A Detour Into Constitutional Absurdity

By Peter M. Shane

PITTSBURGH
Just when we thought there could be few constitutional assaults more dangerous than the Clinton impeachment, the Republicans are promoting another: the prospect of a Senate vote that would not "convict" the President on impeachment, but would simply declare him guilty of a criminal offense.

Under this strategy, the Senate could first vote on each impeachment charge and then, if President Clinton is found guilty on either count, have a separate vote as to whether he should be thrown out of office.

This is outrageous. The Senate is neither a grand jury nor a court with any kind of criminal jurisdiction. It

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does not give the President the kind of due process a fair trial would demand.

The Senate's sole function in an impeachment trial is to determine whether the charged official has or has not committed acts that deserve removal from office. Conviction and acquittal are the only two choices: there is no other constitutional judgment that the Senate may render.

The Constitution is explicit that, if an impeached official is to be indicted for criminal conduct, the indictment is not to come from the Senate. The Constitution states that the Senate's "judgment" upon conviction on impeachment "shall not extend further" than removal and possible disqualification from future office.

In the next phrase, the Constitution says that the official convicted on impeachment "shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."

Well, if a convicted official is to be

"liable" to indictment but the Senate cannot proceed further than removal, then the indictment must come from another institution.

It obviously follows that if the Senate cannot formally accuse a con-

Guilty but not removed from office? Ridiculous.

victed official of a criminal offense, then plainly it cannot accuse an acquitted official.

Moreover, if the Senate can simply pronounce the President guilty of a criminal offense, it could surely do the same to any other person. But the Framers were absolutely opposed to the new Federal Congress taking on

any judicial function other than impeachment. They considered trials by legislatures to be among the most grievous defects of government under state constitutions during the Articles of Confederation period.

Chief Justice Earl Warren wrote in 1965 that "the Bill of Attainder clause was intended not as a narrow, technical . . . prohibition, but rather as . . . a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature."

The idea of a Senate "guilty vote" that does not remove the President is just a desperate attempt to rescue the overreaching Republicans from the edge of a political abyss.

We can forgive the Senate Republicans the impulse to figure a way out that does not embarrass their House colleagues. What we cannot forgive is an impeachment innovation that usurps the power of the judiciary and unfairly attacks the executive branch. □