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AFTER THE NIXON RESIGNATION WE STILL NEED REFORM!*

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“Along with these three kinds of law goes a fourth, most important of all, which is not graven on tablets of marble or brass, but on the hearts of the citizens. This forms the real constitution of the State . . .” (Rousseau).

The drama of the moment is impressive. For only the second time since the Constitution was written and adopted in 1787–88, citizens of the United States are seriously asking the most fundamental questions about it. With Watergate and impending presidential impeachment, the country has been gripped by the gravest political crisis since the Civil War. Often the President has proven to be out of control. The threat of a dictatorial government has loomed. Unbridled bureaucracies have acted with an arrogance befitting their autonomy. Many pressure groups have exercised enormous political leverage. Increasingly disorganized, the public has felt deceived and disillusioned. Politicians have been reviled, and politics itself discredited. The heritage of Washington, Jefferson, and Lincoln—so long miraculously intact—has seemed to be crumbling.

The mood of inquiry into constitutional reform must be solemn and even reverent. We are, after all, examining the basic arrangements by which we live together as human beings. At the beginning, then, the undertaking should be properly understood. To quote Chief Justice John Marshall, “we must never forget that it is a *constitution* we are expounding” (*McCulloch v. Maryland*, 1819).

Constitutional government means limited government. It provides a framework of power, lays out a system of making and enforcing laws, and—most important of all—prescribes limits, embodied with us in the Bill of Rights, that the government-of-the-day

*This discussion is based on the writer's book, *Presidential Power and Accountability Toward a New Constitution* (Chicago: The University of Chicago Press, 1974). A version of this paper appears in *The Forensic Quarterly*, the organ specifically oriented to high school debaters throughout the United States. For 1974–75, high school debates will center on the question, “To what extent should the federal government be revised . . . ?” The first question suggested for debaters is: “Resolved that the United States should adopt a parliamentary system of national government.”

cannot change. The ideal and the reality of limited government form the most precious secular heritage of humanity: the proof of that statement resides in the bloody annals of tyranny. The ultimate alternatives to limited government are Dachau and the Gulag Archipelago. Far from calling the essentials of constitutionalism into question, we must be concerned with nourishing and strengthening constitutional government. Our discussion will be limited to the powers of the President; the powers of Congress; the manner of election of the President and of Congress; the relationships between President and Congress—and between both and the people; and the strengthening of political parties. As in the present Constitution, the intention is to check power with power. Instead of pitting the President against Congress, we suggest that the power of the government-of-the-day may more effectively be checked by an organized opposition headed by a “shadow government.” Both government and opposition would be institutionalized in strong, disciplined, and centralized political parties.

Many people have felt the need for fundamental changes. Recent Presidents—Eisenhower, Kennedy, and Lyndon B. Johnson—have considered and some have urged basic constitutional reforms. In 1973, Richard M. Nixon endorsed a single six-year term for Presidents coupled with a four-year term for Congressmen. Ironically, his suggestion coincided with the most serious discussion of presidential impeachment since the impeachment and trial of President Andrew Johnson in 1868. The thought of impeachment made many persons shudder. And yet there was the haunting nightmare of a discredited President continuing in office for forty months. Senator Edward M. Kennedy and commentator Howard K. Smith, among others, pointed out that the parliamentary system would enable removal of a politically disabled President by political means and for political reasons—a great improvement over impeachment.

In this situation, two facts were of first importance. First, the crisis of 1973 had been foreshadowed. Presidential abuse of power, though recently much worse, had been visible for decades; the inadequacy of Congress to provide an alternative to presidential government had been shown from the close of the Civil War to the end of the nineteenth century and fitfully demonstrated again thereafter; and the malaise of public opinion, becoming evident in the late 1960's, seemed to be deepening in the 1970's. In short, the problems were long-standing and were rooted in structural faults; they were not associated with one administration and one series of events. Second, there was—there is—a way out, painful, difficult,

and even dangerous as it may be. It will require constitutional surgery approaching the severity of that of 1787. The end result can be briefly stated as “presidential leadership and party government.”

It will be useful to set forth the diagnosis and the prescription in an outline:

1. A foremost requirement of a great power like the United States is strong executive leadership. The political demand for it, manifestly worldwide, arises from the present condition of international relationships, given the state of the military arts; from the unavoidable need to develop and use science to maintain national security; from the economic imperatives in a country in an advanced state of industrialization (to maintain economic stability, to keep unemployment low, and to control inflation); and from the need to reconcile the continuation of economic growth with rising demands for protection of the environment.

2. America met the first requirement by its presidency; but in recent decades, the presidency has escaped the political controls essential to constitutional, that is, *limited*, government. New controls must be found.

3. The search for controls is complicated by the danger that curbs may diminish the effectiveness of the presidency. The executive needs energy today at least as much as in the critical years immediately following 1787 when the framers of the Constitution concluded that it should be wielded by a single pair of hands to achieve the “decision, activity, secrecy [yes, secret!] and dispatch” essential to safeguarding the republic (Alexander Hamilton in *Federalist* No. 70). How to maintain the full force and effect of the presidency and yet to restrain those presidential excesses so generously demonstrated in this century?

4. The beginning of the answer lies in the relationship between the President and the people. The major premise of our theory of representation has been: the people must rule. But the people cannot rule and the President has become their substitute. Accordingly, he personifies their political authority. When he speaks from atop his pyramid of 40 million votes, with the bulk of the populace reportedly behind him, he is awe inspiring. His infallibility especially impresses those closest to him whose approval, if not their adulation, convinces him that he is larger than life. And yet all this authority may dissolve if the public turns against him. The people’s choice becomes the people’s curse. We have seen it happen five times in this century. President Nixon’s plunge by mid-1973 from

his exalted pinnacle at his January inauguration was unprecedentedly swift; but witness the debacles of Woodrow Wilson, Herbert Hoover, Harry Truman, and Lyndon Johnson. The forced retention of a President whose prestige has been shattered is always dangerous and can be disastrous for the country.

5. A measure of control over the President can be provided by subjecting him to the criticism of an organized, focused opposition with leadership centered in one person who will be continuously visible and vocal as the alternative to the President. As the presidency is unified, so should the opposition be unified. As the President speaks with a single voice, so should he be answered by a single voice instead of by a clamor of discordant and little known voices in a legislative body whose genius has been the dispersion of power. If a focused opposition can be achieved, the perception by the public of the opposition (and especially of its leader) will change—and this will change the crucial relationship between the public and its government.

6. To establish an opposition we must turn to Congress, and the first step is to contradict the myth that greater controls over the President without unduly undermining his power can be provided merely by increasing the weight of Congress. When powers are separated, they are ordinarily less shared than displaced. Either power resides in the presidency with some congressional criticism and subject to some bargaining, or it shifts to the bureaucracy, defined as conglomerates of power among agencies, strategic Congressmen, and interest groups. It must be understood that the genius of Congress is opposite to that of the presidency. Where the presidency comes to life in the unification of power, Congress disperses power among the hundred leaders each with his own base in seniority and in sectional jurisdiction (over taxation, finance, transportation, military, labor, the judiciary, or whatever). It has been impossible to create in Congress a concentration of power sufficient to furnish an organized opposition to the President—let alone to provide a centralized executive government.

True enough, stung by President Nixon's charges that "delay in congressional consideration of the budget is a major problem," that the budget is "fragmented," that it lends itself to "backdoor financing," and that congressional committees were unduly "sympathetic to particular and narrow causes"—and driven, too, by their fear that by impounding funds the President would seize control of spending—congressional leaders embarked on a major budgetary reform in 1973–74. Only time will tell if the reform will bring about a significant change or whether the historic tendency in

Congress to decentralize and disperse authority will simply appear in a new guise.

Congress was unable to invent, adopt, and maintain an effective and responsible system for controlling government spending in the nineteenth century, particularly in the second half. Provisions for the executive budget in the Budget and Accounting Act of 1921 clearly followed from—if they were not dictated by—congressional inability to organize its own controls of spending. Since then two more efforts by Congress to reform its budgetary proceedings, in 1946 and in 1950, have ended in failure.

7. The nature of Congress is strongly influenced by the manner of its selection—staggered terms for Senators, two-year terms for Representatives. As with the President, this situation induces a peculiar relationship between Congress and the public. Where the President is elected as one without equal, Congressmen and Senators tend to be chosen as a means of assuring their constituents' shares of the national largesse. The voter's political obligation in electing Congressmen is held to be fulfilled when he communicates his wants to government. The voter has no share in the responsibility of government. Indeed, the "responsible electorate" has been authoritatively defined as one that knows on which side its bread is buttered. The logical outcome for public opinion is that Congress "as a whole" is despised because Congressmen are generally seen as serving the interests of others—but individual Congressmen are typically admired and appreciated by the active and knowledgeable among their constituents.

8. The first reform then must strike at the relationships not only between President and Congress but also between both and the public. The President and Congress should be elected for simultaneous four-year terms. In addition, the defeated candidate for the presidency should have a seat in the House of Representatives, priority in committees and on the floor, and a staff, offices, and other perquisites suitable to his position as the leader of the opposition.

The same imperatives that practically dictate concentrated executive leadership in modern industrial nations call as well for a unified opposition. If we can create conditions that will encourage the rise of a single leader of the opposition, we can count on the compulsions of the times—greatly assisted by the alert members of the press—to confirm his claims to the reins of alternative authority. Moreover, the press will certify his title to the public at large so that his legitimacy becomes "graven on the hearts of the citizens" as part of the "real constitution of the state."

But suppose the opposition party grows so dissatisfied with the leader that they can no longer follow him? Let the members of his party in Congress remove him. But require them to do so by an act that *names his successor*. In one stroke, then, the opposition should become visible, unified, stable, responsible, and legitimate. There is a similarity here to the great improvement of the West German Constitution of 1949 over the Weimar Constitution. The bundestag may express its lack of confidence in the Federal Chancellor (and thus expel him from office) but only by a vote which names his successor.

9. How would presidential candidates be nominated? Let the candidates for Congress of each party constitute the party's national nominating convention so that when people vote for and share in the nominations of Congressmen, they will know that they are also naming those who will nominate candidates for President.

10. Other reforms include: Abolish the office of Vice-President. It would no longer be needed since under party government a means for immediately filling a vacancy in the presidency is at hand. Reduce the role of the Senate and enlarge that of the House of Representatives because a system that makes the chief executive accountable to the legislature is very hard to work if two "co-equal" legislative bodies are functioning. Introduce a generous slate of congressional candidates-at-large, to supplement the Congressmen from single-member districts. Provide that the party winning the presidency will elect enough of its slate of Congressmen-at-large to insure that it has a working majority in Congress and thus put an end to divided government. Create conditions which will invite the use of the power of dissolution so that it becomes the normal way of ending one government and creating its successor.

11. These changes should give the voters a new sense of their function and of their relationship to government. They will be able to realize a political responsibility which the present Constitution denies them or, at least, makes very obscure, namely, that they share in the selection of a government—or, equally important, of an opposition. This action is significant. *First*, it will cause a wholesome change in a basic premise of American political thought. Implicit in the new electoral system is the realization that government is a necessity if people are to dwell in communities.

Second, these changes will give voters the experience which will give rise to an improved theory of representation. The people will elect a government—and an opposition—and hold them accountable, the one for governing, the other for systematically

criticizing government during its term in office. A workable theory of representative democracy should emerge.

Third, an extremely significant step will be taken to restore political controls on the President without diminishing his essential power. He would be seen as the necessary and legitimate leader for a given period rather than as the personification of the will of the people which has been called “the voice of God.” Governmental decisions would rest on a majority, a sufficiently legitimizing concept, but one which takes into account the fact that nearly half the people consider the President to be politically fallible—and one which will prevail merely for the good and democratic reason that in a civilized community there must be some way other than violence to settle disputes. Control over the President derived from these propositions will be enhanced by the presence of the leader of the opposition and the alternative government which he heads. The tendency for the instincts, the whims, or the idiosyncrasies of Presidents to become expressed in dangerous initiatives should be greatly reduced.

Fourth, the sovereign right of the majority to choose a government which it considers more favorable to its interests would not be denied; but the emphasis would be placed—where it should be if the public is to have a practicable and active share in the awful responsibility of modern government—on the choice of who shall rule.

12. The new framework of government will increase the ability of politicians to bring bureaucracy in America under control. And the balance of power between public government and private groups, which is unfortunately tipped toward the latter in traditional American politics, will be redressed.

13. Beyond these considerations looms the inability of the American system to replace a President who has become politically discredited. Impeachment is a clumsy device. Indeed, it is all but unworkable.

In my remarks so far, criticism of impeachment is relatively minor among the indictments of the American system. Nevertheless, some may argue that the accuracy of the description of impeachment as “all but unworkable” is denied by the fact that “the system worked” in 1974. It seems wise, therefore, to supply a rebuttal, as follows:

Impeachment was unconscionably long in working. The delay was extremely expensive because of the diversion of the government from the deepening economic crises that plagued the country.

Prolongation of the process increased public distrust for political institutions generally and for the Republican party in particular. When the system finally worked it did so under such unusual circumstances that the result must be considered largely a matter of luck.

President Nixon resigned August 8, 1974. Until August 5 he was reported to have considerable support in the Senate if a trial should be forced there by an impeachment vote in the House. Then came disclosure of the tape recording of Mr. Nixon's conversation with Mr. Haldeman, June 23, 1972. All ten of Mr. Nixon's staunch supporters on the House Judiciary Committee immediately switched sides. They jointly declared that it "was Richard Nixon . . . who impeded the investigation of the Watergate affairs [and who] preserved the damning evidence . . . and . . . concealed its terrible import until he could do so no longer." Support crumbled among 30 to 40 Senators deemed most likely to uphold the President (34 sufficing for acquittal). Various persons managed to convey the dimensions of the debacle to Mr. Nixon, who stepped aside August 8 so that Gerald R. Ford could become President.

Along with the sigh of relief that swept the country came a chorus of familiar voices celebrating the toughness, adequacy, and resilience of the nation's political institutions. Praise was heaped on the Supreme Court's unanimous decision (absent Justice Rehnquist) requiring Mr. Nixon to release the subpoenaed tape recordings. Accolades were showered on Congress for its cautious and sober approach to impeachment. There was acclaim for the smooth transfer of power to President Ford and his acceptance by the public despite the fact that he was the first incumbent who had not been popularly elected. (The public's euphoria may have been disturbed by Mr. Ford's full pardon of Mr. Nixon September 8, 1974.)

Nevertheless, some observers remain critical. They stress the virtually unique events surrounding the resignation. An avalanche of impeachment evidence was launched by one bungled burglary, the perpetrators of which might well have gone undiscovered. Much more important, Mr. Nixon's contention that he could be impeached only if proven guilty by legally admissible evidence of a criminal act—that he must be "caught with a smoking gun in his hand"—would very likely have prevailed over the counterargument that impeachment required proof merely of a political offense that need not be a crime at common law. Had Mr. Nixon's argument prevailed, it would probably have vindicated him but for the emergence of such evidence as that contained in the fatal recording of June 23, 1972. Surely no future President will be so accom-

modating! One of President Ford's first acts was to order removal of all secret recording equipment in the White House. The lesson seems clear: the investigation of Watergate and the formal impeachment process consumed 18 months, absorbed much of the government's attention during a time of aggravating foreign and domestic crises, significantly increased public disillusionment with our political institutions, and—in the end—succeeded largely because of fortuitous circumstances.

The fault of impeachment for removing Presidents lies in its legalistic procedures, that smell of the criminal courts, its indictments and its trial according to the rules of evidence, to ascertain the *individual's* guilt or innocence. But emphasis on the *legal* liability of *individuals* hides *political* responsibility which must be *collective*.

In the modern age, the intricate and complex problems of government require a collegial approach (as current political terminology recognizes—the White House team, the task forces, the National Security Council, the Domestic Council, the presidential game plan). Political adequacy is judged, not by weighing individual guilt or innocence according to the rules of evidence, but rather by political procedures for testing confidence in the prudence and judgment of government. Legal guilt by association is unacceptable; political liability by association is essential. The political process should be capable of registering the collective judgment of responsible politicians—who, in turn, are informed by their sense of public opinion—on the prudence and wisdom of governments. The legality of a President's acts may figure in such judgments but more important are decisions on presidential prudence, grasp of events, will, wisdom, and self-control.

It was impeachment on such grounds, namely, to enforce political responsibility, that James Madison apparently had in mind when he successfully urged the first session of the First Congress under the Constitution (1789) to acknowledge that the President must have the power not only to appoint but also to remove subordinate officers.

The system of government proposed in this essay would aim at restoring Madison's priceless sense of political responsibility, and it would do so without clinging to the misplaced legalisms of impeachment, including the extraordinary two-thirds majority required for conviction. Under this system, the question of President Nixon's continuation in office should have been decided in the summer of 1973. If he had been replaced, it would have been by a man acceptable to the Republicans (who would have had a major-

ity in the House of Representatives). But, in any event, the problem should have been solved and put behind us. It is a shocking thing for Americans to contemplate the removal of the chief executive. It will not be done lightly. For a majority party to remove its own leader means to destroy its most valuable political property and to increase the risks of every party member. There are times, nevertheless, when it must be seriously considered and perhaps done.

14. As the idea that a President can be replaced by an adverse vote of confidence becomes fixed in the living Constitution—or as presidential resignation comes to be understood and accepted when he loses so many supporters that he is prompted to resign even without an adverse vote of confidence—another step should be taken. Along with the establishment of executive accountability to the legislature, enforced by votes of confidence requiring majorities to sustain the executive, there should be an executive counterthrust, the ability of the executive to dissolve the legislature and to call for new elections so that the people may again choose a government and an opposition.

In the first place, the power to dissolve is of essential importance in the creation of cohesive and disciplined parties. In the second place, once this step is taken, we may devoutly hope that dissolution will become the normal way governments are ended and new governments chosen. When that happens, our endless nominating and electoral campaigns will be compressed into a few weeks. It will remove the hazards inherent in calendar elections that now permit potential enemies to plan to harass this country at a time of great vulnerability: during the period when elections must be held. The cost of campaigns and the leverage of money in politics will be reduced. Stringent campaign laws will then become much more enforceable.

15. And, finally, party government and short electoral campaigns will enable us to smother the viper of corruption. John Gardner, in a *New York Times* article, "You Are Being Had," said that in the United States, "elective offices can be purchased; . . . votes of Federal, state and local officials are bought and sold every day; . . . access of the people to their government is blocked by a Chinese Wall of money." The daily harvest of news brings dreary confirmation. There was a time when similar corruption flourished in Britain. But it came to an end with the emergence of party government.

In conclusion, it is well to examine certain counterarguments. One is offered by Samuel H. Beer in "Government and Politics:

An Imbalance," *The Center Magazine*, March-April, 1974. He argues that "some grand program of party reform to create responsible and cohesive partisan majorities in Congress and in the country . . . may have vast effects" which, from the tone of the indictment, will be at least unfortunate and perhaps disastrous. Until these evil consequences are specified we must dismiss them. Many of the framers of the Constitution of 1787 had doubts about the enterprise. As late as 1802, Alexander Hamilton wrote: "Perhaps no man in the United States has sacrificed or done more for the present Constitution than myself; and contrary to my anticipation of its fate, . . . I am still laboring to prop the frail and worthless fabric." Nevertheless, our Constitution served well for perhaps 160 years. Now there is an argument for fundamentally revising it. That argument can no more be answered than could the advocates of the 1787 Constitution by picturing desperate but undefined ills if the path of revision is pursued.

More concretely, the counterargument asserts that political parties, rather than becoming more cohesive as they must if they are to be instruments of party government, are losing their appeal. Party ties are weakening; party loyalty is declining. Indeed, the argument holds that American parties will become more effective instruments of social choice only if and when millions of people have grasped a new vision of the national future which they need a political party to carry out.

At present, our governmental arrangements (divided governments, separated constituencies, staggered elections, etc.) are exquisitely designed to accelerate the disintegration of political parties. We are proposing reforms to simplify politics, to identify the roles of voters and of candidates for office and of elected officials, and to clarify lines of accountability and responsibility. If these reforms are adopted and the new institutions come into being, citizens will soon feel that they share in the crucial task of government through an act of unique significance that only they can perform—voting in an election that clearly creates a government and an opposition. If this comes about, the proper aspirations of the advocates of participatory democracy will be significantly fulfilled. We cannot know before the fact if a new set of institutions will nourish parties capable of governing as parties, but there is some evidence that party government may be feasible in America.

A final counterargument is that major reforms are not needed; rather, reform of Congress will suffice—and Congress seems on the verge of the most sweeping reforms in its history. The War Powers Act of 1973 was passed over a presidential veto. The

seniority principle has been considerably modified, at least in theory. An extensive examination of the committee structure has been undertaken in the House. A significant bill to reform campaign finances has passed the Senate. Perhaps most important of all, fundamental changes in the fiscal functions of Congress—the whole business of taxing and spending—have been legislated. Some of the reforms remain to be fully realized and others (especially the War Powers Act) are still to be tested. Will the reforms work? Asking whether the new Budget Committees will be able to make authoritative decisions, Professor Beer concedes that such an outcome “surely will require rather more hierarchy in the inner structure of Congress than exists now.”

At first the counterarguments may seem persuasive. If we can solve our problems by passing laws rather than having to amend the Constitution, it will be simpler, easier, and more prudent to do so. And yet history has a warning for us. For Congress to achieve “rather more hierarchy” means that Congress must become more centralized—in short, more like the executive. But that will go against the nature of Congress which has been to divide and to distribute power rather than to centralize it. During periods of congressional supremacy, fiscal policy—taxing and spending—has been a shambles. When Congress has failed in the past, the cry has gone up to give more power to the President. Will the price of present complaisance, of assurance that we can get by if we merely reform present procedures, be a clamor five or ten years from now for enormous grants of power to the President?

Let us listen to those who advocate reform by relatively minor adjustments within the present system. At the same time let us insist on keeping the study and the discussion of basic constitutional reform alive and vigorous. If the momentum for change of this magnitude becomes irresistible in the United States—as it has fairly recently in every other constitutional democracy—we had best be prepared.