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BOOK REVIEW

WATERGATE AND THE CONSTITUTION. By Philip B. Kurland.* The University of Chicago Press. 1978. Pp. 224. \$12.50.

*Reviewed by Rex E. Lee***

Among the "Watergate" books, this one is distinctive in several respects. It was not written by one of the Watergate insiders, nor was the author involved in any aspect of uncovering or disclosing events relating to the demise and fall of Richard Nixon. It is further distinguished because it is the most scholarly of the books bearing a Watergate-related title.

Philip B. Kurland is one of the most astute, one of the most productive, and one of the most respected American constitutional scholars of this century.¹ *Watergate and the Constitution* is typical of the quality of his work. It is a careful, thoughtful, well-researched, and crisply presented statement of Professor Kurland's views concerning some of the important constitutional lessons he believes our nation should have learned from the events and conditions we lump together under the heading "Watergate." The most sophisticated constitutional scholar will find it provocative. At the same time, the casual student of government with an interest in the long-range welfare of our Republic—and I would hope that includes most of us—will find it understandable and interesting reading.

* Philip B. Kurland is the William R. Kenan, Jr., Distinguished Service Professor at the University of Chicago, where he has been a Professor of Law for 22 years. He graduated from Harvard Law School, where he was President of the *Harvard Law Review*, and later served as law clerk to Justice Felix Frankfurter. He received his Doctor of Laws degree from the University of Notre Dame. Professor Kurland founded and edits *The Supreme Court Review*, and has published numerous books including *Politics, the Constitution and the Warren Court* and *Mr. Justice Frankfurter and the Constitution*.

** Dean and Professor of Law, J. Reuben Clark Law School, Brigham Young University. B.A., 1960, Brigham Young University; J.D., 1963, University of Chicago. Assistant United States Attorney General, May 1975-January 1977.

1. *The University of Mississippi School of Law Memorial Lectures*, 45 Miss. L.J. 529, 529 (1974):

When Phil Kurland was appointed Chief Consultant to the United States Senate Subcommittee on Separation of Powers in 1967, Senator Sam Ervin, chairman of the subcommittee, said:

Professor Kurland is one of the greatest authorities on the United States Constitution that America has ever known. He is not only a scholar in the traditional sense of knowing court decisions and their trends, he is also a brilliant legal technician, an eloquent writer, and one of those rare men who know the language, the intent, and the history of the Constitution.

These encomiums are not intended to imply, however, that all of Professor Kurland's conclusions are correct. One of his dominant themes is that our national welfare would be better served, and protection against future misuses of power better secured, if Congress would play a more prominent role vis-à-vis the other two branches. That is a popular theme these days, and no one articulates it any better than Kurland. He sees in the judiciary a demonstrated proclivity to usurp the fundamental policymaking prerogative of the Legislature under the guise of constitutional interpretation. In this he is correct, though for reasons discussed below I disagree with his view concerning some of the implications of this premise. He also views with alarm the expansion of power in what he refers to as the "Imperial Presidency" or (borrowing a term from Arthur Schlesinger) the "Plebiscitary Presidency." Kurland correctly recognizes, as Schlesinger does not, that the increased power of the Presidency is not a Nixonian nor a Republican phenomenon, and that the Democratic occupants of the White House over the past half century have also contributed their fair share to this trend.

In Professor Kurland's view, one of the major lessons of Watergate is that the Presidency has become too powerful, that the augmentation of Presidential power has been accomplished largely at the expense of Congress, and that Congress must reassert its authority. On these matters, I find myself in substantial disagreement with my former professor. Although I am not certain what the best preventative for future Watergates is, my own experience in government has taught me that Congress is no more immune from excesses of power than is the President. It is true that article I disperses congressional authority between two Houses and among 535 individuals. Article II, by contrast, vests all executive authority in one individual, the President. But that argument cuts both ways. Certainly there is no single Senator or Representative as powerful as the President. However, it is equally apparent that it is much more difficult to locate the responsibility for misuse of power where the responsibility for its exercise is diffused among so many.

In his search for protection against the recurrence of Watergate-type excesses, Professor Kurland proposes institutional changes. In one respect, that is laudable: institutional correctives do not depend on the quality or honesty of the people who occupy the offices of government, and they last beyond periodic personnel changes. The kinds of institutional changes advocated by *Watergate and the Constitution*, however, pose serious questions for the cornerstone principle of the American Constitu-

tion, separation of powers. This is particularly true of Kurland's endorsement of the provisions of S. 495 calling for the creation of an Office of Congressional Legal Counsel,² his support of increased congressional involvement in the oversight of the intelligence community, and his argument that the courts should stay out of disputes between the legislative and executive branches concerning the competing claims of each for constitutionally based jurisdiction. With regard to this final issue, I recognize that deciding between competing claims for jurisdictional turf necessarily involves the courts in significant policymaking decisions. But Professor Kurland's alternative—leaving the issue to the final decision of Congress—is worse. It would vest in one of the competing players the enviable combined role of competitor and referee.

It may well be that Congress should play a larger role, and that if Congress would do so, one of the results would be to insure against future excesses such as we experienced during the Watergate period. But if Congress is to play a greater role, it should be safely within the boundaries contemplated by the principle of separation of powers. That is, if there are excesses, and Congress is to correct them, Congress should do so by passing statutes, rather than by attempting to implement public policy through enforcement of statutes already passed. Establishing a permanent litigating force to implement public policy and administering the nation's intelligence activities are both activities that smack of law enforcement and law implementation. Under our system of separation of powers that responsibility belongs to another branch of government. Congress' job, and a very difficult one, is to make policy, not to enforce it. Lawmaking involves hard policy choices, the kind of decisionmaking that inevitably invites criticism from someone. It is much easier, and much safer, for Congress to use its resources in examining whether some other branch of government is doing its job properly.

There is a time and place for congressional inquiry. To the extent that there needs to be greater congressional involvement in the prevention of future Watergates, however, it should be in the direction of greater exercise of Congress' constitutional responsibility—the making of laws. It should not be in the direction of usurpation of the responsibilities of its sister branch—the enforcement of laws.

Finally, I have serious doubts concerning the preventative

2. S. 495, 94th Cong., 1st Sess., 121 CONG. REC. 1828-32 (1975).

value of institutional changes. Ironically, institutional changes can sometimes be counterproductive because of the sentiment of security they engender. It can be a comforting assurance to our national psyche that effective changes have been built into the governmental system. The result, however, can sometimes be a diminution of concern for the real causes of the problem, which are human rather than institutional. Professor Kurland lauds Attorney General Levi's creation of the Office of Professional Responsibility within the Justice Department and expresses the view that it is an effective step toward protecting against high-level Justice Department improprieties such as occurred under Attorney General Mitchell. I served with Edward Levi in the Justice Department at the time the Office of Professional Responsibility was created. I believe it will be a long time before we see a repetition of the improprieties of the Nixon-Mitchell era at the Department of Justice. If this belief becomes reality, it will be principally because of the work of Edward H. Levi—but not because of any formal institutional changes he made, and certainly not because of his creation of the Office of Professional Responsibility. Rather, it will be because of the example he set in putting a level of lawyer-client insulation and independence between 1000 Constitution Avenue and 1600 Pennsylvania Avenue. It was Edward Levi the man, with his superb combination of competence as a lawyer and morality as a human being, who brought the Department of Justice from where he found it in early 1975 to where he left it two years later.

Some institutional changes may do some good. Others may simply divert attention from the real problem. In any event, the real key to successful government, to government that warrants the respect of its citizens, and to the prevention of future Water-gates lies not so much in change of governmental institutions as in the quality and the morals of the people who run them.