

Impeachment, Yes, But How About Imprisonment Too?

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blog.zmag.org
June 06, 2005

I agree with Ralph Nader and Kevin Zeese's argument in the Boston Globe that "the impeachment of President Bush and Vice President Cheney, under Article II, Section 4 of the Constitution, should be part of mainstream political discourse"

(see: <http://www.zmag.org/content/showarticle.cfm?SectionID=15&ItemID=7982>)

As Nader and Zeese know, that article and section read as follows: "The President, Vice President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, or other high crimes or misdemeanors."

The specific crime that Nader and Zeese cite is the one that has emerged from the recent revelation about a meeting that took place between White House officials and British Prime Minister Tony Blair in the summer of 2002. Minutes from that meeting show that the Bush administration was "fixing" American intelligence to justify invading Iraq.

If "President Clinton was impeached for perjury about his sexual relationships," Nader and Zeese argue, then certainly Bush deserves to be impeached for lying about Iraqi "weapons of mass destruction" in order to launch a war that has killed as many as 100,000 Iraqis and more than 1600 US GIs. "Comparing Clinton's misbehavior to a destructive and costly war occupation launched in March 2003 under false pretenses in violation of domestic and international law," Nader and Zeese note, "certainly merits introduction of an impeachment resolution. "

Indeed, title 18, part 1, chapter 47, and section 1001 of the United States federal statutory code (US Code Collection, <http://www4.law.cornell.edu/uscode/18/1001.html>) mandates fines and imprisonment up to five years for a federal office-holder who "knowingly and wilfully - falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry."

Here are some of the "materially false" allegations that George Bush, Jr. and his "posse" (as the President likes to describe his team) used to justify the fictitiously labelled "Operation Iraqi Freedom":

*Iraq possessed 30,000 liters of anthrax and other lethal biological agents.

- *Iraq attempted to buy aluminum tubes to be used to construct nuclear weapons.
- *Iraq had “in fact reconstituted nuclear weapons” (Cheney)
- *Iraq possessed a “growing fleet of manned and unmanned aerial vehicles” that could be used to dispense chemical weapons against US targets within and beyond US soil.
- *Saddam possessed 30,000 munitions capable of delivering chemical agents and inspectors had recently turned up 16 of them (Powell, to United Nations).
- *Saddam was building ballistic missiles that could fly 620 miles, nearly seven times the range permitted by the United Nations (Powell).
- *Saddam’s regime possessed several mobile biological weapons labs.
- *Saddam removed United Nations weapons inspectors from Iraq during the late 1990s without any provocation, seeking to hide a resurgent program of WMD reconstruction.
- *During the recent crisis leading to US invasion, “we gave [Saddam] a chance to allow the inspectors in, and he wouldn’t let them in....so we decided to remove him from power.”
- *Iraq had strong and longstanding ties to al Qaeda and was linked to 9/11 and a serious threat to hand off weapons to mass destruction to Islamic militant terrorists like bin-Laden.
- *Saddam’s past horrific (and US funded and approved) use of chemical weapons against Iraqi Kurds and Iranian soldiers and his invasion of Kuwait (with perceived US approval) proved his reckless (in fact suicidal) willingness to use WMDs against the US and/or other states.
- *The Bush administration wished to avoid military action against Iraq, seeing the use of military force against that nation as “a last resort” and only “reluctantly” engaging in war.
- *The US invaded Iraq out of respect for international law, the United Nations, and international democracy and in opposition to the use of violence in international affairs.
- *Invading US troops would certainly be welcomed as grateful, joyous Iraqi masses, celebrating the freedom granted them by George W. Bush and his “liberating” armies.

Even as he and his subordinates made such strikingly deceptive and false claims in preparing and conducting an illegal invasion of a sovereign state - an action opposed by the preponderant majority of the human species, which sees the US as the leading threat to world peace - Bush had the audacity to include the following quotation from John F. Kennedy in the text of a pivotal war speech given in October 2002: "Neither the United States of America nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small."

I just pulled these bullet points and the above paragraph out of an article I published on ZNet in August 27, 2003: "Systematic Distortion Non-Random Material Falsification And The White House Agenda," available at <http://www.zmag.org/content/showarticle.cfm?SectionID=15&ItemID=4095>

That article (whose annotated version serves as the 19th chapter in my book Empire and Inequality: America and the World Since 9/11- the last chapter in a section titled "Masters Marching to War") began with the following statement: "As he sets new campaign fundraising records, reflecting dedicated service to the wealthy few, the threat of being removed from office ought to be the least of his worries."

By this I meant to say that Bush ought to have been worried about more than impeachment. He ought to be concerned at the possibility of being INCARCERATED.

I'm talking about that potential five year sentence mentioned in Title 18, part 1, chapter 47, and section 1001 of the United States federal statutory code.

Below I have pasted in an interesting New York Times article about the constitutional issue of whether or not a sitting president can be fully indicted, convicted, and (presumably) incarcerated for crimes leading to their impeachment. The article comes from the Clinton-Lewinski-Starr period, when Special Puritan Inquisitor Counsel Kenneth Starr appeared to be operating on the assumption that a sitting president could in fact be indicted and prosecuted (not merely removed from office) for high state crimes... like lying about oral sex.

Before reading that article, however, please remember that many millions of American citizens, a shockingly disproportionate number of whom are black (thanks to racially disparate patterns of drug surveillance, arrest, and sentencing), carry the often crippling legacy of a prison history because of their past engagement in non-violent narcotic offences that swept them into the cells of the world's leading incarceration state. As Governor of Texas, Bush was a passionate agent of America's racially disparate mass incarceration campaign and related "War on Drugs." He was also, of course, an enthusiastic inflictor of the (also savagely racist) death penalty.

He benefited, by the way, from the expungement of a youthful cocaine bust from his criminal record. See J.H. Hatfield, *Fortunate Son: George W. Bush and the Making of an American President* (Brooklyn, NY: Soft Skull, 2002), pp. 309-318.

Huge swaths of the American populace are serving long sentences for dealing and buying drugs. How many years should Dubya, Dick, and other key Bush administration civil officers do for engaging in the thoroughly non-random material falsification ("fixed" intelligence) that produced the continuing mass slaughter in Iraq?

Here's the aforementioned Times article:

Linda Greenhouse, "Constitution Does Not Favor or Forbid Charges Against President, Experts Say"

New York Times, 1 February, 1999 - Washington DC

Kenneth W. Starr, the independent counsel, will be moving into uncharted waters if he decides to bring a criminal case against President Clinton before the President leaves office.

The President's personal attorney, David Kendall, said he was taking legal action against Starr concerning a weekend story in *The New York Times* saying the independent counsel had concluded that a grand jury could indict Clinton while he was still in office. Kendall accused Starr of violating grand jury secrecy rules.

On the question of whether a sitting President can be subject to criminal prosecution, the Constitution's text is ambiguous, the evidence of the framers' original intent is equivocal and the Supreme Court, in inviting briefs but not deciding the issue in the case of the Nixon tapes 25 years ago, has remained silent.

So if Starr does decide to charge the President with perjury or obstruction of justice, charges that are the foundation of the articles of impeachment now before the Senate, he may not get a conviction but he could very well bring about the definitive resolution of this elusive issue.

Although Starr's advisers have reportedly told him there are no constitutional barriers in the way, this is not the majority view. Most legal scholars and historians believe that the President, alone among all the "civil officers" subject to impeachment, cannot be prosecuted until he is no longer in office, either through the expiration of his term or following automatic removal after conviction by the Senate.

This view, expressed during the Watergate era by such scholars as Philip B. Kurland and Alexander M. Bickel, among the leading conservative legal thinkers of their day, is based on the structure of the Government, including the

constitutional separation of powers. Since prosecution is an executive branch function and the President not only heads but in a sense embodies the executive branch, “it is hardly reasonable or sensible to consider the President subject to such prosecutions,” as James D. St. Clair told the Supreme Court in a brief for President Nixon in 1974.

It is something of a historical paradox, in fact, that this theory of the “unitary executive,” which Starr and his allies have evidently discarded as a basis for thinking about the question, has always held much more appeal for conservatives than for liberals. It was the theoretical basis for the Reagan Administration’s unsuccessful attack on the independent counsel law in a 1988 Supreme Court case, *Morrison v. Olson*.

“Our central objection is that this statute strips the President of a purely executive function—criminal prosecution, and criminal prosecution in an important class of cases—and lodges that function in one almost wholly untethered to the President,” Charles Fried, the Reagan Administration’s Solicitor General, told the Justices in arguing that the independent counsel law was unconstitutional. He told the Court that the proper mechanism for checking abuse by the executive branch was the “long, deep shadow of Congress’s power of impeachment.”

Earlier, Robert H. Bork, as the Nixon Administration’s Solicitor General, had concluded that while a sitting Vice President—Spiro T. Agnew, who pleaded no contest to tax evasion charges—could be prosecuted, the President could not be prosecuted.

And though Leon Jaworski, the Watergate special prosecutor during the Nixon tapes case, was advised by lawyers on his staff that he could seek an indictment of President Nixon, he rejected the advice. “Those fellows are still law clerks,” he said of the young lawyers on his staff, according to a 1977 account by James Doyle, one of Jaworski’s assistants. “All they know is casebooks. This is the real world,” Doyle quoted the prosecutor as having said.

Those who think that a trial of a sitting President would be unconstitutional do not necessarily raise the same objection to another option that confronts Starr, namely indicting Clinton now but not attempting to put him on trial before he leaves office.

A sealed indictment, the existence of which would not be disclosed until then, does not pose the same threat of disruption and, in a practical sense, puts the President in little more peril than if the indictment were not returned until he left office, some constitutional experts say.

For example, Michael W. McConnell, a professor of constitutional law at the University of Utah, believes that the constitutional text and structure both argue against prosecuting a sitting President. But “I don’t see anything wrong” with

obtaining an indictment for a later prosecution, he said in an interview. He added, however, that “the bottom line is, nobody knows” about the constitutionality of either course of action.

The relevant constitutional language is found in Article I, section 3: “Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.”

Read one way, those words appear to indicate that impeachment must come first, with criminal prosecution following conviction and removal from office through the impeachment process. Read another way, the text imposes no such requirement but simply makes clear that conviction on impeachment charges would not be a bar, on grounds of double jeopardy, to subsequent prosecution.

According to Professor Eric M. Freedman of Hofstra University School of Law, who published an extensive study in 1992 on the history of the impeachment clause, the Constitution’s framers and their contemporaries reached no agreement on whether impeachment was the exclusive means of acting against a sitting President. “Many delegates to the state ratifying conventions believed that the President could be indicted while in office, while numerous others held the contrary view,” Professor Freedman wrote in a 68-page article laden with footnoted quotations from members of the “founding generation” who held opposite views. However, Professor Freedman concluded that historical practice has in fact ratified the view that officials subject to impeachment may also be prosecuted while in office. The prosecution of sitting judges has never been seriously challenged, he noted, and many of the judges who have been impeached and removed were convicted first of criminal offences. (One, Alcee L. Hastings, now a member of Congress from Florida, was tried and acquitted while he was a sitting Federal judge, and was impeached and removed from the bench anyway.)

The Supreme Court’s answer to the question before it in the Paula Jones case—whether an incumbent President must stand trial in a private, civil lawsuit based on accusations of misconduct before he took office—bears only a superficial relevance to the question now before Starr.

In rejecting Clinton’s claim of temporary immunity, the Court analyzed the Paula Jones case as raising the question of whether the Federal courts could exercise their “core” jurisdiction to hear a dispute in which one party happened to be the President.

The decision did not disturb a 1982 precedent, *Nixon v. Fitzgerald*, in which the Court gave Presidents, both incumbent and former, complete immunity from civil liability for official actions while in office. And because the Paula Jones lawsuit

was not a criminal case, the Court had no occasion to address the profound separation of powers question that has hovered for many months around Starr's activities and which may now be rising, inevitably and inexorably, to the surface.