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Commentary and Analysis
In Rebuttal

TO CATCH A KING

PRESIDENTS ARE NOT IMMUNE FROM INDICTMENT

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The Feb. 17 commentary by Professor Stephen M. Griffin ("We, the Independent Counsel," Page 21) suggesting that the president should be exempted from the reach of the independent counsel statute proceeds from a false premise, viz., "that under the Constitution, there is only one way to remove a president from office: through impeachment by the House and conviction by the Senate." Considerations of history, principle, and pragmatism combine to show that this argument is simply misguided.

The question of presidential indictability is not new. During the Watergate scandal, lawyers for both President Richard Nixon and Vice President Spiro Agnew asserted that those officials could not be required to face criminal charges during their incumbencies. At least as to the president, Special Prosecutor Leon Jaworski apparently agreed. In other words, if the public desired prompt action, the president would have to be impeached before he could be indicted.

Because of Nixon's resignation and Agnew's plea bargain, there was no judicial resolution of the issue then. And the Supreme Court purposely ducked the question in deciding the Watergate tapes case, *United States v. Nixon* (1974). Thus, as Professor Griffin notes, the issue remains undecided as a legal matter.

That is not to say, however, that we are lacking materials from which to reach a sound constitutional conclusion.

The Constitution specifically grants federal legislators a limited immunity from arrest, but says nothing about a similar executive privilege. Nor was this a mere oversight; during the discussion of legislative immunity at the Constitutional Convention, James Madison raised "the necessity of considering what privileges ought to be allowed to the Executive." According to the later report of one delegate, such a discussion took place, and the framers, mindful of the abuses in England caused by the maxim that the king could do no wrong, rejected any

extension of the privilege.

Our historical practice accords with this view. In 1804, for example, Aaron Burr, then the vice president, was indicted by the state of New Jersey for killing Alexander Hamilton in a duel. (New York had already charged him, leading Burr to comment that the episode had sparked "a contention of a very singular nature between the states of New-York and New-Jersey" over which one of them would "have the honour of hanging the vice-president.")

'PECULIAR EMBARRASMENTS'

In response to the New Jersey indictment, a group of U.S. senators sent the governor a letter urging that the prosecution be discontinued. Although they argued that this course would "facilitate the public business by relieving the President of the Senate from the peculiar embarrassments of his present situation, and the Senate from the distressing imputation thrown upon it, by holding up its President to the world as a common murderer," they did not suggest that the Constitution granted Burr immunity from prosecution.

In the intervening years, high federal officials have repeatedly been the subject of criminal charges while still in office.

Congressmen and senators have frequently been indicted, and the courts have uniformly adhered to the position taken by the Supreme Court in *Burton v. United States* (1906): Despite the importance of the legislator's function, there is no constitutional barrier to such prosecutions.

Similarly, there have been a number of indictments of sitting federal judges. In each case in which the indictment was challenged, the court has responded by recognizing the vital importance of an independent judiciary, but nonetheless adopting the view, first taken by the attorney general of the United States in 1796, that the prosecution was permissible.

And when, in 1984, Secretary of Labor Raymond Donovan became the first sitting Cabinet member ever indicted, the idea of claiming an exemption from prosecution apparently did not even cross his mind.

This is not surprising. While the courts have sometimes invented doctrines of official immunity, they have done so only in civil cases, not criminal ones. And even then, the courts have attempted to tailor their rulings in such a way as to encourage officeholders to perform their duties diligently and fearlessly without shielding them from the consequences of deliberate wrongdoing.

THE PRIMACY OF LAW

This uniform course of practice is consistent with what we know of the philosophy underlying the structure of our government. The framers had no faith in the goodness of human nature, particularly the human nature of officeholders. On the contrary, they believed that power tends to corrupt. Those who wrote the Constitution would be saddened, but by no means shocked, to hear us discussing matter-of-factly the possibility that the country's highest officials might be guilty of criminal behavior.

For the framers, the primacy of law was the basic instrument by which the inevitable tendency of public officials to abuse their positions would be curbed. "In America," Thomas Paine wrote in *Common Sense* in 1776, "the law is king."

To control the predictable misconduct of those who would hold high office, the practical politicians who wrote our Constitution provided for two separate and simultaneous checks on our most powerful public officials.

Impeachment was designed to curb behavior undermining the president or vice president's fitness to continue governing. As Hamilton wrote in No. 65 of *The Federalist*, the impeachment power was vested in Congress because the purpose of the procedure was to reach those offenses "of a nature which may with peculiar propriety be denominated political."

Thus, although the Constitution speaks in terms of "high crimes and misdemeanors," it has long been settled that impeachable abuses of power are not limited to crimes. As then Rep. Gerald Ford said while seeking the impeachment of Justice William O. Douglas in 1970, "About the only thing that the authorities can agree upon in recent history ... is that an offense need not be indictable to be impeachable." When President Nixon bombed Cambodia and concealed it from Congress, this was an impeachable offense, even if not a crime, and could properly have led to his removal from office.

Criminal sanctions serve a different social purpose. The criminal code, defined in statutes and applied by a neutral judiciary, embodies a minimum standard of behavior that society requires of all citizens. If, as was rumored, Lyndon Johnson drove drunk on his ranch, he should have been convicted of drunken driving, not impeached. In this way, society would have expressed its disapprobation of his conduct, while retaining a leader who had done nothing to undermine his political legitimacy.

But, say the advocates of immunity, if presidents and vice presidents were amenable to criminal indictment, they might be subjected to endless harassment. In Professor Griffin's words,

"the president's political opponents can effectively eliminate his salary by involving him in costly lawsuits."

Nearly two centuries of experience demonstrate that this concern is overblown.

In 1807, when Burr (by this time a private citizen) was charged in federal court with treason, Chief Justice John Marshall wrote a landmark opinion affirming the defendant's right to seek possibly exculpatory documents and testimony from President Thomas Jefferson--who objected bitterly to the potential intrusion on his official time. Nonetheless, ever since then, the law has required that presidents and vice presidents give evidence in criminal proceedings. Chief Justice Warren Burger ringingly reaffirmed this principle for a unanimous Supreme Court in *United States v. Nixon*, citing *United States v. Burr* as evidence of our historical commitment to the rule of law.

Yet in practice, Jefferson's fears have proved groundless, as the courts have always shown extreme deference to presidents and vice presidents, and their testimony has almost never actually been taken. In fact, the first sitting president to testify in a criminal case was President Ford, who in 1975 was permitted to give his evidence in the trial of his would-be assassin, Lynette Alice "Squeaky" Fromme, by means of a videotape. Similarly, Independent Counsel Lawrence Walsh (following the example set by Special Prosecutors Archibald Cox and Leon Jaworski) was highly respectful of former President Ronald Reagan, and obtained evidence from him without actually calling him to testify before the grand jury. Independent Counsel Kenneth Starr followed the same practice in obtaining President Bill Clinton's testimony on videotape for the trial of James McDougal.

The historical record, then, provides no basis for the concern that acknowledging the liability of the president and vice president to criminal prosecution will result in their being harassed. On the contrary, there is every reason to believe that the courts will continue to accommodate them generously.

Professor Griffin, however, argues in his commentary that the effect of an indictment of the president would be so politically devastating as "to give an independent counsel the power, in effect, to nullify a presidential election." This is an argument that shows remarkably little faith in the insight of the public, in whose hands the political judgment as to the significance of the charges will ultimately rest. The electorate may, depending on the circumstances, consider the charges to be a serious reflection on the president's fitness, the product of a political vendetta, or evidence of regrettable but not intolerable behavior.

And any prosecutor considering an indictment will have to make a

judgment as to which of these outcomes is most likely. As the front page of the very same issue of Legal Times reports, Kenneth Starr is even now having to consider Hillary Clinton's political popularity in deciding whether he would be able to secure a conviction if he indicted her ("Starr's Jury Problem," Feb. 17).

Nor should we forget that an indicted president or vice president would have all the protections, including those against prejudicial pretrial publicity, afforded to any other criminal defendant.

SAFETY VALVE

In light of the ample legal resources available to the leaders of the executive branch and their power to mobilize public opinion, subjecting them to the infrequent need to defend themselves in the courts is greatly preferable to turning each allegation of criminal conduct into the traumatic struggle of an impeachment battle. Impeachment proceedings are far more disruptive to the officeholder personally, and to the country as a whole, than conventional litigation. They should not have to be brought simply because there is no other way to get the president or vice president to respond to ordinary criminal charges.

Yet a rule of absolute immunity would have just this effect. Only a single congressman is needed to set the impeachment machinery in motion. If there is reason to believe that a president or vice president has committed a crime-- particularly one for which the statute of limitations may expire before the end of the incumbent's term--such a congressman will surely be found.

Thus, the availability of criminal indictment acts as a safety valve by providing an alternative to the impeachment mechanism. This allows for a desirable flexibility in circumstances in which impeachment may be thought to be an inappropriate remedy (as, for instance, the majority of the House impeachment committee believed with respect to the charge that President Nixon had committed criminal tax evasion) or in which the appropriate outcome may be some form of agreed-upon resolution.

Moreover, even if there is never an actual indictment in the future, just as there has not been in the past, there is an important symbolic value to the affirmation that the president is merely an ordinary citizen, temporarily delegated to perform certain functions but otherwise amenable to the same constraints as anyone else.

A contrary conclusion would not only feed the imperial delusions to which too many high officials in this century have succumbed, but would make a mockery of our proud claim to have instituted a government of laws rather than of men.

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