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Political Prosecution: The Unconstitutional Rick Perry Case

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In August 2014, then-Texas Gov. Rick Perry was indicted for threatening to exercise a veto and then carrying through with that threat. Last month, the Texas Court of Criminal Appeals rightly held that the prosecution of former Texas Gov. Rick Perry was as much an "oops" as his own debate slip that famously felled his 2012 presidential campaign, and remanded the case to the district court with orders to dismiss the two-count indictment.

The Perry prosecution started with a drunk driving arrest. It was not his, but that of Travis County District Attorney Rosemary Lehmberg, who was not only arrested (and ultimately convicted) for drunk driving, but who also berated the arresting officers such that she had to be put into restraints (which was captured on video). In response, Gov. Perry declared that he would veto the $7.5 million in funds for Lehmberg's public integrity unit unless she resigned. She refused and, shortly after her conviction, he exercised his constitutional authority to veto the funding.

And for that, Gov. Perry was indicted for "abuse of official capacity" under Texas Penal Code § 39.02 for vetoing the funds (count one) and "coercion of a public servant" pursuant to Texas Penal Code § 36.03 for the threat to veto (count two). The charges against Perry were weak, and he should not have been charged. The Court of Criminal Appeals determined as much in its opinion rejecting both counts.

With respect to count one, the court concluded that the governor has constitutional authority to veto legislation. It held that "the Legislature cannot directly or indirectly limit the governor's veto power. No law passed by the Legislature can constitutionally make the mere act of vetoing legislation a crime." Ex Parte Perry, No. PD-1067-15, 2016 WL 738237, at *10 (Tex. Crim. App. Feb. 24, 2016). Because it was the veto that was the alleged illegal act, the prosecution violated the separation of powers. In a footnote, the court distinguished the indictment with a hypothetical bribery prosecution in which a governor accepted money in exchange for the veto. In such a case, "the illegal conduct is not the veto; it is the agreement to take money in exchange for the promise." Id. at *11, n.96.

Having concluded that the prosecution violated the separation of powers, the court sustained Gov. Perry's challenge to count one. But the indictment was weak for reasons beyond the significant separation of powers issue. The court acknowledged the array of other "serious questions," including whether Gov. Perry's conduct even fell within the ambit of the statute. The statute makes it a crime for a public servant "with intent to obtain a benefit or with intent to harm or defraud another" to "intentionally or knowingly ... misuse[] government property, services, personnel, or any other thing of

value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment." Tex. Penal Code § 39.02(a)(2). Among other things, the governor cannot possibly have "custody" of the $7.5 million that is, at all times, within the Texas Treasury and under the custody not of the governor, but the Texas comptroller.

Count two fared no better. The statute under which Gov. Perry was charged proscribes the following offense: "A person commits an offense if by means of a threat, however communicated, to take or withhold action as a public servant, he influences or attempts to influence a public servant in a specific performance of his official duty." Tex. Penal Code § 36.03(a)(1) (incorporating Tex. Penal Code § 1.07(a)(9)(F)).

The court held that the definition of threat, even after applying the exception in Tex. Penal Code § 36.03(c) addressing "official action taken by a member of the governing body," was unconstitutionally overbroad in violation of the First Amendment. Ex parte Perry, 2016 WL 738237 at *23. The court concluded that there were limited applications of the statute, particularly in light of the fact that any activity that could legitimately proscribed by the statute is covered for specifically in other provisions, such as bribery. The court then held that there were numerous unconstitutional applications, including, by way of example, threats by a governor to veto a bill unless it is amended, by the comptroller to refuse to certify the budget unless a budget shortfall is eliminated, and by a trial judge to quash an indictment unless it is amended. Id. at *21

The potential scenarios outlined in the court's opinion were but a handful of applications. There are undoubtedly scores of others, including those articulated by a group of constitutional and criminal law scholars, as amici curiae, who filed a brief in support of Gov. Perry's appeal. Notably, the scholars pointed to President Obama's threatened and eventual use of executive orders if Congress refused to enact comprehensive immigration reform. As a legal mater, the line between President Obama's threat and action and Gov. Perry's threat veto is, at best, negligible and provides a concrete example of the dangers of criminalizing political conduct.

The Gov. Perry prosecution was political from the start, focusing on Gov. Perry's threats to use his constitutional authority and his ultimate exercise of it. Yet, the fact that the prosecution involved the use of a veto does not mean that there could never be criminal conduct in connection with the use of a veto pen. Indeed, as the Court of Criminal Appeals recognized, a chief executive could agree to veto a piece of legislation in exchange for money or property. But, even though such prosecution has governmental action as its background, the criminal conduct in such a scenario is not the veto, but the illicit agreement.

The dismissal of the indictment against Gov. Perry may have little effect on a zealous prosecutor destined to bring down a political rival. Perhaps, such a zealous prosecutor may be more concerned with the political implications of a failed prosecution, rather than the legal ones. As Court of Criminal Appeals Judge David Newell expressed at the opening of his concurring opinion, channeling the character Omar Little from the HBO series "The Wire," "Come at the King, you best not miss." Id. at *26 (Newell, J., concurring). Yet, regardless of any broader implications by the Texas court's opinion, Gov. Perry's prosecution, if unjustly brought, reached a just conclusion.

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