

THE CRIME REPORT

YOUR CRIMINAL JUSTICE NETWORK

Trump Could Run Again Even If Convicted Under the Insurrection Act

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May 24, 2020

New York Attorney General Letitia James' announcement last week that her office was “actively investigating the Trump Organization in a criminal capacity” has added to the former president’s legal worries, but the biggest landmine believed to threaten his political future has yet to be detonated.

U.S. Attorney General Merrick Garland must decide whether to pursue a criminal prosecution under the Insurrection Act, 18 U.S.C. § 2383 against Donald Trump in connection with his conduct leading up to, and during, the storming of the U.S. Capitol on Jan. 6. Asserting a strict interpretation of the 1788 Constitution and relying on relevant commentary and precedent since then, two constitutional law professors argue that in the unlikely event of a prosecution—and conviction—Trump would not be prevented from running for, and serving, a second term.

Writing in the *University of Illinois Law Review Online*, **Josh Blackman** of the South Texas College of Law in Houston, and **Seth Barrett Tillman** of the Department of Law from the National University of Ireland, don’t take a position on whether or not Trump committed any prosecutable offenses related to his actions on Jan. 6.

Instead, they analyze the potential legal hurdles of trying Trump under the statute.

According to the Insurrection Act statute:

Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

The authors argue that even if Trump were convicted of violating § 2383, he would not be disqualified from serving a second term as president. The reason: the legal and historical literature don’t define the presidency as “an office,” and the original public meaning with respect to the Constitution of 1788 hasn’t changed.

The president would have to be an “officer of the United States” as that phrase is used in the jurisdictional clause of Section 3 of the Fourteenth Amendment. In fact, Trump assumed the

presidency only on an oath to support the Constitution, which doesn't make him an officer, they argue.

Moreover, the presidency would also have to be an "office . . . under the United States" as defined in the statute. According to the paper, legal and historical precedent do not necessarily support this definition.

"We think this issue remains unsettled," the authors write.

The Biden administration's recognition of this is likely one reason that a federal prosecution is unlikely, the paper argues, noting that the legal barriers to proving guilt would be formidable. Trump would have to be convicted beyond a reasonable doubt of "engaging" in insurrection — which is clearly different from "inciting" one, they write.

"In our view, if Trump were convicted of violating § 2383, he would be disqualified from holding appointed federal positions," the authors conclude.

"However, that conviction would not disqualify him from holding the presidency or any other elected federal position."

Lack of Clarity

Because of this analysis, the researchers write that the Department of Justice faces a "difficult choice" about whether and how to proceed.

The lack of clarity and precedent allow Trump to argue that "he did not engage in insurrection, and thus did not run afoul of Section 3."

"We suspect these legal and political risks would factor into the future Attorney General's decision," the authors conclude.

"Yet, even if Trump is prosecuted and convicted, the scope of disqualification would remain for another day."

According to legal observers, Trump would be barred from holding office again if he had been impeached in both houses of Congress. But while Trump was impeached twice in the House he was acquitted both times in the Senate, allowing him to claim "exoneration" of the impeachment charges.

Using the same reasoning, if there were a federal trial and Trump were acquitted, he would be within his rights to claim that he was again "exonerated," and could not be prevented from running again just because he was prosecuted, the authors wrote.

There are both "legal and political upsides and downsides" to a prosecution—with the political fallout from a trial an equally important consideration, the paper asserted.

"Any prosecution could be seen as an effort to disqualify the presumptive Republican nominee for President in 2024," the authors write.

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In effect, a Biden administration prosecution could knock out its most likely political opponent.
“A substantial segment of the public may view the Attorney General as disenfranchising tens of millions of voters.”