

## **Some Thoughts About the Constitutional Crises Occasioned by the Watergate Affair**

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### *I. Philosophical framework*

A form of government can be judged good by quite different criteria. On the one hand, its goodness is proportionate to its justice: one form of government is better than another if it is more just, and the best form is the most completely just. On the other hand, its goodness is proportionate to its efficiency or effectiveness in achieving not only justice but also other ends of government, such as domestic tranquility, national security, economic prosperity and welfare. In addition, stability is a desirable quality from the point of view of effectiveness in government.

By the criterion of justice, considered in itself, constitutional democracy is more just than any other form of government; and among constitutional democracies, that one is most just in which the constitution secures and protects all human rights, economic as well as political. Constitutional government in any of its sub-forms is more just than despotic government. The basic human right to political liberty, which consists in being governed with one's own consent and with a voice in public affairs, is denied by despotic government. Constitutional government is "free government"—government that acknowledges and respects the freedom of the ruled.

Among the sub-forms of constitutional government, democracy is more just than oligarchy. Political liberty, or the freedom of the ruled, being a human right, it should be enjoyed by all human beings without unjust discriminations based on property, race, sex, creed, etc. The only just disqualifications for enfranchisement are infancy, criminality, and mental pathology. Democracy, which is constitutional government with universal suffrage, excluding only those who can be justly disfranchised, is therefore more just than oligarchy, which is constitutional government with a restricted suffrage in which the restrictions embody unjust disfranchisements. As the principle of political liberty or freedom underlies the judgment that con-

stitutional government is more just than despotic government, so the principle of political equality underlies the judgment that a democratic constitution is more just than an oligarchical constitution.

Among constitutional democracies, one is more just than another in proportion as the freedom and the quality it establishes and safeguards include not only the rights essential to political freedom and equality but also the rights essential to economic freedom and equality.

That the government of the United States is a constitutional government and has the virtues of that form of government would appear to be beyond question. It is, however, necessary to distinguish between those features of the government of the United States which make it a constitutional government and those features of it which could be changed without affecting its essential character as constitutional government.

*The indispensable features are as follows.* The ruling class consists of citizens some of whom, by election or appointment, hold public office for a limited term of years. It is a government in which the citizens rule and are ruled in turn. It is a government of laws not of men: no citizens, not even those who hold the highest public offices, are exempt from obedience to the laws of the land, both its constitutional law and its legislatively enacted laws. It is a limited government: its acts are limited by the constitutional charter of human rights which should not be transgressed or violated; and the acts of any office-holder in the government are limited by the constitutional definition of the authority conferred upon the office he holds. It is a government in which the limitations upon government are made effective by tribunals authorized to declare enacted laws or official acts unconstitutional, nullifying the laws or acts so declared.

It is questionable whether any of the following features of the government of the United States are indispensable to its being a constitutional government. (a) *Its having a written constitution.* Is not the government of Great Britain constitutional without having a written constitution? (b) *Separation of powers together with a system of checks and balances.* Is not the parliamentary system of government as truly constitutional as our presidential system of government? Again, the obvious contrast is between the British and American systems of constitutional government. (c) *Its being representative government.* Here the basic contrast is between a constitutional government in which the citizens participate directly (as they did in the city-states of ancient Greece) and a constitutional government in which the citizens participate mainly through their elected representatives. (d) *Its having the particular public offices now defined by the*

*constitution.* This is not essential to its being constitutional government. All the changes in the structure of public offices proposed in the Tugwell draft constitution would not make the government of the United States more or less a form of constitutional government, and would not make it more or less just, though many of the proposed reforms might make it a more efficient and effective government.

Two things, in my judgment, are essential to the effectiveness of constitutional government, precisely with respect to its being a government of laws rather than a government of men. One is the authority vested in judicial tribunals to declare the acts of government or the acts of public officials unconstitutional. (This feature, present in the government of the United States, appears to be absent from the government of Great Britain.) The other is the power to remove from public office officials who have either acted unconstitutionally or who have violated other laws of the land.

It is questionable whether the constitutional device of impeachment and conviction of officials impeached is the only way to implement this power. It is also questionable whether the privileges of office-holders (in any branch of the government) should be limited, so that they are not unduly protected from proceedings aimed to remove them from office on sustained charges of unconstitutional or illegal acts.

That the government of the United States is in principle a constitutional democracy would also appear to be unquestionable, but whether it is democratic in actual operation as well as in principle would appear to be highly questionable. It is a constitutional democracy in principle in that the franchise has been extended as far as distributive justice requires, and also insofar as the will of the majority prevails, neither hindered nor frustrated by the power of factors other than the force of numbers (e.g., the undue influence of wealth, social position, special interests, etc.). In a government the constitution of which safeguards all human rights that should be secured and protected, majority rule is constitutionally limited rule; and the limitations thus imposed upon it prevent it from becoming majority misrule, at least with respect to matters of justice and injustice. Whether the Constitution of the United States is at present perfectly just in the sense of safeguarding all human rights is, of course, highly questionable; and it is, therefore, also questionable whether the present limitations on majority rule prevent it from becoming majority misrule involving injustice. Equally important is the question whether majority rule is in fact actually operative, unhindered and unfrustrated by other factors, such as the undue influence of private or corporate wealth, social position, organized lobbies for special interests,

etc.

*II. Constitutional reforms suggested by  
the consideration of the Watergate affair*

Considered in the philosophical framework set forth above, the Watergate affair calls attention to two major defects in the government of the United States as a constitutional democracy. Both of these defects are deficiencies by criteria of efficiency or effectiveness rather than by the criterion of justice.

One is a deficiency with regard to making the rule of law effective. Here we must face questions about: (a) presidential privileges and prerogatives, especially those invoked in the name of confidentiality and national security; (b) the status and authority of the White House staff of the President, as distinct from the President's cabinet who are public officials appointed with the advice and consent of the Senate; and the relation of this staff to cabinet officers; (c) the effectiveness of the constitutional device of impeachment proceedings; (d) the role of the Department of Justice in the prosecution of illegal acts by government officials; (e) the balance of power that should accompany the separation of powers in the presidential as opposed to a parliamentary system of constitutional government, including the power to use television, the power to use agencies of government, such as the IRS, the CIA, and the FBI, for private rather than public purposes; (f) the possibility of conferring greater power on Congress to check the President, and of insuring the exercise of this power.

All of the foregoing questions are asked on the assumption that we are irrevocably committed to the presidential system of constitutional government, and are not willing to substitute the parliamentary system or certain features of the parliamentary system for it. It is that assumption which requires us to re-examine the separation of powers and the system of checks and balances, which are supposed to make the rule of law effective.

The other major defect called to our attention by Watergate is a deficiency with respect to the effectiveness of majority rule in our constitutional democracy, especially in our electoral procedures, and especially with regard to nominations and elections for the office of President and Vice-President. Here we must face questions about (a) the financing of political campaigns; (b) the role of the primaries in the nomination of candidates for the Presidency; (c) the way in which a candidate for the Vice-Presidency is named; (d) such devices as initiative, referendum, and recall to increase the power of popular majorities in the electorate, as distinguished from representative majorities in the Congress.

All of the foregoing questions are asked on the assumption that we are not irrevocably committed to a purely or even predominantly representative democracy, and so are willing to alter it by the addition of certain devices that would make our government a direct as well as a representative democracy.

*The following constitutional reforms might make the rule of law more effective.*

(1) Changes in the procedure for the impeachment and conviction of public officials, including the President and Vice-President, aimed at making these procedures easier and speedier, yet without introducing undue instability in the administration of government: (a) enlarging and specifying the list of offences which are grounds for impeachment; (b) possibly substituting a vote of no confidence for impeachment, leading to mandatory resignation.

(2) Creation of a new office, that of Public Prosecutor, who shall be independent of the Department of Justice and hence independent of the executive branch of the government; who shall be an officer of the courts, appointed as federal judges are appointed with the advice and consent of the Senate; and who shall be charged with the prosecution of public officials suspected of unconstitutional or illegal acts while in office. No office-holder shall be immune from prosecution by reason of special privileges.

(3) Creation of one or more executive vice-presidents, as distinct from the one elected Vice-President who is the successor to the President. These executive Vice-Presidents are to be appointed by the President as members of his staff, with the advice and consent of the Senate. This is aimed at replacing the rapidly growing White House staff with a set of public officials whose authority and power are constitutionally limited and defined, especially in relation to the officials who are members of the President's cabinet and heads of departments in the executive branch of the government.

The foregoing proposals are intended as suggestive of directions to be taken. They are not specifically formulated recommendations for legislation or enactment. Nor do they provide answers to all the questions concerning how to make our constitutional government more effective as a government of laws rather than as a government of men.


*The following constitutional reforms might*

*make majority rule more effective.*

(1) An Amendment to the Constitution limiting the President to a single six-year term in office, in order to prevent the imbalance of power and opportunity which occurs in an electoral contest between an incumbent in that office and a contender for it.

(2) Public funding of all electoral campaigns, including a shortening of the period of such campaigns to six or eight weeks at the most. (a) Private or corporate violators of the law against financial contributions to candidates should be subject to prosecution by the Public Prosecutor. (b) Access to the electorate through television should be publicly financed in a manner that gives candidates equal time and equal opportunity.

(3) Changes in the nominating procedures, not only with regard to candidates for the Presidency, but also with regard to candidates for the Vice-Presidency. (a) A nation-wide uniform system of primaries should be established. (b) The expenses involved in primary campaigns should be limited and controlled, so that the undue influence of private or corporate wealth is prevented. (c) The candidates for the Vice-Presidency should be nominated through the primaries and by their parties, not selected by the nominee for the Presidency. (d) Another possibility here is selecting the man with the second largest number of votes in the nominating convention as the candidate for Vice-President.

The foregoing proposals are merely suggestive, They are not intended as specifically formulated recommendations-for legislation or enactment. Nor do they provide answers to all the questions concerning how to make majority rule more effective in our constitutional democracy. 

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