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By Philip B. Kurland

A delicate line divides a popular victory from a divine right. It is a distinction too many Presidents have ignored.

The Imperial Mandate

Sir Robert Peel once wrote: “Infamous as Robespierre and Marat unquestionably are, it would be no easy matter to assign each their due share of infamy without a very dispassionate enquiry into many minute events which contributed to shape their course, and into the degrees of conflicting dangers between which they had to choose.” The same thought may be ventured about Richard Nixon. No such “dispassionate enquiry” has yet been afforded to us by either the popular or the academic press. If and when it is forthcoming, it is no more likely to change the judgment about Nixon’s infamy than it did history’s judgment on Marat or Robespierre. For historical judgments, like judicial judgments, are seldom based on data. But we pretend.

Nixon’s defenders of the moment, like William Safire and Patrick Buchanan, were once paid by him for their services as apologists and continue so to act through the good graces of the very news media that they once damned. But Nixon cannot be defended by a refusal to accept established facts without an explanation of them or an addition to them. Nor will the judgment on Nixon be affected by the argument that Nixon was only the latest of a long line of perfidious presidents. Victor Lasky is surely right in the title of his latest book, It Didn’t Start with Watergate. Unfortunately, his next book may well be titled It Didn’t End with Watergate, which would be a better defense. But it should be remembered that it didn’t start with Charles I, either, nor did it end with him.

Nixon may one day be succored the way Caesar was by Marc Antony. But none of Nixon’s defenders has yet displayed the gifts of Antony’s ghost writer. And it will probably take a poet, even if one of smaller magnitude, to make out the case for Nixon. Yet, even Antony speaking through Shakespeare conceded:

The noble Brutus
Hath told you Caesar was ambitious;
If it were so, it was a grievous fault;
And grievously hath Caesar answered it.

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.” In criticizing their efforts, we tend to assume an omniscience that only newspaper writers or television commentators are, by their nature, entitled to assert. But it nevertheless remains the function of academics to aspire to the “dispassionate enquiry” of which Sir Robert Peel spoke.

Attempting—without entire success—to put to one side my long and deep-seated distaste for the person of Richard Nixon, I conclude that the best reasons for Nixon’s removal from office are not to be found in the three articles of impeachment voted by the House Judiciary Committee or even in all five of those that the committee considered. This is not to say that these charges were inadequate for impeachment and conviction. It is rather that, just as Watergate was but the symbol of the problems of the imperial presidency, so too were the impeachment articles but the symbols of Watergate. If there were no more to Watergate than concealment of a crime, lying about it, and refusing to respond to congressional demands for information, it could not have been the traumatic event that it was. The impeachment charges will always remain as proof of malversations.

From Watergate and the Constitution by Philip B. Kurland. © 1978 by the University of Chicago Press.
The Articles were not the reason to impeach. They symbolized Watergate, just as Watergate symbolized an imperial presidency

unique to President Nixon, but to concentrate only on these issues is to exalt shadows and demean substance.

The President’s trespasses were recorded not in the bills of indictment but in the evidence from which they were adduced. The published Watergate tapes and the published volumes of evidence before the House Judiciary Committee revealed not only the criminality of a President of the United States but also his immorality or, more properly perhaps, his amorality.

When Nixon took to the air to excuse his behavior in his initial interview with David Frost in May of 1977, the New York Times wrote an uncharacteristically acute editorial, displaying more doubts than editorial writers are usually willing to acknowledge:

Watergate exposed an enduring dilemma that explains a strength of the Presidency but also says much about excess. . . . To become President requires calculation, single-mindedness and ferocity, qualities which can, abruptly, become far less admirable after an election, depending on the character of the man. Even if the electorate judges character wisely, not even the most upright President can wholly immunize himself against the compulsions of office.

The nation has, so far, responded to this dilemma with a tide of reform. . . .

Are such reforms adequate? Cynics already wonder whether they will not quickly degenerate into perfunctory piety. Some legislators seem resigned to enacting lifeless monuments to a fleeting national attention span. 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.

Therein lie the basic constitutional problems that beg for attention if our Watergate experience is to be a lesson learned. As a second-class poet put it in a second-class poem:

And when midst fallen London, they survey
The stone where Alexander’s ashes lay,
Shall own with humbled pride the lesson just
By Time’s slow finger written in the dust.

Or, to stick to Shakespeare:

I shall the effect of this good lesson keep,
As watchman to my heart.

The question remains, however, What is the lesson to be learned from Watergate? We can readily say that the evils revealed were the failure of our system of checks and balances to inhibit the imperial presidency and the abuse of governmental institutions for the personal gratification of the President. But how was Nixon’s presidency different from those of his predecessors and how must it differ from those of his successors?

Arthur Schlesinger put forth a cogent thesis about the special nature of the Nixon presidency:

As one examined the impressive range of Nixon’s initiatives—from his appropriation of the war-making power to his interpretation of the appointing power, from his unilateral determination of social priorities to his unilateral abolition of statutory programs, from his attack on legislative privilege to his enlargement of executive privilege, from his theory of impoundment to his theory of the pocket veto, from his calculated disparagement of the press to his carefully organized concentration of federal management in the White House—from all this a larger design ineluctably emerged. It was hard to know whether Nixon, whose style was banality, understood consciously where he was heading. He was not a man given to political philosophizing. But he was heading toward a new balance of constitutional powers, an audacious and imaginative reconstruction of the American Constitution. . . .

. . . It may be that he was the first President in American history to conclude that the separation of powers had so frustrated government on behalf of the majority that the constitutional system had become finally intolerable—and to move boldly to change the system. For Congress, it could be argued, had failed majority government in the high-technology society. It had proved itself incapable of the swift decisions demanded by the twentieth century. It could not make intelligent use of its war-making authority. It had no ordered means of setting national priorities or of controlling aggregate spending. It was not to be trusted with secrets. It was fragmented, parochial, selfish, cowardly, without dignity, discipline or purpose. The Presidency had not stolen its power; rather Congress had surrendered it out of fear of responsibility and recognition of incapacity. Congress was even without pride and, if ignored or disdained, waited humbly by the White House and licked the hand of its oppressor.

Then, providing the philosophical framework of which Nixon was not conscious, Schlesinger undertook to set forth the theory of government that Nixon’s actions revealed:

What Nixon was moving toward was something different: it was not a parliamentary regime but a plebiscitary Presidency. His model lay not in Britain but in France—in the France of Louis Napoleon and Charles de Gaulle. A plebiscitary Presidency, unlike a parliamentary regime, would not require a new Constitution; presidential acts, confirmed by a Supreme Court of his own appointment, could put a new gloss on the old one. And a plebiscitary Presidency could be seen as the fulfillment of constitutional democracy. Michels explained in Political Parties the rationale of the "personal dictatorship conferred by the people in accordance with constitutional rules." By the plebiscitary logic, "once elected, the chosen of the people can no longer be opposed in any way. He personifies the majority and all resistance to his will is anti-democratic. . . . He is, moreover, infallible, for he who is elected by six million votes, carries out the will of the
people; he does not betray them.'" How much more infallible if elected by 46 million votes! If opposition became irksome, it was the voters themselves, "we are assured, who demand from the chosen of the people that he should use severe repressive measures, should employ force, should concentrate all authority in his own hands." The chief executive would be, as Laboulaye said of Napoleon III, "democracy personified, the nation made man."

Any doubts about the validity of Schlesinger's thesis may seem to have been put to rest by Nixon himself in a third television interview with David Frost that was broadcast on May 19, 1977. In that broadcast he unashamedly announced that the President, like the ancient kings of England, could do no wrong. What was a crime when committed by others was legal if done by the President, or by the members of his staff to whom he had issued orders or given permission to ignore the laws and Constitution of the United States.

If there is no doubt about the accuracy of Schlesinger's conclusion, there is still some problem with his analysis. For the fact is that the "plebiscitary Presidency" has long been justified and advocated by many, if not all, of our academic students of the presidency. It is well described by Clinton Rossiter in his appropriately entitled book, Constitutional Dictatorship, and reiterated later in The American Presidency. It is the direction of Harold Laski as early as 1940, in The American President. One can read similar directions in Richard Neustadt's Presidential Power and Louis Koenig's The Chief Executive, as well as Louis Heren's flattery of the presidency that resembles the rule of the kings of England for a century after Magna Carta.

Clearly, Schlesinger is right in his assertion that Nixon lacked the contemplative state of mind to define the "plebiscitary Presidency" which was the unstated premise of his actions. But there really was no need for him to provide such a rationalization. "Liberal" scholars had long since justified his notions of the scope of the presidential power, although when they did so, they did not have Nixon in mind, but rather Roosevelt and Kennedy.

When one examines the rhetoric of presidential campaigns, both before and after Watergate, it may be readily noted that all the candidates assume the validity of the "plebiscitary Presidency." Each candidate speaks of what he will do when elected to office, on the assumption that all power over foreign and domestic affairs falls into the hands of the victor. The speech is not in terms of leadership but in terms of command. And the public is called upon to choose between the candidates in the expectation that its choice will not be the representative of the people but the surrogate for the people. Even if the Supreme Court no longer speaks of the people as sovereign, the Court is still bemused by the notion of separation of powers, however often it has sustained presidential overreaching. It has not yet succumbed to the language of a constitutional "plebiscitary Presidency." Surely, it had not yet done so in the 1950s, when it uttered its major ruling on separation of powers.

In 1952, in reviewing and rejecting the constitutionality of a presidential seizure of the American steel mills, which purported to be an exercise of presidential power that rested, in part at least, on the constitutionally specified authority of commander-in-chief and the constitutionally implied powers over foreign relations, the Court's opinion, written by Justice Black, stated:

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. . . .

. . . it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. . . .

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief. . . . [The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. . . .]

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

In the Steel Seizure Case, Justice Frankfurter displayed a healthier respect for separation of powers than he had shown as Professor Frankfurter. With the responsibility for judgment on his shoulders, he wrote:

A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. . . . If a society is to be at once cohesive and civilized, [there is a] need for limitations on the power of governors over the governed. . . .

To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. . . . The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

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Nixon’s attempt to stack a “strict constructionist” Court was nothing new. FDR had already set a perfect example

And, indeed, it was “the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority” that faced the nation with the crisis of Watergate.

The strongest and weightiest opinion in the Steel Seizure Case was written by Justice Jackson. Because of his experience as a member of the executive branch under President Roosevelt, he was given to weighing such experience more heavily than he would Black’s commitment to the language of the Constitution, or Frankfurter’s commitment to what Jackson termed “doctrine and legal fiction.” But even he, who, when attorney general, wrote a book in which he had chastised the Court for allowing the Constitution to interfere with the administration of government, reached the same conclusion as Black and Frankfurter as to the necessity for confining each branch to its proper role. It was “checks and balances” more than “separation of powers” that guided his decision: “The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. . . . [The Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”

Jackson also met and rejected the argument of necessity, that emergency situations license the executive to meet them as he sees fit:

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

. . . Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

. . . I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

The essence of our free Government is “leave to live by no man’s leave, underneath the law”—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

At least as of a quarter-century ago, it was clear that, whether on the premises of constitutional language, which were Black’s, on the premises of constitutional doctrine, which were Frankfurter’s, or on the premises of the realities of free government, which were Jackson’s, the Court rejected the concept of the “plebiscitary Presidency,” the investment of the sovereignty of the nation in the chief executive.

Even if the validity of the “plebiscitary Presidency” is rejected, however, there remains the question what actions taken by Nixon as charged by Schlesinger are innovations in presidential government to support the proposition that Nixon “was heading toward a new balance of constitutional powers, an audacious and imaginative reconstruction of the American Constitution.” For it would seem that the catalog of usurpations stated by Schlesinger reveal no exercises of presidential authority not performed by Nixon’s predecessors in office. A review of each of the charges would be too cumbersome for inclusion here. Examples suffice to show that Nixon was not an innovator but a follower in the untoward expansion of the presidential office.

Thus, with reference to Nixon’s appropriation of the war-making power it is certainly most difficult to charge him with assuming authority not exercised by his predecessors. The Vietnam War was initiated by President Kennedy with full knowledge that it must expand if even a small military force were sent to aid the South Vietnamese. And it was President Johnson who elevated the Vietnam expedition into a full-blown war, without congressional approval and, indeed, with misrepresentations to both the people and the Congress of what was going on, the most notorious of these incidents being that
which called forth the Tonkin Bay Resolution. President Truman brought the country into the Korean War without so much as a "by your leave" to Congress. Eisenhower invaded Lebanon. Abraham D. Sofaer has recently published a diligent, scholarly study of many similar presidential actions in our earliest history.

At the time of the Korean "police action," a letter appeared in the New York Times defending it against attack by Senator Robert A. Taft:

Senator Taft in his speech on Jan. 5 made the flat statement that President Truman "had no authority whatever to commit American troops to Korea without consulting Congress and without Congressional approval"; and, further, that he "has no power to agree to send American troops to fight in Europe in a war between the members of the Atlantic Pact and Soviet Russia." When he sent troops to Korea, Senator Taft continued, "the President simply usurped authority, in violation of the laws and the Constitution."

Senator Taft's statements are demonstrably irresponsible. The public is entitled to know what provisions of the law or of the Constitution have been violated by President Truman in sending troops overseas. From the day that President Jefferson ordered Commodore Dale and two-thirds of the American Navy into the Mediterranean to repel the Barbary pirates American Presidents have repeatedly committed American armed forces abroad without prior Congressional consultation or approval.

Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities.

The author of that letter was Arthur Schlesinger. He did not stand alone in this position. For another, Henry Steele Commager argued the same point.

None of this relieves Nixon of the fact that he, too, carried on a war—indeed, secretly extended it into Cambodia—as though Congress did not exist, often lying or telling half-truths both to Congress and to the people. And, perhaps, it should be noted that both Johnson and Truman surrendered their party's hold on the presidency because of the furor created by their war-making activities. But it remains the fact that Nixon did not conceive or create this abuse of presidential power; he had a long line of precedents.

Nixon's pique at the rejection by the Senate of his Supreme Court nominations of Judges Carswell and Haynsworth, which resulted in his statement that the Senate confirmation should have been pro forma, hardly rises to the action of a "plebiscitary Presidency." Nor did his efforts to secure a Supreme Court of his own persuasion, for which Franklin Roosevelt had set such an excellent example.

Nixon's refusal to deliver data to the Congress at its demand was hardly an innovation, although it was probably the first time data was denied to a House impeachment inquiry. But, then, it was the first time such a committee had made such a demand. And the Supreme Court did conclude, for the first time, that there was such a thing as a constitutionally derived executive privilege, albeit a conditional one, not assertable against a criminal court subpoena, however effective it may still prove to be against congressional demands.

Nixon's calculated disparagement of the cabinet is, again, hardly new. The cabinet is not a constitutional office or body. The dismissal of cabinet officers who refused to do the President's bidding is of ancient vintage, never so clearly exercised as by President Jackson when he had to fire two secretaries of the Treasury, Louis McLane and William J. Duane, to get one, Roger B. Taney, who would remove the government's deposits from the Bank of the United States. The cabinet has long since ceased to be an advisory body or one, like its namesake in Great Britain, where government policy is debated and resolved by the taking of opinions.

The Nixon cabinet and his treatment of it is probably the least vulnerable to attack of any of the charges against his undue assertion of power. Harold Laski properly put the role of the American cabinet in the same category of limited importance:

"While it is true that it has attracted men of the first eminence, like Jefferson and Hamilton, into its ranks, it has rarely been an effective team, and its formal subordination to the president has meant that it has never been, in a really continuous way, a policy-making body. The president may or may not consult it, as he chooses; he may or may not compose it of men of national standing.

Nixon chose not to consult his cabinet and chose, with few exceptions, not to "compose it of men of national standing." But the discretion was legitimately his, whichever way he chose to exercise it. Not within the memory of living Americans has the cabinet played a substantial part in the governance of the nation, except through the administrative roles of heads of departments, for which constitutional provision exists.

Similarly with the charge that Nixon "carefully organized concentration of federal management in the White House." The office of the White House was not a Nixon creation; it derived from Franklin D. Roosevelt's reorganization plan.

Under the presidencies of Kennedy, Johnson and Nixon, the White House staff more than doubled and President Carter has not seriously diminished this number, in spite of talk about reducing the size of the White House bureaucracy. At last count the Carter White House staff numbered 590. In the Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Nixon and Ford administrations, the assistants to the President and other members of the White House staff became assistant presidents, assuming control and disposition of matters submitted for presidential decision. They issued orders at their own discretion to departmental chiefs and even lesser bureaucrats in the executive branch. Under Nixon, this circle was not merely a source of advice and analysis, it became a force that closed off the President from access by all other government officials, and the President from access to others than the White House staff. The sanctum sanctorum of the Oval Office became a reality during the time of the Nixon presidency. Once again, however, we do not have Nixon as the inventor of a device for the attainment of the "plebiscitary Presidency," but only its extrapolator. The opponents of the Roosevelt plan for the reorganization of the White
All Presidents claim a “plebiscitary Presidency.” It is as if they are omnipotent. Their talk is not of leadership, but of command

House anticipated the evils of the present form of the White House office. Their views were derided as a phantasm of imaginary evils. Those imaginary evils have turned out to be real ones. But they neither originated with Nixon, nor have they disappeared with his disappearance from office.

Surely, too, Nixon’s relationships with the fourth estate were accurately described by Schlesinger as “calculated discrediting of the press.” It was an enmity between the press and the presidency that has also had its precedents.

Writing of Thomas Jefferson, Leonard Levy said:

By the time he left the presidency, a much wiser and embittered man, so convinced was he that the press was hopelessly abandoned to falsehoods and licentiousness—epithetical standards relinquished by libertarian theorists—that he professed to believe that it was doing more harm to the nation than would result from suppression. “I deplore, with you,” he wrote to a correspondent, “the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write for them; and I enclose you a recent sample... as a proof of the abyss of degradation into which we have fallen. These ordures,” he exclaimed—forgetting that the press mirrored American culture and the people whom he professed, in moments of intellectual isolation, to trust—“are rapidly depraving the public taste, and lessening its relish for sound food. As vehicles of information, and a curb on our functionaries, they have rendered themselves useless, by forfeiting all title to belief.” The violence and malignity of party spirit, he thought, was the cause of the press’s fall from grace.

The history of the New Deal is a history of conflict between Roosevelt and the press. While Kennedy like other Presidents had his media favorites, paid with presidential inside information, he too had a running battle with at least some of the media. If Johnson watched three television sets at one time, it was not out of affection for the newscasting, but to deplore its content. If there is presidential paranoia in this relationship, it is not without cause. While Roosevelt could go over the heads of the Congress to the people through the medium of radio, the medium of television has gone over the heads of the Congress and the President to the people. Television has tended to destroy Congress by ignoring it, or by so selecting those aspects of its business for broadcast as to make it impotent in its conflict with the President, any President. Douglass Cater has written of all journalism:

Communications media have a vast power to shape government—both its policies and its leaders. This is not an editorial-page power. It is the power to select—out of the tens of thousands of words spoken in Washington each day and the tens of dozens of events—which words and events are projected for mankind to see. Equally powerful is the media’s capacity to ignore; those words and events that fail to get projected might as well not have occurred.

Surely the case can be made out that there were Nixon administration threats to the freedom of the press. The defenders of the press “pointed to the administration’s suggestions that public concern about media bias would lead to demands for antitrust action, its repeated complaints about news distortion, its wiretapping of journalists, the wave of subpoenas commanding journalists to testify about news sources, the thinly veiled threats to make political use of the FCC’s power of licensing broadcasters, and the FBI investigation of CBS news correspondent Daniel Schorr.”

But it was not only the Nixon government that regarded the press as its adversary. The “new journalism” that eschewed objectivity in favor of “Truth” also came to regard the government as the enemy and fashioned their stories accordingly, as Benno Schmidt writes:

Daniel Moynihan... decried in a widely read article what he regarded as the systematic hostility of journalists in the national media to the institution of the presidency. He ascribed much of this hostility to the fact that the national media “thought to improve itself by recruiting more and more persons from middle- and upper-class backgrounds and trained at the universities associated with such groups.” Moynihan contended that these recruits from the “adversary culture” infused their elitist, anti-Establishment attitudes into the national media. The muckraking heritage of American journalism, which in the past had been a small part of the overall tradition, has been inflated by dramatic instances of government deceit into a general attitude that exposing the seamy side of official acts is the optimum in successful reporting. Moynihan claimed that the result was a decline in journalistic objectivity, a harmful condition that is worsened by the absence of any tradition of self-correction in the American press.

Yes, Nixon abused the press and, implicitly or explicitly, threatened it with illegal sanctions. His stand was more forceful than Kennedy’s cancellation of White House subscriptions to the now-defunct Herald-Tribune. But it must also be conceded that the press has abused a presidency that it always opposed. Its complaint that Nixon refused to confide in it can hardly be regarded as evidence of a failure to confine the presidency within appropriate bounds. Had he done otherwise, he would surely have been accused of attempting to manipulate the press.

The press regards itself as the governor of our government. So long as it insists on playing this role, it should be clear that we have almost as much to fear from an imperial press as we have to fear from an imperial presidency. Both have the capacity to reduce government to the agency of a single group, in a society with a government that was framed to respond to a multiplicity of organized and unorganized constituencies. It is, per-
haps, unfortunate that it was Spiro Agnew who made the point that the spokesmen for the media were elected by none and represent none other than themselves. The fact remains that the voices of the Associated Press, and the United Press International, of ABC, NBC and CBS, sound like but a single voice, not only in the editorial positions that they espouse but in the selection of news that they choose to publish and the way it is presented. And when the New York Times, the Washington Post, the Los Angeles Times, Time magazine and Newsweek speak with that same voice—all in opposition to presidential government—as they certainly did during the Nixon era, his paranoia is understandable, even if his actions were indefensible.

Until the press returns to some concept of objectivity—the duty to tell the facts, all of the facts, and nothing but the facts—the First Amendment may continue to guarantee its freedom but not its responsibility. It may be hard for the viewer or reader or listener to distinguish fact from opinion, but that should be within the competence of a press with professional standards. The modern-day media, however, must be recognized as the inheritors of the partisan traditions of eighteenth- and nineteenth-century journalism, except that then each newspaper represented a different faction, whereas now they all seem to represent a single faction. The modern problem of the press lies primarily not in its editorializing but in its news reporting.

None of this affords a defense of Nixon's treatment of the press. An 'imperial president,' however, would not choose to destroy the press's freedom by threatening it, but rather by co-opting it, as the Kennedy administration almost succeeded in doing. Surely an approving press is a better ally for a 'plebiscitary Presidency' than an adversary press. If Nixon failed to realize that and work toward it, however, it revealed only more bad judgment on his part and not an absence of cupidity for illegitimate power.

Schlesinger also complained of Nixon's arrogation of authority in "his unilateral determination of social priorities." Certainly this is an important element in the "plebiscitary Presidency." Equally certain is that this was not an innovation on the part of Nixon. Thus, for example, Richard Neustadt wrote of Eisenhower's "unilateral determination of social priorities" in approving terms:

Early in 1954, President Dwight D. Eisenhower presented to the Congress—and the country and his party—some 65 proposals for new legislation, over and above appropriations...

Throughout, one theme was emphasized: here was a comprehensive and coordinated inventory of the nation's current legislative needs, reflecting the President's own judgments, choices, and priorities in every major area of Federal action; in short, his "legislative program," an entity distinctive and defined, its coverage and its omissions, both, delimiting his stand across the board. ...

Thus, one year after his inaugural, Eisenhower espoused a sweeping concept of the President's initiative in legislation and an elaborate mechanism for its public expression; developments which no one seemed to take amiss. Both in governmental circles and in the press, the whole performance was regarded almost as a matter of course, a normal White House response to the opening of Congress. The pattern, after all, was quite familiar; the comprehensive program expressed in ordered sequence, with some sort of publicized preliminaries and detailed follow-up, had been an annual enterprise in Truman's time. Indeed, while Eisenhower had undoubtedly improved upon the earlier mechanics, his 1954 procedure seemed expressive less of innovation than of reversion to accustomed practice. ...

Traditionally, there has been a tendency to distinguish "strong" Presidents from "weak," depending on their exercise of the initiative in legislation. The personal appearances in the halls of the House, the special messages, the drafted bills, the public appeals, so characteristic of contemporary program presentation, have all been represented in the past—no farther back than Franklin Roosevelt's time—as signs of a President's intention or capacity to "dominate" the Congress. If these were once relevant criteria of domination, they are not so today. As things stand now they have become part of the regular routines of office, an accepted elaboration of the constitutional right to recommend; as such, no more indicative of presidential domination than the veto power, say, in Herbert Hoover's time.

Once again we see that the tools for the execution of the "plebiscitary Presidency" were not Nixon creations. Nixon revealed not a capacity for innovation but only a capacity for imitation. What he did do was to utilize devices created by predecessors, who used them sparingly, while he used them persistently; who used them in isolation, while he used them in combination; who used them unsuccessfully, while he used them successfully, until they failed him in the end.

He was an innovator, however, in a way that showed less imitation of his presidential predecessors than of governors of less democratic nations. He created a presidential, political police force; he rejected the basic concept of Anglo-American political freedom, the rule of law. And he effected both these changes in American political tradition—deeply imbedded in the Constitution—through the device of the White House office.

Nixon's creation of the White House political police and the perversion of the security agencies to his political needs did not derive from a desire to be perverse, or even from dreams of glory. They were evoked by fear, the fear of the marchers on Washington, of the despoilers of universities, of the burners of cities, of the bombers, many of whom he correctly regarded as the scions of the eastern establishment. Revolution invokes suppression; force is met by force; conspiracy responds to conspiracy. Nixon did not act here, he reacted. And his reaction took the form of a lawlessness no less reprehensible—certainly more reprehensible because of his office—than the lawlessness he was seeking to put down. As Justice Jackson once told us: "Security is like liberty in that many are the crimes committed in its name." Worse, in Nixon's case, he undertook to substitute himself and his personal staff for the police and the courts to determine what conduct he thought deserved sanction because he
disapproved of it, not because it was illegal. "L'etat, c'est moi."

Nixon's primary Watergate evils consist of his violations of the rule of law as we and our common law brethren have come to know it. Dicey's classic statement of the English constitution summarizes the first two of the three essentials of the rule of law in this way:

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

Nixon violated the rule of law to make war on a large part of the presidential constituency. It will be remembered that King Charles was charged with subverting the "fundamental laws of the land" and confounding the "liberties and the property of England." And as C. V. Wedgwood has said:

The King's friends might argue that the King had made war only in defence of his rights. But, rightly or wrongly, he had made war on his subjects, and in the crudest possible manner this was a violation of the fundamental bond between him and his people.

There are some who are concerned that Nixon's actions be recognized, not only as unconstitutional and illegal, but as immoral, and uniquely immoral:

There is something unresolved in our attitude toward him. A major source of this anxiety is that we have never been able to answer the question of the extent to which Nixon, elected by us, is made in our image. This is why the term "Nixon-haters" still carries a sting; this is why allegations—no matter how clumsily put forth, or how righteously used as a justification—that Nixonian ethics have for a long time guided people in power are so unsettling. We have an imperative need to reach back into ourselves for some sense of principle by which to measure and judge him—by which to distinguish ourselves from him. We need to know whether such a sense of principle really exists. We are still not sure whether it is just Nixon who is morally bankrupt or the culture at large, and so we are compelled to test ourselves against Nixon in order to find out.

There is a moral duty, and there ought to be, for those to whom it is applicable—most often officers of government—to obey the manifest constitution, unless until it is altered by the amendment process it itself provides for, a duty analogous to the duty to obey final judicial decrees. No president may decide to stay in office for a term of six years rather than four, or, since the Twenty-second Amendment, to run for a third term. There is an absolute duty to obey; to disobey is to deny the idea of constitutionalism, that special kind of law which establishes a set of pre-existing rules within which society works out all its other rules from time to time. To deny this idea is in the most fundamental sense to deny the idea of law itself.

We should not forget that criminality is one thing—a matter of law—-and that morality, ethics and religious teachings are another. Their relations have puzzled the best of men. Assassination, for example, whose criminality no one doubts, has been the subject of serious debate as to its morality. This does not make it any less criminal, but it shows on what treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case. We usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove it. In fact, what better reason is there?

It should be recognized, however, that in an open society there is a moral duty to obey the law. Acts committed with political motivations are not the less criminal because of such motivations, but they cannot be made into crimes because of those motives. And certainly, whatever the moral justifications for civil disobedience, the narrow nature of the legitimacy of that concept must be kept in mind. Civil disobedience does not encompass the violation of law as a means of protest. At most it justifies disobedience of a particular law the validity of which seeks to challenge and test both against legal norms and community standards. Civil disobedience cannot encompass violations of other laws as a form of protest against the law sought to be challenged.

Certainly civil disobedience affords no justification for violation of the laws by government officials. They cannot hold office under an oath to support the Constitution and laws of the United States and, at the same time, assert a right to violate the Constitution and the laws. As Professor Bickel put it:

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It was the denial of "the idea of law itself" that was Nixon's most egregious offense. And none need seek further than his own words to establish his guilt. His incapacity to understand the enormity of his proposition, "When the President does it, that means that it is not illegal," reflects immorality as well as paranoia. And it is this that none of his defenders can discount. It is this that justifies the removal of a president no less than of a king. It is the ultimate rejection of the validity of this rationale that will prevent the American president from becoming Louis Heren's twelfth-century English king or
Orwell’s “Big Brother.”

Bickel, in imitation of Burke, said:

In order to survive, be coherent and stable, and answer to men’s wants, a civil society had to rest on a foundation of moral values. Else it degenerated—if an oligarchy, into interest government, a government of jobbers enriching themselves and their friends, and ended in revolution; or if a full democracy, into a mindless, shameless thing, freely oppressing various minorities and ruining itself.

The Nixon administration partook of both dangers, tending toward a government of jobbers at the same time that it sought to create majority rule without minority rights. “Any true believer will want total power to achieve the true ends of government, and will be a democrat or an authoritarian depending, as Burke said, on which scheme or system he thinks will bring him nearer to total power.”

Nixon and his White House office were guilty of reaching for “total power” in a constitutional state that recognized the need for dispersing and not concentrating governmental authority. Nixon and his White House office were guilty of “corrupting the Constitution.” And, if that is not a “high Crime and Misdemeanor,” it should be. The lesson still to be learned, however, is that the Constitution abhors a benevolent despot no less than a malevolent one. As we continue to keep watch on our government, we should do well not to forget the equality of the rule of law that denies arbitrary power to those we like no less than those we dislike. We forget this—as we tended to forgive it in some of our earlier Presidents—at our peril. It remains true that “the price of liberty is eternal vigilance.”

There are many possible inferences to be derived from the constitutional aspects of the Watergate affair. One attitude is that of the generation of the “counter-culture.” It has been stated by Charles L. Mee in his recent book A Visit to Haldeman and Other States of Mind:

The ruins of our Republic lie about us, like shards of some other ancient dead civilization. . . .

Dare we admit that we did not at first notice? That it died when no one was looking, and we scarcely missed it for days or, it may even be, for years? We only first noticed it, reluctantly, wishing not to see, when Nixon buggered the works, and then buggered those who went after him, a Bulgar holding out against the hordes until at last, unimpeachable, he was told he must step down—not by Congress and not by the courts but by four-star General Haig in a pinch play with Bad Kissinger, and then—oh, God, where is our sense of shame?—pardoned by his handpicked successor for crimes he protested he did not commit.

We said it proved the Republic worked, but we knew that Republites are not saved when their constitutional usages are forgotten or avoided and salvation depends upon the accidents of a tape recording machine and the wits of a four-star general. Machiavelli could not do justice to this theme. Shakespeare’s Richard II could not weep copiously enough. We watched it play itself out, with the nerves of dead men in a dead Republic.

Was Mee wrong in his judgment? An alternative is the reading long since given, years before the events of Watergate, by a scholar-historian, Charles H. McIlwain:

If the history of our constitutional past teaches anything, it seems to indicate that the mutual suspicions of reformers and constitutionalists . . . must be ended if we are to keep and enlarge the liberties for which our ancestors fought. Liberals must become more constitutional than some of them are, constitutionalists must become more liberal than most of them have been. We cannot get the needed redress of injustices and abuses without reform, and we can never make these reforms lasting and effective unless we reduce them to the orderly processes of law . . .

We live under a written constitution which classifies some things under jurisdictio, as legal fundamentals, . . . while it leaves other matters to the free discretion of the organs of positive government it has created. The distribution of these matters between jurisdictio and gubernaculum, made so many years ago, is of course in constant need of revision by interpretation or by amendment . . . But the surest safeguard of a proper balance between the jurisdictio and the gubernaculum—and that even in a government of the people as well as for them—would seem to consist in some such constitution containing some such distribution. There is the problem of restriction and the problem of responsibility, and practical politics involves their interrelation . . . The people have now replaced the king in these political matters of government; but even in a popular state, such as we trust ours is, the problem of law versus will remains the most important of all practical problems . . . The two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power and a complete political responsibility of government to the governed.

Scholarly historians have seldom made good prophets. The prophecies of the counterculture of the Sixties reveal only self-indulgence. Both share responsibility for the crisis of the imperial presidency. The former because of their advocacy of the desirability of presidential power; the latter because their nihilism and tactics contributed so largely to the reaction that was Watergate.

Surely there can be no return to the Jeffersonian idyll, but the Hamiltonian king has not yet been ensconced. 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. It was the poet Yeats who warned us against the events certain to overtake us when “the centre cannot hold.” It was the artist Goya who graphically portrayed the consequences of the abandonment of reason in one of his etchings inscribed, “The sleep of reason brings forth monsters.”

There is yet hope. “And hope is brightest when it dawns from fears.” It is not fear of particular events, but fear of the corruption of the Constitution that should now provide us the motivating force for hope. “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”