

A Perversion of the Constitution

Ernest van den Haag

New York, N.Y. — I'm reluctant to agree with former Senator McCarthy. I have never liked any of his stands, or his poetry, or the following he attracted and which, in my opinion, he deserved. Still, this time I do agree with Mr. McCarthy's conclusion. President Nixon should not be impeached.

Not surprisingly, Mr. McCarthy's reasoning is odd. Impeachment would not sufficiently subvert the voters' will — it would not replace the policies for which they voted in 1972 with those Mr. McCarthy favors, though the voters do not. Impeachment would replace Nixon with Ford. That still would not be McCarthy. Therefore, he reasons, impeachment would be useless. Congress, he reproachfully notes, made the mistake of following the intent of the Constitution by confirming Mr. Ford as Vice President. Mr. McCarthy opposes resignation for the same reasons, and even proposes that political office holders be held in involuntary servitude and not permitted to resign when they wish, as Agnew was forced to do and Rockefeller did. Poetry? Mr. McCarthy, in short, is against impeaching President Nixon because it would not sufficiently subvert the Constitution. I am against impeachment because it would.

In most democracies the chief executive is voted in and out by parliament; he and his cabinet are, in effect, an executive committee of the legislature, expected to do its will. This has worked well in England (less well almost anywhere else). However, the founding fathers of our republic designed a Congress no more able to oust presidents than presidents were able to oust congress-



men or senators. The Presidency is a separate coordinate, independent branch of our government. The President is elected by the nation as a whole, while Congress is elected by districts. These branches — with the judiciary as a third coordinate branch — were to limit and balance each other's power, but none was to displace the incumbents of the other. The system has worked well for us (less well elsewhere). To make the Presidency depend on the postelectoral confidence of Congress or of the voters would pervert our Constitutional design into a parliamentary democracy. I cannot see the advantage.

As for impeachment of a president, it was not designed by the

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founding fathers with such things in mind as failing to inform the *N.Y. Times* beforehand of planned bombings in Cambodia, or dipping into the petty cash, or tax returns, mortgages, or what Mr. Dean said to Mr. Nixon, and what happened to the tape that may or may not have recorded it. Rather for "high crimes" — which I understand to mean such things as to be in cahoots with the enemy; or to try to fire Congress, or the judiciary, and forbid free elections — an attempt by a president to perpetuate himself in office as a dictator. Nixon, of course, has not attempted anything of the sort. Nothing he is accused of doing would warrant impeachment, even if there were evidence for the truth of the accusation (so far there is none). Wherefore he should not be impeached.

Let me now turn to some less immediate but not less important issues. If there is one institutional fault in the Presidency it is that it requires the incumbent to be three quite different things: a symbol of the nation, of its ideals and values, of its unity; its chief executive; the leader of one of its political parties. Competence for these three things is seldom combined in any one person. For reasons I shall turn to, Mr. Nixon, in my opinion, is the most able chief executive we have had in the last fifty years. But if the accusations levelled against him are true, he is not good at representing the ideals of the nation. He may, however, embody its actual practices too well — which may explain some of the outcry against him and some of the more disgusting spectacles such as Senator Weicker's posturing on tv. Presidents are expected to be ideal, not real. It has been re-

vealed that Mr. Nixon is real. His predecessors have been spared that revelation: they got along better with the media and the bureaucracy.

I do not think that the institutional fault could be remedied by anything but the reintroduction of the monarchy — by a *parens patriae* who would benevolently represent, sym-

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bolize, preside, be an ideal, something like the flag one could be loyal to while despising the government. There is one difficulty. Whom should we hire? Queen Elizabeth? She has experience, but a British accent. There is King Constantine (of Greece) now unemployed, and looking for a job. But, *timeo Danaos dona ferentes*, as Spiro has just reminded us. Anyway, perhaps monarchies work well only if legitimated by, at the least, tradition. So let's drop the idea and ask whether competence is more important in a chief executive or petty cash, let alone unproved accusations about it.

I certainly grant that Mr. Nixon is nothing like Queen Elizabeth. He is a politician. Probably he is innocent of what his enemies accuse him of: anyone who defends himself so clumsily must either be innocent — and too enraged and depressed by the accusations to be clever in his defense — or a fool. Nixon is no fool. Still, 500 lawyers looking for a weak spot will find something, if only to earn their keep — even if it means to impeach the Lord.

But the accusations are irrelevant anyway. Nixon has stopped the

Kennedy rhetoric and the Johnson promises, and therewith the riots. He has actually won the Vietnam war Kennedy and Johnson started, but could not win by sending half a million men. Nixon won while withdrawing them. His diplomacy has so balanced the superpowers as to assure peace and no territorial expansion of any kind for the foreseeable future. He has even succeeded in putting out brushfires such as occurred in the Near East. He has done all this despite a sabotaging bureaucracy, a hostile academy, incensed union bureaucracies, and media literally foaming at the mouth. He has not been able to disestablish the liberal establishment (McGovern nearly succeeded *malgré soi*) which now is on the offensive. But he has tried and has somewhat restrained it. I'd like more, but am thankful for what he did.

Come back to the constitutional balance. What has thrown it out of whack is not the ambition of presidents, but the weakness of Congress and the ambitious activism of the judiciary. Howevermuch one agrees with the conclusion, or the spirit behind it, it is utterly absurd to assert, as the Supreme Court did, that the Constitution requires particular racial mixtures of school children (or for that matter any schooling). No

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wonder we are confronted now with judicial decisions that find that the Constitution (the Constitution!) prevents the death penalty for adult convicts and also prevents states from prohibiting its application to unborn and unconvicted children; or allows school districts to be drawn, and school or welfare expenditures to be regulated by courts — even

though the voters, when consulted, oppose this use of their money. Congress could do worse than to assert itself with respect to the judiciary. It should legislate and not let the courts preempt its territory. Mean-

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while impeachment would greatly weaken the Presidency, the one protection left against thinly disguised legislative power arbitrarily exercised by a hierarchy of non-elected functionaries who are responsible literally to no one.

P.S. Though Mr. McCarthy makes a fuss about it, how vice presidents are elected matters little. They have not proven worse on the average when they became presidents than the presidents they replaced. One could select presidents and vice presidents simply by lottery except that:

1) Nomination by the present method requires a broad consensus, which excludes the worst eccentrics. (Not always, as McGovern shows, but nearly always.)

2) Candidates must have some political ability to work their way into the nomination (McCarthy did not) and therefore are in some respects likely to be fit for the Presidency.

3) Election gives more authority than a lottery would.