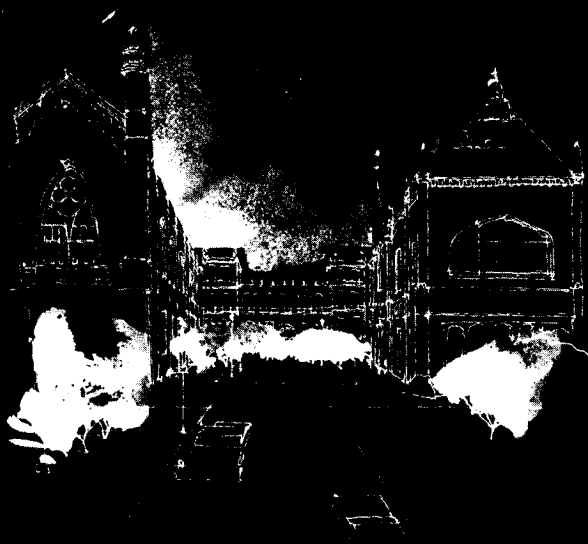


Selected Papers • No. 44

Some
Constitutional
Aspects
of Watergate

By PHILIP B. KURLAND



GRADUATE SCHOOL OF BUSINESS
UNIVERSITY OF CHICAGO

Some Constitutional Aspects of Watergate

SCANDALS in the United States, and not least political scandals, have usually been short-term affairs. In most such instances, the press publishes the charges of wrong-doing with its accustomed fervent, if not noisome, self-righteousness. The accused is quickly condemned by the public, often removed from office and soon forgotten, as with Sherman Adams or Abe Fortas or Spiro Agnew, or left to the long-drawn processes of the criminal law, as with Bobby Baker or Otto Kerner. In the latter event, the press coverage will be intense and titillating during the period of the trial, but also soon beyond the interest of the American public. Seldom do the cases involve more than the peccadilloes of a single, temporarily high-placed official; seldom do the cases present basic problems of a constitutional nature.

The Watergate affair is different. It is different because the immediate criminal acts are but symptoms of a deeper and more fundamental ailment. It is different because it is not concerned with underlings, but with personages who once held the governance of the nation in their soiled hands. It is different because the essence of the wrong-doing is not to be found in the greed for money. It is different because it raises important constitutional questions, not least of which is, as President Nixon constantly reminds us, the question of the proper status of the presidency itself in our constitutional democracy. Not the XYZ affair, not the corruption of the Grant

administration, **not the Teapot Dome scandal**, not all of them together cut so deep a wound **in the American body politic.**

THE ONLY ANALOGUE **that comes to my mind does** not derive from American history at all. It is, rather, the Dreyfus affair that shook the French Republic at the turn of the century and consumed a decade in its unfolding and its cure. One is reminded by the facts of Water-gate of Emile Zola's speech in his own defense at his trial for defamation:

Do you not understand now that what the nation is dying of is the obscurity in which there is an obstinate determination to leave it? The blunders of those in authority are being heaped upon those of others; one lie necessitates another, so that the mass is becoming formidable. A blunder was committed, and then to hide it a fresh crime against good sense and equity has had daily to be committed!

The responsibility lies with the power which, to cover the guilty, and in furtherance of political interests, has denied everything, hoping to be strong enough to prevent the truth from being shed. It has maneuvered in behalf of darkness, and it alone is responsible for the present distraction of conscience. . . . A nation cannot be thus upset without imperiling its moral existence. This is an exceptionally serious **hour.**

And it was William James who could write, at the time of the Dreyfus case, a letter to Mrs. Morse:

Talk of corruption! We don't know what **corruption means** at home, with our improvised and shifting agencies of crude pecuniary bribery, compared with the solidly entrenched and permanently corruptive geniuses of monarchy, nobility, church, Army, that penetrate the bosom of the higher as well as the lower kind of people in all European **states . . . and sophisticate their motives away from the impulse to the straightforward handling of any simple case.**

We now know **the kind of corruption of which** James then wrote. **Certainly, as the**

Agnew case revealed, "crude pecuniary bribery" is still with us. But we have achieved the sophistication of European depravity. Niccolò Machiavelli advised his prince: "If the chief party, whether it be the people, or the army, or the nobility, which you think most useful and of most consequence to you for the conservation of your dignity, be corrupt, you must follow their humor and indulge them, and in that case honesty and virtue are pernicious." And the events of Watergate suggest that for the highest officials of our realm, "honesty and virtue are pernicious."

Even so, the immediate events of Watergate are not so threatening to our democracy as the more fundamental ailment of which Watergate is only a symptom. In his recent tour-de-force, in some ways an *pro vita sua* Arthur Schlesinger, noted the terminal illness that threatens us:

For Watergate was a symptom, not a cause. Nixon's supporters complained that his critics were blowing up a petty incident out of all proportion to its importance. No doubt a burglary at Democratic headquarters was trivial next to a mission to Peking. But Watergate's importance was not simply in itself. Its importance was in the way it brought to the surface, symbolized, and made politically accessible the great question posed by the Nixon administration in every sector—the question of presidential power. The unwarranted and unprecedented expansion of presidential power, because it ran through the whole Nixon system, was bound, if repressed at one point, to break out in another. This, not Watergate, was the central issue.

Clearly, Schlesinger is right in his analysis. But, possibly because he was an agent of earlier administrations, he did not see that the disease was contracted before Nixon came to power. The power of arrogance, the cancer that could kill our republic, was fully impregnated by the Kennedy administration, grew under the Johnson administration, and only achieved its culmination under Nixon.

WATERGATE is not a place, not a series of recent events, not a point in time. Watergate is a compendium whose most important element is a state of mind, an attitude about how American government should function. Watergate is also a question whether these United States can survive as a constitutional democracy.

Is it erroneous to suggest that the immediate events of Watergate began with the Pentagon Papers leak? Is it heresy to suggest that the evils that were revealed by the Pentagon Papers were wrong-doings of Presidents Kennedy and Johnson and their advisers rather than those of President Nixon and his advisers? Is it inappropriate to notice that the "Plumbers" were President Nixon's contribution to the scandals of the Pentagon Papers? Is it irrelevant to notice that the Bay of Pigs and the CIA are integral parts of the Watergate scandal? Is it improper to suggest that Truman's Korean venture is the direct precedent for the illegal war initiated by President Kennedy, stepped up by President Johnson, and continued to a delayed end by President Nixon? Is it bad taste to assert that the secret bombings of Cambodia were no more secret than the original use of advisers in Viet Nam or the use of CIA mercenaries in South East Asia at an earlier date?

For me, all these questions and more are necessary to the understanding of Watergate. Watergate did not occur as a biological sport. It is not a matter of yesterday, but of many yesterdays. Even the election methods that were the direct subject for study by the Watergate Committee have their antecedents. Were Muskie's tears worse than Nixon's make-up in his first debate with Kennedy? Did money play a different role in the 1972 campaign than in the 1960 Democratic primaries and the contest that followed? Were the tactics that secured the nomination for the Demo-

cratic candidate in 1972, a candidacy that assured a Republican victory, more wholesome for our democratic institutions than those indulged by the Nixon campaign forces?

Watergate, however you define it, is a modern day Pandora's box. The evils it has loosed are immeasurable. The problems it has raised are horrifying and apparently unsolvable. There are two different kinds of constitutional questions that derive from Watergate. The first are those constitutional issues that have engaged the attention of the news media and the public. Essentially these constitutional matters derive from questions of who is guilty of what, of how guilt is to be determined, and on what evidence. This kind of question has been, or probably will be, resolved by some appropriate tribunal. The resulting decisions may or may not afford important precedents for the future.

WITH ALL RESPECT, the second set of constitutional questions is more important, if less sensational and therefore less noticed. These are concerned with the conditions that have made Watergate possible, *i.e.*, they are concerned with the present structure of our government and the problem of the survival of our democracy. These questions are likely to remain obscure and unresolved for want of attention or a proper forum, and with the great possibility of dire consequences. And it is to these that I would address myself now.

George Washington's decision not to be available for a third term as President of the United States was announced in what we have all come to know as his Farewell Address. Even Macaulay's schoolboy knows of the Farewell Address. Aside from the injunction to abstain from all foreign entanglements, however, the contents of the Farewell Address have been obscured by time and circumstance.

Henry Steele Commager has told us that the admonitions contained in the Address “have influenced American history far more than Washington himself could have anticipated.” And yet, it must be conceded, that none of the advice so painstakingly offered has been abided.

Washington warned against political parties and they have come to dominate American affairs. He advised against “overgrown military establishments which, under any form of government, are inauspicious to liberty, and which are now regarded as particularly hostile to republican liberty.” He admonished us that: “It will be worthy of a free, enlightened, and at no distant period a great nation to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence.”

Included among his cautions was one that is particularly relevant to the subject of our discussion today. In 1796, he told us:

It is important . . . that the habits of thinking in a free country should inspire caution in those entrusted with its administration to confine themselves within their respective spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all departments in one, and **this to create, whatever the form of government, a real despotism. . . . If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good; it is the customary weapon by which governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.**

We are governed today by a far different constitution than that which Washington bequeathed us. And the most basic changes

have not been brought about by means of constitutional amendment as Washington would have had it. We have seen the concentration of power in the Presidency that has been achieved by the usurpation of which Washington warned us, aided largely by the abdication of responsibility by the Congress. We are, indeed, threatened by that despotism which he decried, whether it may be called "benevolent" or not.

The affair called Watergate, however, has brought the spectre of totalitarianism to the attention of the American public. Now, as hardly ever before, we are cognizant of the crisis that we face. For the first time in many years Congress is seeking to assert itself. And the question is whether or not it is too late to restore the constitutional balance that our Founding Fathers created.

HERETOFORE, crisis has been the handmaiden of presidential power. Whether the crisis was economic, as was the case when Franklin Delano Roosevelt first came to power, or a military crisis of the kind that has plagued every generation of Americans, at least since World War I, it has always brought with it exaltation of executive authority. And each time, until the advent of the Vietnamese War, this concentration of authority has been justified not only by our leading liberal politicians but also by our leading liberal scholars, either on the ground of necessity or expediency.

Thus, it was possible for Professor Clinton Rossiter, after World War II, in his book entitled *Constitutional Dictatorship*, to state as his conclusion:

One final word. In describing the emergency governments of the western democracies, this book may have given the impression that such techniques of government as executive dictatorship, the delegation of legislative power, and lawmaking by administrative decree were purely transitory and temporary in nature. Such an impression would

be distinctly misleading. There can no longer be any question that the constitutional democracies, faced with repeated emergencies and influenced by the examples of permanent authoritarian government all about them, are caught up in a pronounced, if lamentable trend toward more arbitrary, more powerful, and more "efficient" government. The instruments of government depicted here as temporary "crisis" arrangements have in some countries, and may in all countries, become lasting peacetime institutions.

It is his concluding sentence that sends shivers up my spine:

No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself.

Facts are to be faced, **however, and the facts are** that since Roosevelt's **tenure all meaningful government power has been vested in the national government. The only governmental powers** that states now exercise are those **allowed to them by the national government. State government is politically as well as economically bankrupt. And, within the national government, power has, since Roosevelt's day, been concentrated in the executive branch. This is not a result of the Nixon incumbency.**

As long ago as 1968, before Richard Nixon was elected to his first term as President of the United States, Louis Heren, then Washington correspondent for *The Times of London* wrote a perspicacious, if wrong-headed book, which described the dominance of presidential power in American government in this fashion:

The modern American Presidency can be compared with the British monarchy as it existed for a century or more after the signing of the Magna Carta in 1215. . . . Indeed, it can be said that the main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than a diminution of his power. In comparative historical terms the United States has been moving steadily backward.

The point I should like to make here, **however, is that the dangers to American democ-**

racy and freedom against which George Washington warned lie not only in the adhesion of power to a single man, the President, but the adhesion of power to the executive office: an executive office that includes the National Security Council, the Council of Economic Advisers, the C.I.A., and the Office of Management and Budget among its unchecked, unlimited, and unelected “guardians” of the American people. To use Mr. Heren’s analogy, what we have witnessed in the Kennedy, the Johnson, and the Nixon administrations is a return to that period of English history when the power was not wielded solely by the king, but by the king and his council, to the period that led up to the American Revolution.

A STARTLINGLY PERCEPTIVE and insightful work, Professor Bernard Bailyn’s *The Ideological Origins of the American Revolution*, published in 1967, demonstrates that the intellectual case for the American Revolution was based not so much on those simplifications about George III that are taught in our history courses, as on the notion that the English constitutional system on which all men’s liberties depended had been perverted by the men around the Crown in conjunction with the king rather than by the king alone. Listen to Bailyn’s words, and his use of the words of those who lived in the era that gave birth to our nation, and ask yourselves whether the explanation does not fit our day equally well:

The most common explanation, however, an explanation that rose from the deepest sources of British political thought—located “the spring and cause of all the distresses and complaints of the people in England or in America” in “a kind of fourth power that the constitution knows nothing of, or has not provided against.” This “overruling arbitrary power, which absolutely controls the King, Lords, and Commons,” was composed, it was said of the “ministers and favorites” of the King, who,

in defiance of God and man alike, “exerted their usurped authority infinitely too far,” and “throwing off the balance of the constitution, make their despotic will” the authority of the nation. For their power and interest is so great that they can and do procure whatever they please, having (by power, interest, and the application of the people’s money to *placemen* and pensioners) the whole legislative authority at their command. So that it is plain (not to say a word of a particular reigning arbitrary *Stuarthal* power among them) that the rights of the people are ruined and destroyed by ministerial tyrannical authority and thereby . . . become a kind of slaves to the ministers of state. This “junto of courtiers and state-jobbers,” these “court-locusts,” whispering in the royal ear, “instill in the King’s mind a divine right of authority to command his subjects” at the same time as they advance their “detestable scheme” by misinforming and misleading the people.

Bailyn wrote:

For the primary goal of the American Revolution was . . . the preservation of political liberty threatened by the apparent corruption of the constitution . . .

The American Revolution was a political revolution, not a social or economic revolution. It was fought to restore the constitutional balance that Englishmen and Americans thought essential to the liberties they claimed. In the two centuries that have elapsed, the “corruption of the constitution” which they deplored has once again occurred. And, if our liberties are to be preserved, we should be looking to the means to restore the constitutional balance among the three branches of government.

The first step toward the restoration of our constitutional democracy is clear to me, if to no one else. It would be the abolition of the “fourth branch of government,” -to quote again from Bailyn’s sources-“a kind of fourth power that the constitution knows nothing of, or has not provided against.”

I DON’T KNOW yet when the euphemism “The

White House” first came into use as a **de-**scription of something other than the Presidential mansion at 1600 Pennsylvania Avenue. But it was exactly when “The White House” became what it now is, a fourth branch of American government, that we were committed to take the road that led to Watergate. And this long journey probably began with the single step of the statutory authorization of the Roosevelt Reorganization Plan in 1939. My proposal is, therefore, that the first step back towards our constitutionally established democratic principles is to remove the powers accumulated in the so-called Executive Office of the President, to dissipate the Office of Management and Budget, the National Security Council, the Council of Economic Advisers, the czar of this and the emperor of that. Put these functions back in offices that are subject to Congressional control and public scrutiny, or in administrative agencies that can be made totally free of Executive Office corruption.

Watergate, however, is the consequence not of one but of two kinds of corruption. The first is that which I have described as the “corruption of the Constitution.” In 1835, Mr. Justice Story wrote with prescience what Washington had preached in his Farewell Address. Story said:

Unless the people do at all times possess virtue, and firmness, and intelligence enough to reject mischievous influence; unless they are well instructed in public affairs, and resolutely maintain the principles of the constitution, it is obvious that the government itself must soon degenerate into an oligarchy; and the dominant faction will rule with an unbounded and desolating energy.

* * *

The great mass of human calamities, in all ages, has been the result of bad government, or ill-adjusted government; of a capricious exercise of power, a fluctuating public policy, a degrading tyranny, or a desolating ambition.

THE SECOND KIND of corruption revealed by Watergate is the corruption of the people and particularly of individual office holders. We have forgotten what a little-known Supreme Court justice, in a lesser-known Supreme Court case, once wrote: "The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by consideration of right, justice and the public good." (Swayne, J., in *Trust v. Child*, 21 Wa11.441, 450.) A better-known judge, Chief Justice Warren, in a better-known case, for it derived from the Dixon-Yates controversy which is within the memory of most of us, said: ". . . a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." (*United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 [1961].)

The fact is, of course, that no institutions, however perfect-and the constitutional plan of checks and balances can hardly be deemed perfect-can function without the appropriate human beings to run them. The Founders had in mind not only a concept of the Presidency but the kind of man they wanted when they prepared Article II. Despite their great respect for Washington, they limited the executive power as no national government had ever before limited executive power. The need for a Washington was, nevertheless, pervasively felt. The problem of finding the right men for the right governmental posts has long plagued us. The distinguished French historian, Francois Guizot, supplied the introduction to Jared Spark's biography of Washington. In 1837, Guizot wrote:

The disposition of the most eminent men, and of the best among the most eminent, to keep aloof

from public affairs, in a free democratic society, is a serious fact. . . . It would seem as if, in this form of society, the tasks of government were too severe for men who are capable of comprehending its extent, and desirous of discharging the trust in a proper manner.

TODAY We are suffering not only from a corruption of the Constitution through perversion of the institutions of government, but a corruption of the Constitution because the men we have chosen for high office are unworthy. A President of the United States who tells us that he is "not a crook," thereby affords little reassurance of his qualifications for office, even if we could still credit him with a capacity for the whole truth. It is not enough that the President of the United States is "not a crook." There is more to honor and duty than not stealing from the public fisc. The reassurances we need-and have not received because deeds and not words are the only cogent evidence here-is that the authority of the United States government is not expended merely to effectuate the personal whims or wishes of those in high authority nor to benefit their personal friends and do harm to their personal enemies. (The "white papers" on ITT and the milk industry, the Press Conference following the indictments contain no more than the empty words of an already discredited witness.) We live in an age when it is no longer the love of money that is the root of all evil; for our time it is the love of power that is the root of all evil.

A system of Presidential selection-not, incidentally, the one created by the Constitution-that leaves the voters a choice between the devil and the deep blue sea, as it did in the 1972 election and in some earlier elections, helped bring us to this grievous point in our history. But that is another tale that requires another time for the telling, however short of time we may be.

The crisis called Watergate has provided us pain and suffering, outrage and disgust, fear and trembling. It has also afforded us an opportunity not likely to come again, to reexamine the “corruption of the Constitution” from which we have been suffering these many years and to try to effect a remedy before it is too late.

Archibald MacLeish’s poem, “The Black Day,” was written to a different issue, but it affords appropriate words to close this talk.

God help that country cankered deep by
doubt,
Where honest men, by scandals turned
about,
See honor murdered and will not speak
out.
God help that country!