

Bringing Justice to Clinton

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Just when you thought it was over, think again. Robert W. Ray, the independent counsel who succeeded Kenneth Starr, is considering indicting Bill Clinton after he leaves the White House and said yesterday he is expanding his legal and investigative staff.

Many commentators have come out against any such prosecution because, they say, the charges against President Clinton were fully adjudicated in his impeachment trial. There are indeed good reasons not to prosecute Mr. Clinton, but an acquittal in an impeachment trial is not one of them.

Mr. Clinton's impeachment focused on whether he was fit to complete his term of office. The question in a criminal case is whether he committed a crime of any sort, however small. These two questions overlap but are plainly distinct. The

Constitution makes clear that an official who is tried by the Senate may nevertheless be subject to "indictment, trial, judgment, and punishment" in an ordinary criminal court.

This principle makes consummate sense. If presidents received get-out-of-jail-free cards when impeachments failed, senators might be tempted to convict simply to ensure that the wrongdoer did not escape justice altogether.

Inevitably, the standard for impeachment and conviction would be watered down -- "a high crime [or] misdemeanor" would be read without the word "high." If impeachment were to degenerate into a search for ordinary as opposed to high criminality, Congress could undo presidential elections whenever some small crime could be found. Precisely to preserve a strong presidency, we must insist that ex-presidents be subject to prosecution just like everyone else.

The possibility of indictment brings up another question: Could Mr. Ray indict Mr. Clinton now, without waiting for the end of his term, and force him to stand trial in a criminal case?

Although the Supreme Court has never considered this question, there are compelling reasons to support temporary immunity. While in office, a president should not be distracted by a democratically unaccountable prosecutor. The time for trial is later, when he would not be prevented from doing the people's business.

Another reason to insist on waiting for the end of Mr. Clinton's term stems from the pardon power that the Constitution vests in the president. A president may issue a pardon even before any criminal trial begins -- remember President Gerald Ford's 1974 pardon of Richard Nixon, and President George Bush's 1992 pardon of Caspar Weinberger?

A sitting president, however, may not properly pardon himself, and no one else may properly do so either. Thus, if indicted, the president would be the only defendant in America ineligible for a pretrial pardon. Waiting until after Mr. Clinton leaves office solves this problem; then the pardon decision would be up to his successor.

None of this is to say that Mr. Clinton should in fact be indicted once he leaves office. The strongest reason not to indict is that a jury is unlikely to convict, believing the man has suffered enough. Mr. Clinton may have won acquittal in the Senate, but he lost some of his reputation and legacy in the process -- a large and poetically proportionate penalty for whatever crimes he may be accused of.

Mr. Ray may decide to go ahead and indict; the Senate's verdict in the impeachment trial does not bar criminal prosecution. But in this case, a good prosecutor would use discretion.

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