

Barclay Kurland 7/23/75

The Legal Legacy of the Nixon Years

WATERGATE AND THE CONSTITUTION. By Philip B Kurland. Univ. of Chicago. 261 pp. \$12.50

By J. LAURENT SCHARFF

STILL ONE MORE BOOK on the subject of Watergate certainly requires an excuse," writes Philip Kurland, professor of law at the University of Chicago. His is that he does not discuss that national crisis except as a background to the large constitutional questions it raises.

Kurland's theme is simple if not original: The "Imperial Presidency" has become too powerful, the Congress too weak. As for the Supreme Court, about which he is a renowned scholar, Kurland believes that the future of American democracy turns as much on resistance to the Court's "persistent grasp for power" as on a better balance between the other two branches. In chapters on the congressional power of inquiry, executive privilege, judicial review, and appointment and removal of federal officials, he meticulously studies and balances arguments from law and history. And in the second half of the book, Kurland discusses some interesting legal questions about the Watergate denouement and makes broader observations about the condition of our government. For example:

Could Richard Nixon have been prosecuted for crimes while a sitting president? No, says Kurland (finding

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no clear authority one way or the other), because such a trial would interfere too much with the performance of presidential duties.

Was the pardon to the fallen president legally premature because he had not been indicted for any crime? Perhaps—and Kurland suggests that the special prosecutor should have tested the validity of the pardon by moving to bring Nixon to trial. Kurland believes that the pardon may have been in violation of the Attorney General's regulations (held by the Supreme Court to be binding on the president) that placed full authority over the subject with the special prosecutor.

But however important these and other questions similarly addressed, they are not the principal focus of this book. The author states that, although one of the issues posed by Watergate was "how to bring down the powerful leader who abused his authority and, at the same time, preserve the state from revolution that could spawn anarchy or totalitarianism," he finds the more important question to be, "How does one prevent the accession to such power by the just and unjust alike?"

Kurland is sure that the basic problem lies in the presidency itself, "blotated with unrestrained power," and that "if it is clear that the Congress has neither the will nor the capacity to act as a strong counter-balance . . . it is equally clear that some alternatives must be sought."

Kurland does not come forward with many specific reforms. He does not put great store in the statutory limitations on campaign contributions or in public financing of national candidates. He has recommended the creation of an office of Congressional Legal Counsel charged with the duty, under the impeachment power, to investigate and prosecute misbehavior

by executive and judicial officials. But that "reform" would not undo the accumulation of power in those branches of government.

The imperial presidency, which, Kurland emphasizes, was not invented by the Nixon administration, has resulted from the expanded role of that office over the past 50 years, in foreign affairs, in its execution of national laws "occupy[ing] the entire field of government and regulation despite the existence of the states," and in the accumulation of congressional delegations of authority made to executive departments and independent regulatory agencies. (With some reason—because of the president's power of appointment—Kurland jumps the regulatory agencies with the executive branch even though such agencies are usually regarded as quasi-legislative and independent in decision-making.)

Along with the general shift of power to the executive branch, Kurland adds "the inordinate concentration of power in the hands of the White House staff," and he sees no material change in the White House under the Carter administration.

What is the effect of all this power—and the news media attention it attracts—on the president and his principal White House aides? Human nature being what it is, such concentrated power, Kurland says, has led to what Arthur Schlesinger termed a "plebiscitary Presidency" in which the chief executive is so certain of his mandate (and his influence with congressional members from the political party he leads) that he views himself as "democracy personified, the nation made man," as was said of Napoleon III.

From such dizzying heights it is not difficult to see how a president could come to deny "the idea of law itself."

which Kurland treats as a moral imperative. He cites as evidence Nixon's "incapacity to understand the enormity of his proposition [stated to David Frost], 'When the President does it, that means that it is not illegal.'"

Kurland rejects both the counter-culture's despairing nihilism and the scholar-historians' notions of enhanced presidential power: "Both share responsibility for the crisis of the imperial presidency." Kurland recognizes that good and bad people in government make a difference, and, quotes Archibald Cox that Watergate occurred partly because of "the relativism and disinclination to make moral judgments which for several decades characterized the ethical climate, especially the academic environment." Moral judgment, then, is necessary, but presumptively that judgment can and should be exercised consistently with the law of the land. "A President who has 'implied powers' from Heaven as well as from the Constitution is certainly a fearsome President, without limitation on his authority."

Kurland ends with a belief that "fear of corruption of the Constitution" should motivate citizens to become adherents of the "vital center" and of "the rule of reason based on experience," to better balance the mixed powers of the federal branches. That is a rather nebulous prescription for the serious illness, but it is a beginning.

Watergate and the Constitution is a valuable source of knowledge and inspiration for those who wish to pursue Kurland's goal. It is not an "inside story" to fascinate the reader with dramatic accounts of Washington power. But the author's constitutional law credentials, balanced scholarship and trenchant commentary establish it as an important work. □