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Attorney general's dilemma: Whether to indict a former president

Peter Grier and Patrik Jonsson

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It's become clear in recent weeks that the United States is edging closer and closer to a confrontation that would be unprecedented in the nation's history: the criminal prosecution of a former president by the administration of his successor. Newly revealed actions, from subpoenas and search warrants to the calling of grand jury witnesses, indicate that the Department of Justice has been quietly forging ahead on a criminal investigation of former President Donald Trump's inner circle for election fraud and activities linked to the Jan. 6 Capitol insurrection, say legal experts. The investigation appears to include a probe of Mr. Trump's personal role, though he is likely not a target per se. It's highly unlikely that Attorney General Merrick Garland has already decided whether to include the former president in any prosecution, say former prosecutors. He would want first to let his department's gathering of evidence run its course. **WHY WE WROTE THIS** The decision whether to prosecute a former president comes fraught with risk. Not prosecuting could signal that a president is indeed above the law.

But a case could feed distrust and establish a dangerous precedent. But bits that have emerged – plus testimony from the congressional Jan. 6 committee – show that it is indeed possible Mr. Trump could be indicted for some of his actions, say experts. For Attorney General Garland, the choice may turn on a more difficult and politically fraught question: Would such a prosecution be good for the country? On the one hand, not prosecuting could send the message that for practical purposes a president is indeed above the law. It might invite worse from future chief executives. On the other, such a case could infuriate Trump supporters, feed distrust of U.S. political institutions, and establish a dangerous precedent. It's almost a no-win choice – and perhaps indicative of forces that have been eroding American democracy for years, says Rebecca Roiphe, a former Manhattan prosecutor and professor at New York Law School.

“A healthy democracy does not face this situation, where one administration has to seriously consider a prosecution against the head of the previous administration,” says Professor Roiphe. “I certainly don't envy Merrick Garland.” The combination of Jan. 6 panel testimony and recent legal maneuvering by prosecutors at both federal and state levels has hinted at former President Trump's legal exposure for his efforts to hold onto office, and gripped Washington over the past month. Numerous witnesses for the Jan. 6 committee said that following the November election, the former president was told many times by different advisers that he had lost, that claims of widespread voting fraud were false, and efforts to interfere with counting of Electoral College votes were illegal and could result in federal charges. Some legal experts say this testimony could be used to establish that the former president knew what he was doing was wrong – a

requisite for prosecution. Others believe proving such intent remains a key problem facing any federal case. Mr. Trump himself has continued to insist publicly that the election was stolen and he is the one who is on the right side of the law. What about the false electors?

Meanwhile, the Department of Justice has executed several search warrants for the electronic communications of lawyer John Eastman, who helped the Trump team develop alternate slates of fake “electors” that might help GOP state legislators overturn the 2020 results. Federal authorities in June searched the home of Jeffery Clark, a former Justice official who wanted to send letters to Georgia and other states claiming, falsely, that the department had evidence of widespread fraud in those states. The DOJ has sent subpoenas to many of the people who signed their names on false “elector” slates. Two top aides to Vice President Mike Pence have testified before a federal grand jury about the pressure put on Mr. Pence to block the counting of Electoral College votes on Jan. 6. From all this, it is fair to conclude that Mr. Trump’s closest advisers are being investigated for fraud, says Barbara McQuade, a former U.S. attorney who is now a law professor at the University of Michigan in Ann Arbor. “The most likely crimes remain conspiracy to obstruct an official proceeding by interfering with the January 6 vote certification, and conspiracy to defraud the United States by attempting to interfere with the lawful transfer of presidential power based on the lie that the election was stolen,” writes Professor McQuade in an email. Another charge federal prosecutors might be looking at is seditious conspiracy, says Professor McQuade. That would require proof that a person entered into an agreement with someone else to interfere with the lawful transfer of presidential power. Some members of the extremist Proud Boys and Oath Keepers groups are already facing seditious conspiracy charges for their actions dealing with Jan. 6. “Several members of the Oath Keepers have pleaded guilty and agreed to cooperate. [DOJ] also has the phones of the group’s leaders,” she says. The former U.S. attorney believes that another charge federal authorities could make is involuntary manslaughter, to account for the people who died during the Jan. 6 fighting at the Capitol. Involuntary manslaughter requires only that a person caused the death of another by failing to exercise “due care.”

It doesn’t require intent – only gross negligence. The Fulton County investigation But Washington is not the only source of legal troubles for Donald Trump. In Georgia, Fulton County district attorney Fani Willis is forging ahead with a wide-ranging investigation of Trump administration efforts to overturn the 2020 vote in her state. (Fulton County is the most populous county in Georgia and includes Atlanta, the state capital.) It’s possible the Georgia case will come to fruition before its federal counterpart. Ms. Willis has been moving aggressively. She has experience using Georgia’s relatively expansive RICO (Racketeer Influenced and Corrupt Organizations) statute in complex cases. Her evidence includes a taped phone call between Mr. Trump and Georgia’s chief election official in which the former asked the latter to “find” an additional 11,870 votes in his favor, an increase that would have flipped the state electoral result. Georgia Gov. Brian Kemp has already testified. Ms. Willis has subpoenaed some of Mr. Trump’s closest allies, including Rudy Giuliani and Sen. Lindsey Graham of South Carolina. Her efforts dialed up this summer as she convened a special grand jury and, just in the last month, issued target letters informing recipients of possible charges to a wide range of people who may have been cogs in a wider conspiracy. They include everyone from the state GOP chair to a local car salesman – people who participated in the formation of Georgia’s alternate slate of fake presidential “electors.”

Ms. Willis is “casting a wider net,” says Anthony Michael Kreis, a constitutional law professor at Georgia State University in Atlanta. But there may be risks to such an approach. One judge has already reprimanded Ms. Willis for attending a Democratic fundraiser for a race involving one of the recipients of her target letters. Professor Kreis says that as a general matter he is concerned about over-prosecution and stretching past the limits of the law. But more often than not in U.S. history, those who try to usurp elections have gotten away with it – particularly post-Reconstruction era Southern elections. Given that context, a Georgia case over the 2020 election might be fitting, he says. “If this is the case that the buck stops in Fulton County, there’s something that’s historical about that in a good way, in the sense that there will be justice for trying to undo a legitimate election,” says Professor Kreis. But the most important decision regarding any prosecution of former President Trump or his associates remains with Attorney General Garland. The choice to proceed or not with a federal case that could conceivably jail a former occupant of the Oval Office would be a profound one. No former president has ever been charged with a crime. On one side are legal experts who think the former president’s actions don’t meet the standards of an actionable offense under the relevant statutes. Others warn of the cost of failure – a “not guilty” verdict could embolden future presidents to go beyond Mr. Trump’s attempts to remain in power. Still others say the political divisions a prosecution would produce could make the nation’s current polarization much worse. Those on the other side say that not prosecuting Mr. Trump’s actions would also embolden further such lawbreaking. And non-prosecution, some say, could also widen division.

It can be “divisive and destructive of civic peace ... to see criminal behavior prosper,” tweeted Cato Institute senior fellow Walter Olson. That may be the real challenge to America in the current situation, says Professor Roiphe of New York Law School. Whatever the attorney general decides, a large portion of American voters will be outraged. A long decline of faith in the nation’s political, judicial, and civic structures has been exacerbated by the norm-breaking, confrontation, and strains of the Trump era. “I’m not worried about another Jan. 6,” she says. “I am worried that we may no longer have enough faith in these institutions to decide matters in a way everybody can say was fair.