

# Mocking The Constitution

By Benjamin Stein

WASHINGTON—In the summer of 1971, Senator Ervin was engaged in fighting a bill which might have narrowed the rights of suspects in criminal proceedings. The Senator then often said that he was sure that anyone who loved the Constitution would do the same.

About a week ago, C.B.S. News played a film, with obvious approval, of Senator Ervin making a joke of the claims that the Watergate committee was taking hearsay evidence that might be unreliable. With his simple country lawyer's wit, he made that claim sound positively ridiculous. The next day, in response to the President's refusal to supply certain tapes, Senator Ervin said he was sure that the people of the United States were more interested in finding out what happened at the Watergate than in "abstruse" constitutional considerations of executive privilege or separation of powers.

Senator Ervin has changed. Apparently he is not certain that the same Constitution that applies to a teenage black youth in the District of Columbia also protects John Ehrlichman. He has begun to believe that the goal of investigation is greater than the process of the law. The same man who once urged the protection of the Fourth Amendment so eloquently when the rights of suspects in violent criminal cases were involved now mocks those same protections when former Government officials are involved.

The hearsay objection, which Senator Ervin now uses to make jokes, is a part of our Constitution through the due process clause. It is just as much a part of our system of laws not to be convicted on hearsay testimony as to require that a defendant be allowed to have a lawyer. Certainly, the rules of evidence are different at Congressional hearings from what they are in criminal prosecutions. But due process of law is not a becoming subject for jokes by a man who has spoken so long about his defense of the rule of law.

It may be true, in fact it probably is, that in the short run, the public cares more about finding out about what happened at the Watergate than about "abstruse" constitutional considerations. Similarly, when a black youth is apprehended in the District of Columbia near the place where a white girl may have been murdered, the neighbors and the police would rather simply beat him to death than have to give him Miranda warnings, a free lawyer, and a trial by jury.

This is the meaning of a Constitution and of a system of law. It imposes a certain order upon the passions of the moment. Now Senator Ervin is mocking the Constitution because constitutional claims are raised to impede his committee's inquiries. A Senator who loves the law can wait for the issue to be resolved in the courts. He can afford to the claims of his political opponents the same due process of law that he defended for suspects in violent crime.

Senator Ervin's mockery of the doctrine of separation of powers is most ironic. Weeks ago, Special Prosecutor Archibald Cox sued unsuccessfully to enjoin the hearings from proceeding because he feared that fair trials would be made impossible because of the publicity. The court that ruled against his request did not deny that the committee might be making fair trials impossible. Rather, it based its action on a separation of powers argument. The same "abstruse" consideration which Senator Ervin declared to be meaningless was the one which his lawyers used to keep the hearings going. The committee appealed to the Constitution and it belongs to the President as well. The Constitution does not belong to Senator Ervin.

The resemblance which Senator Ervin's performance and that of his colleagues bears to the hearings of the early nineteen-fifties is becoming chilling. Then, Senator McCarthy used to mock "Fifth Amendment Communists." Will Senator Ervin next be calling people "separation of powers perjurers" or "abstruse constitutional considerations conspirators"?

When Senator Howard Baker questioned Gordon Strachan about "skimming" of campaign funds, Strachan said he did not know if any skimming had occurred. Senator Baker began a classic fishing expedition, climaxing with his question, "Well, were you suspicious of anyone?" It was discouraging that Senator Ervin allowed that question to be asked. Even Joseph McCarthy did not ask witnesses if they were "suspicious" of anyone.

As it happened, Mr. Strachan said he was not "suspicious" of anyone. But suppose he had said "Yes, although I had no clear evidence, I was suspicious of Mr. X." That was clearly the kind of headline-making answer Senator Baker was asking for. What would have happened to Mr. X? The answer is that he probably would lose his job, lose many friends, have his children be tormented, just as used to happen to people named before Joseph McCarthy.

It is true that courts have been slow and weak about regulating what Congressional committees may do but some sense of personal responsibility and restraint are never out of line. Senator Ervin and his colleagues are allowed to play fast and loose with innocent people's lives, but they are not required to do so.

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