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Book Reviews: Watergate and the Constitution

Ilona Modly Hogan

Former Congressional Legislative Assistant

Lawrence J. Hogan

Former U.S. Congressman and County Executive, Prince George's County, Maryland

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BOOK REVIEWS

WATERGATE AND THE CONSTITUTION. By Philip B. Kurland.*
University of Chicago Press, Chicago, Illinois. 1978. Pp. 261.
Reviewed by Ilona Modly Hogan† and Lawrence J. Hogan‡

University of Chicago Law School Professor Philip Kurland begins his preface by saying that this series of essays is meant for nonlawyers. In the words of *Publishers Weekly*, “[i]t will be a hardy layperson who will make his or her way through it.”¹ Twenty-four pages containing approximately 754 footnotes make this volume very much a constitutional lawyer’s research tool. Even at that, it is advisable to read the volume essay by essay in order to maintain interest as the author himself states that the essay form has allowed “for repetition of the same themes in different contexts” (p. ix). This repetition is evident throughout, particularly in the citations of historical and legal precedents, which provide the background for each essay topic ranging from the “Congressional Power of Inquiry” to “The Plebiscitary Presidency.”

Because of your reviewers’ personal involvement in the impeachment process,² the scope of this review will emphasize the essays on “Impeachments” and “Presidential Prosecutions and Presidential Pardons.” Together with the essays on “Separation of Powers and Checks and Balances” and “The Plebiscitary Presidency,” they form the foundation for linking the events of 1972 through 1974 to an exposition of constitutional law. The remaining essays, while in part repetitive of the four chosen for review here, also appear to serve more as a forum for Professor Kurland’s scholarly interest and academic expertise in the field of constitutional law than for their direct relationship to the topic of Watergate and the Constitution.

Your reviewers and the author approached the topics of impeachments and presidential pardons from diametrically opposing viewpoints and yet, through independent legal analysis, reached strikingly similar conclusions on the issues. For example, Professor Kurland, by way of introduction, states that he did not try to tell the

* Philip B. Kurland is the William R. Kenan, Jr., Distinguished Service Professor at the University of Chicago where since 1956 he has been professor of law.

† B.A., 1969, George Washington University; J.D., 1974, Georgetown University; practicing attorney and member of the Maryland and District of Columbia Bar Associations; Congressional Legislative Assistant from 1969 to 1973.

‡ B.A., 1949, Georgetown University; J.D., 1954, Georgetown University; M.A., 1965, American University; County Executive, Prince George’s County, Maryland; represented the Fifth Congressional District of Maryland in the United States House of Representatives from 1969 to 1975 and served on the House Judiciary Committee from 1970 to 1975.

1. See *Publishers Weekly*, March 20, 1978.

2. During his service on the House Judiciary Committee, Mr. Hogan participated in the impeachment proceedings against President Richard M. Nixon.

"inside story" of Watergate. "I could not, if I would. I was never on the inside: not of the Senate Select Committee; not of the special prosecutor's office; not of the judicial proceedings; nor yet of the House Judiciary Committee" (p. 1). One of your reviewers, on the other hand, was a member of that House Judiciary Committee and subsequently the author of a law review article entitled, "*The Impeachment Inquiry of 1974: A Personal View*."³

Further, in his final essay, Professor Kurland tells the reader forthrightly from whence his prejudices spring:

It seems to be harder for academics than for poets to avoid self-righteousness, not to be disdainful of those who are professionally engaged in politics or business, which most of us eschew, except as kibitzers. Politicians' motives, especially, cannot be nearly so pure as our own, and hindsight constantly demonstrates to us the fallibility, if not venality, of those persons in the "real world."

. . . Attempting — without entire success — to put to one side my long and deep-seated distaste for the person of Richard Nixon, I conclude . . . (p. 201).

In contrast, your reviewer who served on the House Judiciary Committee, wrote: "As a member of that Committee, I personally felt the weight of that constitutional test and perceived its dangers."⁴ "A sense of being unable to escape history remained with me throughout the proceedings."⁵ "Despite the inherently 'political' nature of the impeachment process, I chose to approach the entire matter, as best I could, from a purely legal standpoint."⁶ "The body of evidence fell into place one piece after another, finally demolishing the presumption of innocence that I had gladly given the President."⁷ "That one vote changed my life as well as Richard Nixon's."⁸

Professor Kurland's chapter on "Impeachments" has been called by one fellow lawyer "the best brief essay on the concept in print."⁹ Indeed, had it been available during the deliberations of the House Judiciary Committee in 1974, it would have served as an invaluable research tool for the thirty-eight Committee members, all of whom were required to be lawyers before becoming eligible for appointment

3. L. Hogan, *The Impeachment Inquiry of 1974: A Personal View*, 63 GEORGETOWN L.J. 1051 (1975).

4. *Id.*

5. *Id.*

6. *Id.* at 1052.

7. *Id.* at 1061.

8. *Id.* at 1063.

9. 64 A.B.A. JOURNAL 1732 (November 1978).

to the Committee. His discussion on impeachments begins where each member of the House Judiciary Committee began, and that is, with no guidance from past Supreme Court opinions and with very little legal precedent on the meaning of article 2, section 4¹⁰ of the Constitution. Thus an impeachment panel can rely only on the actual words of the Constitution and come to its own interpretation of those words, particularly the rather vague phrase, "other high Crimes and Misdemeanors." Professor Kurland concludes, as did the 1974 impeachment panel, that impeachments need not be based on indictable offenses. Rather, the American impeachment process is basically a political process for removal and not an alternative to criminal proceedings. In keeping with the primary sanction of removal from office, it is logical that the essence of an impeachable offense was thought by the framers of the Constitution to be a corrupt breach of the public trust and not a per se violation of the criminal laws. In reviewing *The Federalist Papers* on this subject, Professor Kurland notes that James Madison "also voiced an opinion that would have forestalled the 'Saturday night massacre,' when he told his fellow congressmen that an unwarranted removal from office by the President of a worthy official would warrant impeachment of the President" (p. 114).

The only presidential impeachment to provide any semblance of legal precedent was that of Andrew Johnson in 1868. But the author, as did the impeachment committee of 1974, found little usefulness in the proceedings of that House impeachment and Senate trial. Professor Kurland in fact lauds the 1974 committee for not proceeding in the manner of the 1868 Congress:

The House Judiciary Committee, which was charged with determining whether charges of impeachment should be brought against President Nixon, proceeded deliberately, judiciously, and conscientiously in its task. No one can read the proceedings of the committee without crediting it with commitment to constitutional standards. The House of Representatives of 1974 was not the House of Representatives of 1868 (p. 119).

Finally, Professor Kurland questions whether there could have been an appeal to the courts from a Senate judgment of conviction. He answers with an emphatic "no" as judicial review was never contemplated by those who wrote the Constitution; but he also

10. U.S. CONST. art. II, § 4 provides as follows:

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

recognized that "the enhanced self-image of the American judiciary today" might well lead it to undertake such review and decision were the opportunity presented, as it was not with the resignation of Richard M. Nixon in 1974.

In his essay on "Presidential Prosecutions and Presidential Pardons," the author concludes that the President of the United States must be immune from criminal prosecution during his term of office (p. 135). While others may dispute this conclusion, the author also contends that there should be no doubt that a removed or retired or resigned President is vulnerable to the criminal processes. Thus, it was that on September 8, 1974, President Gerald R. Ford pardoned Richard M. Nixon, and "[w]ith this stroke of the pen, he freed Nixon from liability for his federal crimes and probably doomed his own chances for election to office in his own right" (p. 136). Professor Kurland further notes that "[i]n November of 1976, Mr. Ford may well have answered to the people for the 'mercy' he dispensed in 1974" (p. 152).

Immediately, the attacks on the Nixon pardon were many. Once again, your reviewer sat on the House Judiciary Committee when President Gerald R. Ford voluntarily came before the Committee to explain his pardon of his predecessor. But, as with the impeachment process itself, pardons are so much a purely political tool that it was difficult to address the precise legal questions raised by a pardon of a resigned president. Professor Kurland concludes that "none of these objections could reach the level of substantial legal doubt as to the validity of the pardon. They all spoke rather to the bad judgment of the man who offered it" (p. 143).

The major legal arguments against the granting of the pardon were grounded on the issue of prematurity because the pardon preceded conviction and the filing of any charges of criminality (pp. 143-44). Furthermore, the pardon failed to conform to the regulations of the Department of Justice. The issue of prematurity was, however, addressed both by President Ford in his statement to the Judiciary Committee on October 17, 1974, and by the questions of Committee members subsequent thereto. In the course of that hearing, your reviewer noted particularly that

[w]e also know from the debates of the framers of the Constitution that they specifically rejected including in the Constitution the words 'after conviction.' They also, in the debate at that time, indicated situations where it might be necessary or desirable to grant a pardon even before indictment, as was the case in this instance.¹¹

11. HOUSE COMM. ON THE JUDICIARY, PARDON OF RICHARD M. NIXON AND RELATED MATTERS, 93d Cong., 2d Sess. 109 (1974).

The final essays on "Separation of Powers and Checks and Balances," "Reforms," and "The Plebiscitary Presidency" provide the forum for Professor Kurland's dismal conclusion that inadequate congressional oversight of the executive branch and too much power in the White House staff caused the constitutional deficiencies revealed by Watergate and that nothing has been done in the aftermath to cure those deficiencies. Whether the deficiencies stem from the failure of the constitutional system of checks and balances or from the growth of the "imperial presidency," the author gives credit to Archibald Cox for his accurate diagnosis of the affliction when Cox explained in 1976 to a Canadian audience that the essential constitutional questions of Watergate derived from the expanded power of the presidency.¹² As "proof" that reform has yet to take place, Professor Kurland points to the fact that the Carter White House staff was at first drastically enlarged and that many staffers "are salaried at the highest government levels, in excess of salaries paid to the Haldemans, Ehrlichmens, Deans, and Magruder of an earlier White House, and far in excess of their earnings before they joined the Carter bandwagon in its early stages" (p. 199).

More frightening, however, than the author's description of the current state of the White House staff is his revealing and all too true description of the massive federal bureaucracy:

The result of this Supreme Court license and congressional irresponsibility is that the nation is now governed essentially, not by laws enacted by Congress, but by rules and regulations promulgated by the executive branch and by independent agency actions, purporting to be in compliance with the congressional will, *i.e.*, where congressional will can be derived from something besides silence, but frequently in opposition to it. With this greatly expanded governmental function, the executive branch has become a series of bureaucracies uncontrolled even by the upper echelons of executive officials and only occasionally subjected to judicial scrutiny (p. 176).

Finally, the only Watergate-era "reform" to which the author can point is the public funding of national elections. Whether public financing can be considered a reform at all is questionable. Yet, it is interesting to note that H.R. 1, the first bill to be introduced in the United States House of Representatives in the 96th Congress convened on January 15, 1979, deals, once again, with just that subject matter.¹³

12. See 26 U. TORONTO L.J. 125 (1976).

13. See CONG. REC., 96th Cong., 1st Sess. (Jan. 15, 1979).