WXPost
JUL 12 1974

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Impeachment Partisans

Whipped by repeated White House propaganda blasts, the tide of Republican partisanship in the House Judiciary Committee is steadily rising, threatening to discredit the impeachment process.

Consider the charge by presidential counsellor Dean Burch that Mr. Nixon would have been deprived of basic Sixth Amendment rights—rights he would have if he had "stolen a loaf of bread"—if he had been refused the six witnesses he wanted at the Judiciary Committee investigation. Although Chairman Peter Rodino yielded him the six witness, the charge remains important. Mr. Burch, former chairman of the Federal Communications Commission and a lawyer, should know better.

The Sixth Amendment governs the *trial* of a criminal prosecution, not the prior investigation. "Accusation," traditionally preceded by investigation, is separately provided for by the Fifth Amendment provision for "indictment of a grand jury." Thus the Constitution itself distinguishes between investigations prior to accusation and the subsequent "trial." Similarly, the Constitution provides that the House shall have the "sole power of impeachment," that is of accusation, but that the Senate shall have the "sole power to *try* all impeachments." Mr. Burch is therefore egregiously wrong in invoking the Sixth Amendment protection for the preliminary investigation; for that is confined to the subsequent Senate "trial," and then only if impeachment constitutes a "criminal prosecution."

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Mr. Burch too easily assumed that an impeachment proceeding is a "criminal prosecution"; scholars are generally agreed that this is not so, that impeachment is merely a removal proceeding, designed to cleanse the office of an unfit officer and unattended by fine or imprisonment. If the offense constitutes a crime, the Constitution expressly recognizes a separate indictment proceeding. Were impeachment also criminal, a prior indictment, under the double jeopardy privision, would bar impeachment and a prior impeachment would bar indictment, notwithstanding that the Constitution expressly contemplates the availability of both.

The White House "indictable crime" view was elaborately "documented" in a memorandum submitted to the committee by Mr. Nixon's defense counsel, James St. Clair. When the St. Clair memorandum was shown to be without historical or constitutional foundation, White House "sources" explained that it had not been prepared by Mr. St. Clair (he merely signed it!) but under the "guidance" of Mr. Nixon's "constitutional law specialist," Prof. Charles Alan Wright. Prof. Wright in turn explained that he had not done he "primary research"; his sole role was "that of reviewer and critic." Such disclaimers of parentage seriously undermine the White House argument that impeachment requires an "indictable crime." Indeed, Mr. St. Clair now argues in his recent Supreme Court brief against interwining the "two processes—each with an entirely different history, function and structure . . . " What is "entirely different" cannot be the same; the indictment and impeachment processes cannot both be criminal, as is underlined by the double jeopardy provision, a provision Mr. St. Clair studiously ignores.

Nor can the committee's investigation be converted into a trial, even by the talents of Mr. Burch. A "trial" postulates a power to adjudicate. The House of Representatives impeachment function was modeled on that of the House of Commons; the latter, said Lord Justice Coleridge, "claims no such power; powers of inquiry and accusation it has, but it decides nothing judicially . . ."

Mr. Burch would have it both ways: on the one hand he longs for the rights Mr. Nixon would have if he had "stolen a loaf of bread." But the thief would have no right to introduce witnesses before the grand jury or to have his counsel present at its investigation. On the other hand, Mr. Burch does not "accept the frequent analogy to a grand jury." Yet the Supreme Court has stated that the grand jury "is a grand inquest, a body with powers of investigation and inquisition"; it is the grand inquest of the county whereas the House is the "Grand Inquest of the Nation". Like the grand jury, the House is limited to "investigation and inquisition"; like the grand jury, it is altogether excluded from the right to "try" the case, which the Constitution makes the "sole" province of the Senate.

Apparently Mr. Burch considers that because the committee has permitted Mr. Nixon's defense counsel, Mr. St. Clair, to appear at its hearings that he has a constitutional right to do so. Nothing could be further from the fact. Speaking in the frame of an investigation by the Commission on Civil Rights, the Supreme Court stated in *Hannah v. Larche* (1960) that it has never "been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses." Indeed, the Court stated, "the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings." And it concluded that "any person investigated . . . will be accorded all the traditional safeguards at a subsequent adjudicative proceeding"; in the case of an impeachment that means at the trial before the Senate.

On the authority of the Supreme Court we may therefore dismiss Mr. Burch's charge that the committee's initial refusal to allow Mr. St. Clair to call all six witnesses was "at the expense of the rudiments of due process." It is Mr. Burch's privilege to indulge in such fantasies, but not to pass them off as constitutional dogma from the steps of the White House.

Finally, those who incessantly charge partisanship should themselves be free of the taint. There is unmistakable evidence that partisanship is warping Republican evaluation of the testimony before the committee. Paul O'Brien, counsel for the Nixon re-election committee, reportedly testified that E. Howard Hunt had asked him for $130,000 for legal fees and family support while he was in prison for his part in the Watergate conspiracy. Unless he got the money, Hunt told O'Brien, he would disclose the "seamy things" he had done for the White House and might be forced to "re-examine" his "options." The issue was not, as Rep. Charles E. Wiggins, a California Republican, stated it—"It's not illegal to sustain defendants" — but whether Hunt's statement constituted blackmail. Republican members immediately commented that no blackmail was involved. Now blackmail is defined as the exaction of money for the prevention of an injury, payment extorted by intimidation. Hunt's statement that unless given $130,000 he would disclose the "seamy things" he had done for the White House was "an exaction of money for the prevention of an injury"; it trumpets "extortion by intimidation." So O'Brien understood because he testified that there had been an "implicit threat" in Hunt's demand. When Republicans gloss over an unmistakable attempt at blackmail they furnish proof that they can not weigh the facts dispassionately, that they are in the grip of partisanship.

That may or may not serve to save their seats in Congress, but it besmirches the process of impeachment. If such conduct persists it may irretrievably damage impeachment as a viable instrument of government—a process Burke called "the cement which binds the whole together." For without executive accountability we are doomed to have an "imperial" presidency."