

The Roots of Watergate

In 1969 Prof. Alexander Bickel of the Yale Law School was invited to address a gathering of Yale alumni on the subject "What is happening to morality today?" He said: "It threatens to engulf us."

He meant that we are living in "an age of assaultive politics." The legal order is battered by "a prodigality of moral causes," each of which is immoderately righteous, and gifted at rationalizing disobedience of the law and disregard of the traditions of civility. Bickel returned to this theme in the January 1974 issue of *Commentary* magazine, in the most brilliant political essay of the year, "Watergate and the Legal Order."

He argued "that much of what happened to the legal and social order in the fifteen years or so before Watergate was prologue." In those years three distinct groups—white southern militants, the civil rights movement, the white middle class anti-war movement—preached disobedience to law, and practiced what they preached.

Watergate, Bickel said, was not a radical departure from the course of our recent history. Rather, it was a manifestation of the radicalism that, for 15 years, in various guises, had been challenging "the premise of our legal order," the idea that the complicated arrangements of the legal order are themselves "more important than any momentary objective."

Bickel's most acute—and acutely represented—perception was this: The impatient, righteous, anti-institutional impulse that helped produce Watergate

had been much in evidence—and much applauded—in government itself, since the mid-fifties:

"The assault upon the legal order by moral imperatives wasn't only, or perhaps even the most effectively, an assault from the outside. It came as well from within, in the Supreme Court headed for fifteen years by Earl Warren . . . More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive, practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities? The Warren Court took the greatest pride in cutting through legal technicalities, in piercing through procedure to substance. But legal technicalities are the stuff of law, and piercing through a particular substance to get to procedures suitable to many substances is in fact what the task of law most often is."

Thus the "derogators of procedure and of technicalities, and other anti-institutional forces, rode high, on the bench as well as off." In a democracy the derogation of concrete institutions inevitably becomes a populist celebration of an abstraction—"the people." Thus, as Bickel noted, it was "utterly inevitable that such a populist fixation should tend toward the concentration of power in that single institution which has the most immediate link to

the largest constituency"—the U.S. presidency.

So, Bickel said, we wound up with "a Gaullist presidency . . . needing no excuse for aggregating power to itself beside the excuse that it could do more effectively what other institutions particularly Congress, did not do very rapidly or very well, or under particular political circumstances would not do at all. This was a leaf from the Warren Court's book . . . I don't know when Mr. Nixon caught the liberals bathing, but he did walk off with their clothes, and stood forth wearing the plebiscitary presidency . . ."

The truth that Bickel wanted us to see before it is too late, is that Watergate was an episode in what is becoming a tradition. It was an eruption, in a new form, of a familiar anti-institutional righteousness, the assaultive politics of the populist impulse. Thus Watergate, although past, is prologue, part of the engulfing stream of moral righteousness.

But the truth Bickel wanted us to see is unwelcomed, and hence an unheeded, truth in this year-end atmosphere of national self-congratulation about "surviving" Watergate.

Hell, Hobbes said, is truth seen too late. Republics—at least fortunate republics—can be saved from damnation by a few constitutionalists like Bickel. But threats to republics are many and constant. Great constitutionalists are few and mortal. Alexander Bickel, the keenest public philosopher of our time, died of cancer late in this, his forty-ninth, year.