

The Corruption of the Constitution

Watergate and the Constitution, by Philip B. Kurland, *Chicago, Illinois: The University of Chicago Press, 1978. x + 261 pp. \$12.50.*

MAKE NO MISTAKE about it, the Constitution and how we have corrupted it are the principal themes of this book. And, while those themes are frequently illustrated by citations to the events of Watergate, that sordid episode does not dominate the book. Rather, it serves as the main but not sole source of facts that collectively descry a more fundamental crisis.

According to Professor Philip B. Kurland, who is a noted scholar of the Constitution and the Supreme Court, Watergate was only the latest, if the worst, symptom of the "institutional failures" of American government: "The notion that because we have come through one critical period we have been restored to health is more wish than reality. Perhaps we have removed a cancerous growth that could have killed us. We have not rid the system of the disease." The disease suffusing our government is the crippling of the precepts of "separation of powers" and "checks and balances." "If there were two distortions of constitutional government revealed by Watergate, they were

the failure of Congress to perform adequately its function as a check on the executive, and the inordinate concentration of power in the hands of the White House staff." Yet, Kurland notes, "[r]emedies for neither of these distortions [have] been afforded."

Professor Kurland's diagnosis of the constitutional ills of American government proceeds through topics that are of particular pertinence to Watergate ("congressional power of inquiry," "executive privilege," the judiciary, "powers of appointment and removal," "impeachments," and presidential prosecutions and pardons), during which Kurland suggests some solutions to the numerous issues raised. I leave the evaluation of those solutions to others more expert in constitutional law than I; my attention will be directed toward those themes that form the basis of the book, an emphasis that is encouraged by Kurland in his repeated efforts to look beyond the immediate phenomena presented us by Watergate.

Central to the book is Kurland's belief that the constitutional limitations on the accumulation of power in the government have been ignored and, consequently, that the federal government in general and the "plebiscitary" presidency in particular have much more power than is appropriate—or healthy: "The primary evil revealed by the events of Watergate was the presidency: not the man but the office." The abuses of power revealed by Watergate show us what inevitably occurs when governmental power grows unchecked; the Founding Fathers understood this fact of human nature and constructed the Constitution accordingly. We have ignored their wisdom. To recapture it, we are required not to throw the rascals out but to end the accumulation of power. Quite clearly, Kurland asserts, the replacement of bad men with good men in office is not sufficient to effect reform. That "the love of power is incompatible with goodness" is a fact of human nature, and the abuse of power follows naturally upon its acquisition and accumulation. "Man is a toad-eating animal." Accordingly, man imposes on himself institutional restraints—here, the Constitution and laws enacted thereunder—in order to save himself from ruination at the hands of too pow-

erful men. The corruption of the Constitution occurs when men fail to observe or enforce the institutional limitations and restraints that have been set, or fail to promulgate new ones as the situation requires.

Historically, the corruption of the (British) Constitution that was complained of by the colonies concerned the undue influence over the King possessed by various ministers and henchmen. Our Constitution was meant to foreclose that possible problem by circumscribing the powers of the executive branch. Today, however, an unauthorized "fourth" branch of government can be found in the White House staff and the Executive Office of the President. Kurland argues that those aides recognize no legitimate limits on their power and believe themselves responsible only to the President. Additional problems arise from our very conception of the presidency ("imperial," "dictatorial")—a conception that derives from the exigencies of the Great Depression, the Second World War, and Franklin D. Roosevelt's unprecedented presidential tenure—and from our inadequate regulation of disparate administrative agencies. To the extent that there exists an effective check on the President's power, Kurland claims, it exists only within that same branch of government, namely, in the unwieldy, inflexible executive bureaucracy.

Usurpation of power is not a fault restricted to the executive branch, however. Kurland argues that the federal judiciary has grown disproportionately to its legitimate authority and jurisdiction. While the federal courts consistently favor the federal government over state sovereignty and the executive branch over Congress, they most often favor their own power over everyone else. Worse still, Kurland alleges, such accretion of power is not repaid or justified by the wisdom or rationality of the decisions of those courts. The sad fact is that their opinions fail to persuade, leaving compliance with their edicts to be achieved through the threat or application of mere force.

Kurland contends that the Supreme Court is guilty of encouraging many of these usurpations of power by the federal government. In addition, he criticizes the way in which the

Court has effected constitutional decision-making ("the constitution and reconstitution of the Constitution"); his description of that process should interest all students of the Constitution and the Court. Since "there is question not only about what the Constitution means but also about what the Constitution is," Kurland acknowledges that there are many possible uses of that document. Are all justifiable? Too often, he says, when the text and history of the Constitution do not answer the questions we face, the Supreme Court interjects its judgment without constitutional warrant. The Court, that is, "has constituted itself a continuing constitutional convention, . . . slowly but effectively, amend[ing the Constitution] so that it may be read to fill the lacunae." Consequently, we "are governed today by a constitution far different from that which Washington bequeathed to us. And the most basic changes have been brought about by means other than constitutional amendment." Kurland suggests that too often the Court has "informally" amended a document that only permits formal amendment. Such inappropriate liberties lead to ill-advised decisions having the force of constitutional commands. This admonition assumes, however, that the Constitution is a document that established, once for all, an allocation of functions among the branches of the federal government and among the federal and state governments and the people. Does not the Constitution also operate in certain ways as a living social charter, allowing and even demanding on occasion interpretation and application that recognize that fact? (Cf. L. Tribe, *American Constitutional Law*.)

In view of the original understanding of federalism as a doctrine of limited authority, Kurland also believes that state sovereignty has been subverted. The erosion of residual sovereignty from the states to the federal government has been steady since the Civil War and has accelerated to a landslide in this century. In addition, the ultimate sovereignty residing in the people has been forgotten or ignored, to the extent that the President is apt to consider himself to be the surrogate of the people rather than their representative. Nor can the "imperial press" or the political parties

claim to represent the people. Rather, the press is the captive of a particular faction within the populace, while the parties simply "dominate American political affairs."

Given this necessarily brief description of basic themes, a number of questions can be raised. Did the problems that Kurland identifies arise because the original conception of our government no longer fits the conditions of the modern world or, instead, because we have corrupted that original conception? "[I]t must be asked," Kurland acknowledges, "whether the Constitution we were given in 1787 is at fault or whether the perversions of that Constitution are to blame." In the face of President Carter's anaemic performance and the failure of Congress to step into the void and evidence some leadership (e.g., its prolonged failure to enact an energy policy), that disturbing question must remain pending. Congress, as the branch of government that has been victimized by the executive and judicial accretion of power, must act—but will it? Another question concerns a quite different impotency. Do the people have the will to reassert their sovereignty? Have they any sense of what they want or need? Can they reassert their sovereign power not as a mob but as a collection of citizens, a gathering of neighbors? The answers to these questions will not be immediately forthcoming. "It will take years to find out; the ultimate Watergate trial lies ahead. It will test not our capacity to blame Richard Nixon but our ability to monitor and adjust the checks and balances we profess to be precious—to understand the infectious imperatives of power."

Of all the problems identified by Kurland in his heavily documented yet accessible book, none seems more pressing than the impotence of the people. This is not a populist theme—it is a public theme, and it is raised by the perception that our "institutions are in disarray, but there is a malaise in the land: institutional crisis and civic inertness." (John Schaar and Francis Carney, "The Circles of Watergate Hell," *American Review* 21 (October, 1974).) "This mood," Schaar and Carney wrote, "which from a republican or civic perspective is exactly what is meant by corruption, is now taking new and perverse forms," forms that

have begun to show up in the way we live. As Nixon did, “we, too, seek lives without limits and form. We have hollowed out the institutions and codes that once disciplined our individual desires and made us willing to temper private impulse by public ends.” In Kurland’s words, we have “long den[ied] . . . institutional values in favor of temporary political expediency.”

Professor Kurland’s book reminds us, as does the article by Schaar and Carney, that constituting a “public” and acting within a public world are achievements rather than givens. If we are not willing to work for it, the *polis* achieved in 1787 will not be ours.

The question is how many Americans are still, or may be persuaded to become, adherents of the “vital center” and of the rule of reason based on experience, both of which guided the Founding Fathers to the framing of a Constitution that we still purport to follow.

Reviewed by THOMAS D. EISELE