

# *Editorial*

## Good ol' fashioned parliamentary immunity

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Parliamentary immunity – that is the impediment for criminal prosecution without Parliament's approval – is seen today as something old, maybe even outdated. It is said to be only a theoretical concept as, in a developed democracy, there would be no need for protection of popular representatives against an absolute monarch. The German Bundestag seems to agree, as, at the beginning of every legislature, it generally waives the immunity from criminal prosecution of its members pursuant to Art. 46 Sec. 2 of the Basic Law. This authorization does not include, however, indictments, search warrants or arrests. Here, the Parliament reserves its right to approve any prosecutorial measures. In any case, pursuant to Art. 46 Sec. 4 of the Basic Law, prosecution must be discontinued upon request of the Bundestag.

New developments in the United States show that even to this day, parliamentary immunity is a powerful tool against retaliatory criminal prosecution and guarantor of the independence of the Legislative Branch: Recently, the former astronaut and current Senator for the State of Arizona Mark Kelly posted a video in which he, together with five other Democratic lawmakers, informed members of the armed forces that they are allowed to disobey illegal orders and asked them to do so.

President Donald Trump called this video “seditious behavior, punishable by death” and Defense Secretary Pete Hegseth emphasized that the “Seditious Six” were encouraging members of the armed forces to ignore orders. Consequently, the Pentagon opened an investigation into Senator Kelly who, as a former Navy captain, falls under military jurisdiction. At the same time, the FBI opened investigations into the other five legislators. As the disobedience of illegal orders is well established in American military law, these investigations have been criticized as retaliatory. Should Members of Congress be afraid to contradict the President because he might order a criminal investigation against them?

Notably, there has not been any request made to Congress asking for permission to prosecute, as there need not be any. The American Constitution follows the common law

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tradition and offers Members of Congress only limited protection against criminal prosecution. While e.g. German parliamentary immunity comprises every aspect of criminal liability and can be waived by a decision of Parliament, the American counterpart only bars civil arrest while Congress is in session. Another type of immunity, the “speech or debate clause” of Art I Sec. 6 of the U.S. Constitution, includes only legislative, but not communicative action. The interpretation of legislative action has been very strict, so that speeches outside of Congress as well as social media activity have not been deemed to be protected. In this sense, it resembles the German parliamentary indemnity (Indemnität) of Art. 46 Sec. 1 of the Basic Law which has a similar scope and does not protect conduct outside of Parliament.

Surely, restraining immunity only in the intra-parliamentary sphere sounds like a good idea. No one should be above the law; no corrupt politician should, therefore, be shielded by his peers. But what if, as has happened to Senator Kelly and his colleagues, the executive branch were to launch multiple investigations into uncomfortable parliamentarians, possibly leading to the paralysis of their activities or ruining their reputation? There need not even be any conviction; simply an investigation or the threat of investigation might silence the opponent, as the Trump administration has shown e.g. in connection with news and media companies. Since it is very easy to construct accusations with no connection to parliamentary activities, it becomes clear that even in the absence of an absolute monarch, there is a threat to the independence of parliamentarians. This is the point where, by vesting Parliament with the power to stop criminal investigations into its members, the true power of parliamentary immunity comes to light, securing the independence of the First Branch of Government. Parliamentary immunity is, therefore, not old-fashioned, but more relevant now than ever.