

A Nixon Monument

By Tom Wicker

Three years ago this week, Richard Nixon's one-time "plumbers," acting on behalf of the Committee to Re-elect the President, broke into the offices of the Democratic National Committee and were caught. Ten months ago, in consequence of that break-in and the attempt to conceal its sponsorship, Mr. Nixon resigned as President.

From the instigation of the break-in through the collapse of the cover-up, Watergate amply demonstrated the existence of grave dangers to American democracy. It disclosed, as Prof. Philip Kurland of the University of Chicago Law School recently suggested, "more than weakness of evil men in high places. Watergate revealed basic institutional deficiencies that have not and will not be corrected unless and until an aroused American public or an aroused Congress demands and secures reform."

Addressing the annual meeting of

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the Delaware Bar Association, Mr. Kurland said that, instead, President Ford was acting as if his pardon of Mr. Nixon "wiped out not only the former President's criminal liability but also the deeds that gave rise to that liability." The press, he said, seemed to have lost interest in Watergate once the scandal itself was ended. Others believed that Watergate represented "merely personal malefactions, and that the removal and replacement of evil men has cured the disease."

The real problem remained, Mr. Kurland argued, and that problem was not just to assign blame for the past, certainly not to destroy "legitimate and necessary Presidential power." Rather, it was to provide, in James Madison's phrase from *The Federalist*, "auxiliary precautions" . . . that will make the exercise of Presidential authority responsible to "we, the people."

Mr. Kurland, a constitutional authority who is generally regarded as a conservative, proposed a number of such "auxiliary precautions," all of which seem politically feasible, and well worth contemplation on the third anniversary of the Watergate break-in:

1. The creation of a permanent Special Prosecutor, charged with "the revelation and prosecution of criminal activities by high Government officials," and the establishment of a "Public Attorney" responsible to Congress.

The latter office, if well staffed and charged with oversight of the executive branch, could in Mr. Kurland's opinion "not only uncover illegal actions, which are the lesser part of the wrongdoing, but the far more common and deleterious executive

actions in disregard of Congressional commands or in frustration of them."

2. Reform of the office of a "chief executive who is no longer regarded as an individual but as a staff or an institution." This was necessary, Mr. Kurland argued, because "there are at least two cancerous growths on the American body politic. One of these is the burgeoning power of the executive branch. The other has occurred within the executive branch itself, where power has shifted from the departments and old-line agencies to what is called 'the executive office of the President.' In fact, it is here that all Government policy is made and . . . the wielders of that power are all unelected, and with little or no responsibility to Congress. . . . They are the overlords of the executive branch."

Mr. Kurland would prefer dissolution of the "executive office of the Presidency" from the swollen form in which it now exists, and distribution of its powers to departments that "can be made accountable to the Congress." Failing that, he recommended, "the major-domos in the executive office" ought at least to be subject to confirmation by the Senate.

3. New efforts to insure "that our intelligence and counterintelligence agencies be confined and restricted to the limited functions they were created to deal with," so that they cannot become "a political police." In this effort, Mr. Kurland said, "if oversight by Congress is not to be the answer, it is hard to conceive of an answer."

4. Finally, Mr. Kurland argued that the doctrine of executive privilege should be defined and restricted by legislation. The doctrine, he said, was "a tool for the preclusion of the power of legislative oversight, which is the only real check on abuse of executive power." Yet, he said, in the Nixon tapes case, the Supreme Court had given executive privilege a constitutional standing Mr. Kurland believed unwarranted; so he thought it necessary for Congress to provide both a statutory definition of the doctrine and a strict assertion of "the conditions under which the privilege could be asserted" by Presidents.

These are the recommendations of only one thoughtful observer, although all are contained in legislation now before Congress. They have their deficiencies—for example, Mr. Kurland may place more reliance than experience warrants on Congressional oversight to curb those past masters of co-optation, the C.I.A. and the F.B.I.

But as the gray cloud of "normalcy" rises from Gerald Ford's White House to settle over a complacent people that considers Watergate "behind us," it's useful to have Philip Kurland's reminder that "King George III had his American Constitution, and the Nixon Administration should have no less glorious a monument to reform"