

Congress can't plea bargain with president

By Donald J. Kochan

As President Bill Clinton's predicament lingers, many commentators and members of Congress are peddling the idea of offering the president a "deal" as an alternative to impeachment and its subsequent trial in the Senate. A comprehensive reading of the Constitution illustrates that such deal-making is forbidden.

Impeachment is Congress' only option. Votes of no confidence or censure in systems like Great Britain allow parliaments to discipline their heads of government. The Founders intentionally crafted a unique American system distinct from their European counterparts. While British Prime Minister Tony Blair serves at the pleasure of Parliament, President Clinton serves by the will of the people.

A plea bargain approach also faces several constitutional impediments. First, this option is precluded because the Constitution fails to grant such power to cut a deal with the president. Supreme Court decisions — such as *United States v. Lopez* (which invalidated gun-free school zones) and *Printz v. United States* (which invalidated a part of the Brady gun bill) — have reminded us that Congress does not have unlimited legislative power and must find some authoritative foundation in the Constitution to act.

Second, the existence of the impeachment clause indicates that it is the exclusive congressional remedy for presidential misconduct. A well-accepted canon of constitutional construction is that the expression of one is the exclusion of another. It negates the presumption of a broader authority.

Article I, Section 2 gives the House the power of impeachment, to bring formal charges against the president. Article I, Section 3 gives the Senate the power to try those charges. More important, Section 3 also provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office" and disqualification from holding any federal governmental position. So Congress can only remove and disqualify the president. Fines or other penalties are not included. If Congress cannot even fine the president after overcoming the difficult hurdles of an impeachment and trial, it is illogical that Congress should have the authority to do so by lesser means.

In fact, the Constitution continues by stating that an impeached official is still eligible to face criminal proceedings and punishment. The preservation of separate criminal proceedings exists precisely because Congress is prohibited from imposing the typical criminal penalties.

Moreover, the Constitution does not give Congress the power to pardon. That Article II power is in the exclusive province of the executive. Yet, a plea bargain struck by Congress is effectively a pardon.

As No. 66 of *The Federalist* papers indicates, separation of powers concerns about mixing an inherently judicial

function in the hands of the legislative body motivated the Founders to limit the impeachment authority and to make its exercise difficult. This explains the separation of impeachment and trial between the branches and the two-thirds majority requirement to remove an official.

If disciplinary action were easy for Congress to accomplish, it would have a significant tool for intimidating the executive into complying with its demands. This is precisely the basis for the Article II, Section I clause prohibiting Congress from altering the compensation of the president while in office.

Cutting a plea bargain deal with the president would set a precedent that could drastically weaken our constitutional government. What are the limits of censure or fining authority? What standard of proof would be necessary to impose such a punishment? What vote would be required to effectuate such a proposal? With so many questions, it is

inconceivable that the Framers would have intended such an authority without prescribing its nature and limits.

The bargain struck with House Speaker Newt Gingrich earlier this year is often cited as precedent for granting a similar deal to the president. But that is an incongruous comparison. The Constitution expressly grants Congress broader authority to punish its own members. It doesn't do so for punishing the president.

Finally, there is a credible argument that a censure and fine of the president effectuates a bill of attainder, prohibited in Article I, Section 9, Clause 3 of the Constitution. Bills of attainder are legislative acts that inflict punishment without a judicial trial. This prohibition underscores the principle that legislatures only enact laws that are generally applicable. Laws cannot specify a person or discrete group of persons



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for punishment.

In light of these arguments, it is irrelevant whether either Congress or the president would prefer the plea bargain alternative. It is not within either's authority to enlarge the powers of Congress. Congress can choose not to impeach or not to convict, but it lacks the authority to choose to make an alternative deal.

The Constitution, often lost in the everyday discussion of American politics, deserves greater public attention, especially now. Already, the task of defining "high crimes and misdemeanors" has brought hope, as quotations from Publius have hit the airwaves. The constitutional discourse should rise even further to eliminate censure and other deals as options available to Congress. If it does not, the most damaging stain we'll remember from this affair may be on the Constitution.

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