities in estate planning," has been accomplished. In the process Mr. Clay has produced an estate planning "idea book" that should be in the library of every estate planner, whether an attorney, life underwriter, or trust officer.

The textual format begins appropriately enough with the task faced by every practitioner: persuading the client that estate planning is an ongoing process that involves planning for the client's remaining years as well as for others after death. The reader is then introduced to the various estate planning considerations and possibilities, including marital deduction plans, powers of appointment, trusts, buy-sell agreements, life insurance, gifts and charitable bequests. Throughout these sections the author discusses certain aspects of the 1976 Tax Reform Act\(^3\) that require new approaches to estate planning. Three chapters are then devoted to a detailed discussion of the Tax Reform Act, carryover basis rules, and generation-skipping transfers. The author concludes with several extremely useful sections on probating the will, making postmortem tax elections, and filing the required income and estate tax returns.

Although Mr. Clay's work covers all pertinent estate planning topics, he purposely does not provide extensive discussion of any single area. A reader looking for an academic treatment will be disappointed with this work. This reviewer recommends that this text be viewed merely as an "idea book": it should be read at one's leisure with pen in hand so that the reader might underline and make note of those concepts and plans he or she was unaware of or had forgotten about. Viewed as such, the work serves several different purposes. First, for the experienced estate planner it provides a brief but complete introduction to the Tax Reform Act of 1976. Further, it affords such a

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1. William C. Clay, Jr. is a member of the Kentucky Bar. He practices law in Mt. Sterling, Kentucky, specializing in tax and estate planning.
practitioner a means to review his or her estate planning methods and forms, to update them where necessary, and to consider additional possibilities and plans to better achieve clients’ objectives. The work is also designed for the young attorney just starting an estate planning practice. The beginning estate planning practitioner will be well advised to review the text carefully and to employ it as one of his or her basic estate planning tools. While Mr. Clay’s work does not answer all conceivable questions, it does provide a basic treatment of the foundation of estate planning principles and concepts.

Although the text appears to have accomplished Mr. Clay’s purposes, it must be criticised for some obvious deficiencies. First, the author has purposely omitted those “burdensome” footnotes and citations [p. viii]. One must question: To whom are they a burden? They are most certainly not a burden to the beginning practitioner who seeks to learn the citation to the revenue procedure referred to on page 20 of the text dealing with the disallowance of the marital deduction in certain cases. Citation to authority also would be useful to the busy practitioner who is trying to understand the new carryover basis rules. While this reviewer agrees with the author that extensive footnotes, such as those found in the supplements to Casner’s Estate Planning, are burdensome to the reader and author alike, basic citations to Code sections, Treasury Regulations, and Revenue Rulings and Procedures are extremely useful. They are helpful both to the busy practitioner who is trying to find the path through the 1976 Tax Reform Act and to the inexperienced among us who are attempting to plan estates without falling into traps.4

There is a second reason why this estate planning text does not escape criticism. As with other treatises on the subject, Mr. Clay’s focus is on the individual for whom estate planning can save taxes. Far too little attention is given to the subject of the young family with minor children, large potential debts, and an estate consisting principally of life insurance.5 At the very least, every estate planning text should allocate one chapter to such factual situations and to the subjects of custody of minors, and guardianships and trusts for minors. It is unfortunate that this category of persons comprising such a substantial percentage of the population receives so little attention on the part of most estate planning writers.

In spite of the foregoing, this reviewer has found Mr. Clay’s text


to be a most useful and thought-provoking idea book for post-tax reform estate planning. The benefits obtained by this reviewer were well worth the time spent reading it, and the work will undoubtedly be skimmed several more times as this reviewer develops and revises his practice.

Reviewed by Barry D. Halpern\(^2\)

On November 5, 1973, Leon Jaworski, a former Nazi war crimes prosecutor and past president of the American Bar Association, took the oath of office as the second Watergate Special Prosecutor. He assumed that post less than a month after his predecessor, Harvard Law School professor Archibald Cox, had been fired. During his eleven-month tenure, Jaworski directed the operation of five task forces, secured indictments against an array of high administration officials, and maintained a precarious balance between the White House, two congressional investigating committees, and an ambitious grand jury. The mere creation of the special prosecution force was in itself a remarkable development in our constitutional system, but the results attained by Jaworski and his staff will unquestionably be recalled as a historical milestone.

In The Right and the Power, Jaworski recounts his task in restrained prose, yet his recollections are those of a very able legal technician who employed all of his skills in the prosecution of a case that, in his words, "proved what we teach in schools, it proved . . . that no man is above the law."\(^3\) The book traces Jaworski's Watergate experience from his arrival in Washington in the wake of the "Saturday Night Massacre" through the Nixon resignation and the subsequent delays during which the Congress, the special prosecution force, and the new President wrestled with the formidable task of disposing of criminal charges against a former chief executive. This compact

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\(^1\) Leon Jaworski received his LL.B. from Baylor University in 1925 and an LL.M. from George Washington University in 1926. Following World War II, he served as Chief of the War Crimes Trial Section of the United States Army in the European Theatre. He was president of the American Bar Association 1971-72. After resigning as Watergate Special Prosecutor, he returned to the firm of Fulbright and Jaworski, Houston, Texas. On July 20, 1977, Jaworski agreed to become Special Counsel for the House Ethics Committee's investigation of South Korean influence-buying among lawmakers. As he did in the Watergate investigation, Jaworski conditioned acceptance of the job on the committee's giving him full cooperation and wide-ranging powers. N.Y. Times, July 21, 1977, § 1, at 1, col. 2.

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\(^3\) T. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 6 (1975). Historian Theodore White quotes Jaworski as saying that he accepted the Special Prosecutor position not for reward or fame, but because he believed that the Watergate case would shape the youth of America's perception of their political system for a generation. Id.
volume provides a chronological review of the Watergate prosecutions, an inside glimpse of the personalities who helped frame the events, and an appendix containing status reports on the cases undertaken by the special prosecution force. Although the book was written primarily for the general reader, Jaworski's brief but incisive essays on professional ethics, the prosecutorial function, and plea negotiations will particularly appeal to the lawyers in his reading audience.

**The Revival of the Special Prosecution Force**

Although ostensibly cloaked with a charter guaranteeing him full authority to pursue the Watergate investigation, Archibald Cox was fired on October 20, 1973, after seeking to subpoena nine White House tape recordings. Cox was terminated for refusing to acquiesce in the "Stennis Proposal," a plan to circumvent the subpoena by allowing the White House to submit expurgated transcripts to the court while restricting further access to presidential tapes and documents. Immediately following Cox's dismissal, the offices of the special prosecution force were sealed, its investigatory responsibility was returned to the Department of Justice, and Judge John Sirica was informed that the President would not comply with the federal district court order for an in camera examination of the subpoenaed tapes. The President, however, grossly underestimated the public reaction to his abrupt assertion of power. Within days, the storm of protest forced the White House to capitulate and search for a second special prosecutor. On October 30, 1973, White House Chief of Staff Alexander Haig dispatched an Air Force jet to bring Leon Jaworski to Washington to discuss the job. Originally reluctant to assume the post, Jaworski accepted after Haig assured him that the President would authorize

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5. On November 14, 1973, U.S. District Court Judge Gerhard Gesell ruled that the firing of Archibald Cox without proof of extraordinary impropriety was illegal. Nixon had ordered Attorney General Elliott Richardson to fire Cox. Richardson, who had recommended Cox for the position, refused to do so and resigned. Deputy Attorney General William Ruckelshaus also refused to comply with Nixon's order and was then discharged from his job. Solicitor General Robert Bork, who had been appointed Acting Attorney General, agreed to remove Cox from office. L. Jaworski, The Right and the Power: The Prosecution of Watergate 2 (1976) [hereinafter cited as Jaworski]. In a suit filed by consumer advocate Ralph Nader, the court cited the Justice Department regulations that established the office and concluded that acting Attorney General Robert Bork's abolishment of the position was "simply a ruse to permit the discharge of Mr. Cox . . . ." Nader v. Bork, 366 F. Supp. 104, 109 (D.D.C. 1973).
a new charter guaranteeing the Special Prosecutor greater independence of action, including the right to take the President to court.\footnote{7} With neither anger nor false modesty Jaworski recalls the tension and suspense that clouded his first days as Special Prosecutor. The New York Times suggested that Jaworski was "fatally handicapped from the outset because he enters the Watergate investigation as the President's man . . . ."\footnote{8} Congress had debated the wisdom of creating a special prosecution office outside the executive branch; and the young staff inherited from Cox waited expectantly for Jaworski to prove his mettle by pursuing the investigation to the White House. During those first weeks even Jaworski's optimism was strained. He admits that his staff did not rally around him, and his early overtures to the White House met with a studied disdain that led him "to experience the frustration that must have acidized Cox's stomach."\footnote{9} By mid-December Jaworski's sense of frustration had been replaced by a shocked realization of presidential complicity to an extent unimagined when he accepted the call to Washington. After receiving a subpoenaed tape of several March 21, 1973, conversations between Richard Nixon and his closest aides, Jaworski realized that his hopes for White House cooperation would have to be abandoned. Though he had expected to find wrongdoing, the Special Prosecutor admitted being severely shaken by evidence of the President's sordid undertaking.\footnote{10} He directed his staff to begin assembling a criminal case against Richard Nixon after listening to a taped voice that he had "heard before in person and on radio and television, so decidedly different now, as the President plotted with his aides to defeat the ends of justice."\footnote{11} The case against Mr. Nixon, like those involving lesser Watergate defendants, was built on a framework of evidence compiled primarily as the result of painstaking plea negotiations. That aspect of the prosecution, however, generated frequent and adamant criticism. In his memoir, Jaworski stoutly defends the use by his staff of plea bargains

\footnote{7} Jaworski, supra note 5, at 5-7. The promise to grant the Special Prosecutor greater independence was incorporated into the new charter. 28 C.F.R. § 0.38 appendix. The order was promulgated at 38 Fed. Reg. 30,738-39, as amended by 38 Fed. Reg. 32,805 (1973). That amendment states: "[T]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties" and not without the consensus of the "Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives . . . ." It also says that the Special Prosecutor's jurisdiction will not be circumscribed without the consensus of the same eight congressional members. Id.\footnote{8} Jaworski, supra note 5, at 13.\footnote{9} Id. at 22.\footnote{10} Id. at 45.\footnote{11} Id.
negotiated with a view toward disclosure of misconduct at increasingly sensitive levels of the Nixon administration. Nevertheless, Jaworski's use of plea bargaining subjected him to criticism for seeming to deal more sympathetically with certain established Watergate defendants than with their younger colleagues.

The author devotes nearly a chapter to an explanation of his decision to breach the established special prosecution force policy by accepting a misdemeanor plea in the case of Richard G. Kleindienst. Though the force ordinarily negotiated only felony pleas, the Kleindienst case was a notable exception to that rule. Jaworski recalls laboring over the peculiar circumstances that attended the decision of the former acting Attorney General to give false testimony to the Senate Judiciary Committee. Several members of the staff disagreed with Jaworski's treatment of Kleindienst; three resigned in protest after Kleindienst was allowed to plead guilty to a misdemeanor.

Jaworski takes similar pains in recounting the extenuating circumstances in the case of Herbert W. Kalmbach. Although the former personal counsel to Richard Nixon raised enormous sums for his client's campaign coffers and admitted retailing at least one ambassadorship, Jaworski describes the California attorney as "a not-very-smart errand runner." As in the Kleindienst case, the Special Prosecutor wrote a lengthy philosophical memorandum to clarify his position on the Kalmbach plea negotiations. Characterizing him as a "shallow minded . . . lackey," Jaworski decided against charging Kalmbach with a felony in the coverup conspiracy. He chose instead to accept a felony plea to a Corrupt Practices Act violation and a single count misdemeanor plea for the sale of an ambassadorship.

12. Id. at 149. Kleindienst was allowed to plead guilty on May 16, 1974, to a one-count violation of 2 U.S.C. § 192 (1970) for refusal to answer pertinent questions before a Senate Committee. Since Kleindienst's testimony was evasive, the statute was broadly construed to accommodate the charge desired by his counsel. Jaworski, supra note 5, at 154-55.
14. Id. at 155.
15. Id. at 79.
16. Id. at 78.
17. Kalmbach pleaded guilty on February 25, 1974, to a one-count violation of the Federal Corrupt Practices Act of 1925, ch. 368, tit. III, §§ 303, 314, 43 Stat. 1071, and one count of promising federal employment as a reward for political activity in violation of 18 U.S.C. § 600 (1974). Jaworski, supra note 5, at 77, 287. Kalmbach is viewed less sympathetically in a recent article written by an attorney who served on the House Judiciary Committee's impeachment inquiry staff. Adler, Searching for the Real Nixon Scandal, ATLANTIC MONTHLY, Dec. 1976, at 76. In that article Kalmbach is described as a man who elicited considerable sympathy by claiming to have been used by the White House. Ms. Adler suggests, however, that Kalmbach actively solicited political assignments that were, at best, of doubtful legality. Id. at 92.
Plea bargaining demands difficult decisions within the framework of prosecutorial discretion, yet Jaworski’s handling of Kleindienst and Kalmbach contrasts sharply with the manner in which he dealt with younger Watergate defendants. Jaworski was less inclined to let sympathy temper his judgment in dealing with young White House assistants. The case of former presidential aide Egil Krogh furnishes a prime example. Although Jaworski acknowledges Krogh’s sincere repentance, he certainly did not strain to find “peculiar circumstances” to mitigate the young attorney’s guilt:

Now the young, fine-looking lawyer was in our offices saying that he no longer could use the umbrella of national security as a defense against the crimes with which he had been charged. My immediate feeling was sadness that power’s corruption had tainted him and other young men of bright promise. But tainted he had been, wrongs he had done. Now he was in our hands.

While Egil Krogh and several of his White House colleagues found their careers shattered by the Special Prosecutor’s insistence on felony pleas, Kleindienst received a suspended sentence and promptly returned to the private practice of law.

Jaworski’s lengthy discussions of the Kleindienst and Kalmbach cases suggest that the author remains sensitive to the criticism fostered by his decisions. Nevertheless, he is steadfast in his advocacy of the plea bargaining process, and he argues persuasively that such negotiations were instrumental in uncovering and prosecuting the Watergate conspiracy.

THE BATTLE AND ITS AFTERMATH

His shocked realization of pervasive presidential complicity and increasing frustration with dilatory White House tactics compelled Jaworski to move on two fronts in early 1974. First, he directed his staff to compile a detailed report outlining Richard Nixon’s criminal involvement. The report was intended for transmittal to the House Judiciary Committee which had by that time initiated its impeachment inquiry. Then, tiring of stalls, he requested a subpoena from Federal District Judge Sirica for tapes and documents relating to selected conversations between the President and his closest aides.

The book provides an inside account of the unprecedented relationship between the special prosecution force and the congressional com-

18. *Jaworski*, supra note 5, at 35.
19. *Id.* at 31.
mittees which were conducting parallel inquiries.20 One complex facet of the case involved the special prosecution force's contact with the House Judiciary Committee. Since his staff's 128-page outline of evidence against Richard Nixon had been compiled from materials cloaked with the secrecy of a grand jury proceeding, Jaworski's desire to cooperate with the congressional committees required the sanction of the federal district court. He surmounted that problem by devising a plan by which the grand jury would tender a sealed report to the court for transmittal to the House Judiciary Committee. Although challenged by two conspiracy codefendants, Jaworski's plan was sustained, and the "road map" was delivered on March 25, 1974.21

In another chapter the author outlines the evidence against the seven Watergate coverup codefendants.22 Though he describes the arraignment of a former Attorney General and six other former White House officials as a "heart-rending moment," he recalls no signs of remorse by the defendants as they stood before the bar of Judge John Sirica's court. In a twelve-page description of the case against the seven codefendants, Jaworski traces the evolution of the conspiracy from Gordon Liddy's hyperactive imagination to the blackmail discussions that took place in the Oval Office.23 While other Watergate commentators have described in detail the million-dollar "Gemstone" plan for kidnapping, burglary, and bugging, Jaworski leaves little doubt as to the former President's involvement in the coverup conspiracy.

After turning the "road map" over to the House Judiciary Committee, Jaworski renewed his efforts to secure tapes of presidential

20. The Senate Select Committee on Presidential Campaign Activities, popularly known as the Ervin Committee, was charged with investigating illegal, improper and unethical activities in the presidential election of 1972, and with recommending legislation necessary to safeguard the electoral process. See 1 Hearings Before the Select Comm. on Presidential Campaign Activities of the United States Senate, 93d Cong., 1st Sess. 2 (1973). The House Judiciary Committee, under the chairmanship of New Jersey Democrat Peter Rodino, conducted the House impeachment inquiry. 1 Impeachment Inquiry: Hearings Before the Comm. of the Judiciary, House of Representatives, 93d Cong., 2d Sess. ii (1974).

21. Although the President did not object to transmittal of the report, H.R. Haldeman and Gordon C. Strachan, two coverup codefendants, sought a writ of mandamus to block its delivery. Noting that the case dealt with a matter of critical moment to the nation, Judge Sirica concluded that "delivery to the Committee is eminently proper, and indeed, obligatory..." In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives, 370 F. Supp. 1219, 1227 (D.D.C. 1974).


23. Id. at 111-22.
conversations. Following nearly a month of frustrating negotiations with White House attorney James St. Clair, the Special Prosecutor filed a motion on April 16, 1974, requesting tapes and documents pertaining to sixty-four conversations between Nixon and aides John Dean, H. R. Haldeman, John Ehrlichman, and Charles Colson. The President responded to the subpoena with a motion to quash and a nationally televised promise to deliver transcripts of White House recordings. Though the President's plan was coupled with a massive public relations campaign designed to pressure the Special Prosecutor into withdrawing the subpoena, the transcripts were so poorly edited and replete with errors that they were rejected by both Jaworski and the House Judiciary Committee.24

James St. Clair's motion to quash confronted Jaworski with a ticklish problem. Two months earlier the grand jury had voted unanimously to name Richard Nixon as an unindicted co-conspirator in the coverup case. Now, argument on the motion might compel disclosure of that bombshell while the House Judiciary Committee, still seething over the President's decision to disobey the Committee's own subpoena for nineteen tapes, debated articles of impeachment. Jaworski, anxious to avoid the potentially prejudicial effect of disclosing the grand jury's action, attempted once more to compromise. The President, however, rejected a proposal to trim the subpoena to eighteen tapes. That decision led Jaworski to believe that the tapes would destroy the President's position, and convinced him that Mr. Nixon was concealing the extent of his involvement from his remaining staff and attorneys:

I did not think that Haig, for all his advocacy of the President's position, would close his eyes against what he considered clear-cut proof of Nixon's criminality. St. Clair on several occasions had said he never listened to the tapes. I believed him: he spoke and acted only when the President instructed him to do so.25

Jaworski's cryptic observation notwithstanding, James St. Clair proved himself an able advocate at the hearing on the President's motion to quash. As anticipated, St. Clair relied heavily on the doctrine of "executive privilege"; but much to Jaworski's dismay, the President's attorney also argued that the Special Prosecutor lacked standing to pursue the subpoena before the court. When reminded of Alexander Haig's pre-appointment promise that Jaworski would be

24. Id. at 131-33.
25. Id. at 136.
free to go to court, St. Clair replied that the question of jurisdiction was not a matter that could be waived or stipulated by the parties. Although Judge Sirica sustained the Special Prosecutor's standing and ordered issuance of the subpoena, the confrontation over the presidential tapes set the stage for the final decisive battle before the Supreme Court.

On May 24, 1974, Jaworski petitioned the Supreme Court for certiorari before judgment, seeking to bypass the court of appeals on the basis of imperative public interest. The petition was granted and argument scheduled for July 8. St. Clair's brief argued that the Court lacked jurisdiction to intervene in an intra-branch dispute between the President and the Special Prosecutor and that the district court erred in refusing to quash for failure to demonstrate the unique and compelling need required by Nixon v. Sirica to overcome the claim of executive privilege. Jaworski's brief contended that the subpoena duces tecum was merely a traditional mechanism necessary to procure evidence in a federal criminal prosecution involving former White House officials. Though conceding the possibility of privilege, Jaworski's brief suggested:

The qualified executive privilege for confidential intra-governmental deliberations, designed to promote the candid interchange between officials and their aides, exists only to protect the legitimate functioning of government. Thus, the privilege must give way where, as here, it has been abused.

On July 24, 1974, the Supreme Court accepted Jaworski's contention that the judiciary, not the President, was the final arbiter of what the Constitution says. No doubt cognizant of Richard Nixon's threat to ignore a less-than-definitive ruling, Chief Justice Warren Burger, speaking for a unanimous Court, chilled the White House by

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26. Id. at 144.
28. 487 F.2d 700 (D.C. Cir. 1973). The court treated the subpoenaed material as presumptively privileged but rejected the President's claim of absolute executive privilege. Concluding that the Special Prosecutor had demonstrated sufficient need for judicial examination, the court required the President to turn the tapes over to the district court for in camera review.
29. Jaworski, supra note 5, at 173.
30. Mr. Justice Rehnquist did not participate in the decision.
addressing the President’s claim of privilege in the context of a criminal investigation:

The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.31

The Court’s decision could hardly be described as less than definitive. Harkening back to Marbury v. Madison,32 Burger’s opinion reaffirmed judicial supremacy in matters of constitutional interpretation.33 The White House had played its last card and lost, leaving the President with few options. Whatever damaging information the tapes held would soon come to public light in the coverup trial. Few, however, expected the disclosures to end the Nixon presidency so suddenly.

Mr. Nixon’s resignation brought an end to his administration, but its aftermath left the Special Prosecutor to wrestle with the extraordinary problem of disposing of charges against a former President. The members of the special prosecution force favored indictment, believing that only prosecution, however distasteful the process, could dissuade Richard Nixon from arguing to history that political chicanery, not evidence of criminal complicity, drove him from office. Although he believed that a fair trial of the former President might not be possible for many months, Jaworski was reconciled to the prospect of indicting Nixon. He was not disappointed, however, by the pardon granted by President Gerald Ford on September 8, 1974. The pardon generated an outpouring of dissatisfaction. But after careful review, Jaworski concluded that “[t]he provision in the Constitution investing the President with the right to grant pardons, and the recognition by the United States Supreme Court that a pardon may be granted prior to the filing of charges are so clear, in my opinion, as not to admit of doubt. . . .”34 A short time later that position was

32. 5 U.S. (1 Cranch) 137 (1803).
34. Jaworski, supra note 5, at 248. The quotation appeared in a letter to then Acting Attorney General William Saxbe,
vindicated by the Supreme Court when it held in *Schick v. Reed* that the presidential pardoning power is virtually unlimited.

Although Jaworski was not anxious to seek an indictment against the former President, he leaves the reader little doubt as to his view of Mr. Nixon's role in the Watergate coverup conspiracy. Indeed, the prospect of an exculpatory Nixon memoir seems to underlie Jaworski's detailed discussion of the former President's involvement. His purpose in writing the book might be traced to a memorandum prepared by a special prosecution staff attorney shortly after Nixon's resignation.

The prospect of Mr. Nixon publishing his memoirs (and thereby adding several million dollars to his net worth) should remind us that unlike his aides who are convicted of crimes Mr. Nixon will have the "last say" about his own role in Watergate if he is not prosecuted. This is why . . . it is important (absent a full admission of guilt) to have some definitive resolution of Mr. Nixon's Watergate actions.

Former President Nixon left office with no admission of guilt, and his pardon leaves little likelihood of a definitive resolution of his involvement in the coverup conspiracy. Jaworski's book, therefore, appears to have been consciously written as an "anticipatory rebuttal" to a Nixon memoir which might argue that political hysteria rather than criminal complicity brought about his downfall.

*The Right and the Power* will bring small pleasure to those who believe that Mr. Nixon was unfairly hounded from office. Jaworski goes to great lengths to expose the abuses of the Nixon White House and to detail the former President's personal culpability. The author describes the entire Watergate affair as unparalleled American tragedy, yet indicates that he emerged from the ordeal with renewed respect for the nation's democratic institutions. Although the book chronicles rampant wrongdoing at the highest levels of government, it is also a compelling testament to the strength of the American legal system. To those concerned about the state of the law and the legal profession, *The Right and the Power* is recommended reading.

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35. 419 U.S. 256 (1974). In *Schick*, the Supreme Court upheld former President Eisenhower's reduction of a death sentence imposed by court-martial to life imprisonment without possibility of parole.

36. *Id.* at 266. The Court found that the President's power to pardon is virtually unlimited so long as conditions imposed do not offend the Constitution.


Reviewed by P. Kent Spriggs

In the "Introduction" to Civil Rights Litigation, the author states that the book is written to aid "investigators, negotiators, and trial attorneys." It is doubtful that it would be of much use to investigators. Its use in the legal profession is limited to law students and those who are just beginning to get their litigating feet wet.

The book is 322 pages long, with an additional 50 pages of index. Of the 322 pages, only 180 are text; the rest are appendices. The text is divided into "Investigation" and "Trial." The book proceeds chronologically, from the setting up of a case file to the conclusion of the trial. The author discusses pre-litigation investigation and the peculiarities of various kinds of civil rights litigation. The rules on discovery are then reviewed seriatim.

The "Trial" chapter has a short introduction followed by a section on the trial notebook, a long section on the Federal Rules of Evidence, and fifteen more sections full of pontifications and some helpful hints on various aspects of trying a case. Much of the material in these sections is directed at the rudiments of trial practice in general and not civil rights litigation in particular. The appendices include model pleadings; sixty-three pages of forms, statutes, and regulations on Ohio law and practice; information on damage awards and attorneys fees; and twenty-eight pages of case citations.

This book can serve the student or inexperienced practitioner. Because its organization follows the chronological progression of a case, it lends itself to use as a manual to which the reader can refer at each stage of the litigation. It differs somewhat from the otherwise similar treatments in American Jurisprudence Trials and American Jurisprudence Proof of Facts, in that the text is devoid of statutes and case law. The only law appears in citations in the "Appendices." The reader using the book as a manual would thus be forced to seek out authority which supports the general instructions. In this regard, the reader interested in employment discrimination litigation is

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2. Member, Florida Bar.
commended to a carefully edited primer, *Legal Services Manual for Title VII Litigation*, prepared by the National Employment Law Project (1973). The CCH (Commerce Clearing House) *EEOC Compliance Manual* can be used in a similar manner. For exhaustive research, the CCH *Employment Practices Decisions* and the BNA (Bureau of National Affairs) *Fair Employment Practices* gather the cases, statutes, regulations, and administrative opinions in looseleaf form.

The interview checklists are helpful only as suggestions. As a result of much too casual preparation, the checklists are not systematic. The section entitled “Public Employers—Interview with Complainant and Other Persons Similarly Situated” is notably deficient in failing to alert the interviewer to the many peculiarities of the government as an employer.

Few aspects of legal education are as sterile as civil procedure taught by the case method. A sense of the dynamics of civil procedure cannot be learned by reading cases. This is especially true of discovery—the heart of employment discrimination litigation. Thus, the author is definitely on the right track in introducing the reader to the practical side of the discovery rules and how they can be used. Civil procedure instruction in law school has generally failed to present mock depositions, require the drafting of interrogatories, and explain things which are not in the rules or reported decisions—such as the fact that at most depositions counsel waive the formalities.

The author’s treatment of discovery is passable. For instance, students generally have little sense of how to integrate the various discovery devices. There is little said in law school about the strengths and weaknesses of each discovery tool and the order in which they may be used most profitably. The author speaks of the value to the plaintiff of taking early depositions, in that the defense may not at that point realize the legal consequences of the information it is giving on depositions. Unfortunately, the author does not discuss the vital importance of having one’s massive statistical compendia completed before taking the depositions of key company officials. This is crucial because the plaintiff will probably be limited to only one deposition per official.

The appendices on discovery are but one example of the less than diligent scholarship which characterizes this book. The author has included as Appendix B a Motion for Production of Documents. No such motion has existed since the change in the Federal Rules in 1970. The author incorrectly reproduced a 1968 motion. Inspection is now done by notice.5 In text, the author discusses the procedure as

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one of notice, but in the interrogatories, Appendices C and D, the author alludes to a fifteen-day period for response. Again, this has not been the rule since 1970.6 Thus, extreme caution is urged upon the practitioner who would hand these forms to the secretary as some do with formbooks.

The choice of complaints is also inappropriate. Because the complaints chosen were filed by the United States, there is no discussion of the 42 U.S.C. § 1981 cause of action,7 or of jurisdiction of the court under 28 U.S.C. § 1343.8 These are, of course, key sections for the private practitioner at whom the book is aimed.

There is discussion of the use of computers to adduce data, but no suggestion as to the importance of ascertaining by interrogatory the basic data about what is stored in the computer. Concern is expressed about getting documentary exhibits admitted, but no mention is made of the fact that one can attach documentary exhibits to a request to admit and resolve these questions long in advance of trial. (It is good to attach interrogatories to the requests, asking that all disagreements be spelled out with particularity; the author does this in Appendix D but does not discuss the procedure.)

In addition to inaccurate scholarship, there is a great deal of padding. A good example is the thirty-two-page section on the Federal Rules of Evidence. Most of the rules are repeated verbatim. The author justifies this by purporting to "comment" on the Rules "where a particular civil rights problem exists" [p. 88]. Many of the rules have no comment, however, casting doubt on the necessity of their inclusion. Many of the comments are not reflective of civil rights problems. Lastly, some are not at all well-taken. For instance, Rule 302 on "Applicability of State Law in Civil Cases" has as the only "comment" the citation to Erie R.R. Co. v. Tompkins.9 This citation may throw the unwitting practitioner off the track. Substantive civil rights law is almost exclusively federal law when practiced in the federal courts. Yet Erie deals with those claims in federal court which have their source in state law. Thus, the reader may research state law on presumptions when a proper determination is a matter of federal law in this federal question litigation. Moreover, there is no justification for the sixty-three pages of Ohio laws, regulations, and forms which appear in the appendix.

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9. 304 U.S. 64 (1938).
The twenty-seven pages of case citations are poorly organized and poorly planned. The reference to back pay as "damages" is inappropriate. For some unknown reason, "validation" cases are placed in the middle of the "recruitment" cases. Furthermore, "Religious Discrimination" and "National Origin Discrimination" are subheadings under "Special Problems Regarding Sex Discrimination." "Discrimination on an Individual Basis" omits Cooper v. Allen, a seminal case on burden-shifting in trials. "Irrelevancy of Intent" is incorrectly listed as a defense. Intent or its irrelevance is an element of the claim. The low quantum of intent consistently required in civil rights litigation (until Washington v. Davis) has been a part of the plaintiff's strength. In the remedies section, there is no mention of "front pay," one of the newer spectacular remedies, nor is there any indication that "bumping" may be ordered for an individual plaintiff.

Lastly, the author alludes to the "emotional and social aspects of the practice of civil rights laws" [p. vii] but demonstrates little sensitivity to those same aspects. He advocates invoking the Exclusion of Witnesses rule in civil rights litigation, with little feeling for the political importance of worker-witnesses seeing the boss taken to task. He demonstrates no sensitivity to the deep fear which many worker-witnesses may have about confronting their employers, and none to

10. "Damages" necessarily connotes legal relief rather than equitable relief. The federal courts have uniformly determined that backpay is equitable relief. See, e.g., Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant, 491 F.2d 1364 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). See also 42 U.S.C. § 2000e-5(g) (1970). The implications of this characterization are substantial. Two obvious illustrations are the preclusion of jury trials on such claims, and the fact that class actions seeking back pay are still characterized as Fed. R. Civ. P. 23(b)(2) rather than Fed. R. Civ. P. 23(b)(3) actions. The 23(b)(2) characterization can be tactically advantageous because it means, among other things, that mandatory notice in Stage I proceedings is not required, as would be the case in a 23(b)(3) action. Fed. R. Civ. P. 23(c)(2).

11. "Recruitment" is concerned with what recruiting and hiring methods are legally permissible, and also with situations in which recruitment is mandated as a remedy. "Validation" is the process by which the proponent of a testing device justifies the instrument even though its use has a substantial adverse impact on an affected class. 12. 467 F.2d 836 (5th Cir. 1972), aff'd on rehearing, 493 F.2d 765 (5th Cir. 1974).
14. "Front pay" is a remedy which is growing in recognition. The term describes potentially lost earnings from judgment day until that day in the future when the class member reaches his "rightful place." The leading case mandating "front pay" is Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976). See also Stallworth v. Monsanto Co., PCA 73-45 (N.D. Fla. Jan. 15, 1976).
15. "Bumping" is a remedy which allows the wronged plaintiff to "bump" the incumbent out of the job which had been awarded illegally. "Bumping" has not been used on a class-wide basis but has been used in individual cases. See, e.g., Griffiths v. Hampton, 12 E.P.D. ¶ 11,038 (D.D.C. 1976).
the utility of allowing witnesses to view the proceedings. In a burst of professionalism, he asks that pretrial not be crowded with clients, failing to recognize the importance of affording the claimants an opportunity to see how their rights are being determined. Further, he has no sense of the effect that one or two hundred spectators may have on the decision-making process of the judge.

The author has been a government lawyer for both the United States and the State of Ohio. His lack of concern for the political impact of the litigation on the client class and on the community in which it takes place is reflective of the government’s litigation posture in school desegregation and employment. The United States government has shown little awareness that a plenary school desegregation suit necessarily disrupts the established social structure of the community, and that community involvement is vital to avoid the racist backlash and ripple effects that often accompany reorganization of intra-community relationships. His approach is therefore not surprising—but nonetheless sad.