



## How to stop a second insurrection

John Avlon

January 6, 2022

(CNN) – One year after the US Capitol attack on January 6, the chief plotters of the attempted coup still have not been brought to justice. And just as truth must proceed reconciliation, legal accountability and legislative remedies must be imposed to defend our democracy from the next insurrection.

The January 6 House Select Commission vice chair, Republican Rep. Liz Cheney of Wyoming, has said there are several "potential criminal statutes at issue here" and "absolutely no question that it was a dereliction of duty" on the part of former President Donald Trump. But what exactly does that mean?

"Dereliction of duty" is a term lifted from the Uniform Code of Military Justice, but it could apply to Trump's failure to "faithfully execute" his oath of office -- to "preserve, protect and defend the Constitution of the United States." More concretely, Trump could be accused of running afoul of the Constitution in the form of the 14th Amendment, Section 3.

Passed in the wake of the Civil War, it was specifically designed to prohibit people who've taken an oath to uphold the Constitution -- and then participated in an insurrection against the United States -- from holding elected or appointed office.

While subject to inevitable legal challenges, this could possibly bar Trump from running for president again, given that a majority of Congress voted in favor of his second impeachment on charges of inciting insurrection (even though he was ultimately not convicted). It could also apply to any members of Congress who are found to have coordinated with the insurrectionists, as Republican Rep. Adam Kinzinger of Illinois affirmed to my wife Margaret Hoover on her PBS show "Firing Line."

The 14th Amendment is a constitutional prohibition -- not a criminal penalty -- but it wasn't supposed to be limited to the 1860s Civil War. As a US senator explained at the time, "Being a permanent provision of the Constitution, it is intended to operate as a preventive of treason hereafter...a measure of self-defense." And as University of Maryland Law Professor Mark Graber, a scholar of the 14th Amendment, told me: "From a constitutional perspective, there's no difference between trying to overturn an election by fraud, force or violence -- all of them fall under insurrection."

As Cheney suggested, there are also specific criminal statutes that could apply to the coup plotters -- if the Justice Department chooses to prosecute.

For example, there's a criminal penalty for insurrection already on the books, which states: "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 incapable of holding any office under the United States."

close dialog

Note that this specifically covers someone who "incites" or "assists" an insurrection.

There's also a separate criminal statute that covers seditious conspiracy. And it could be argued that Trump's past and present attempts to monetize the "Big Lie" constitute a conspiracy to defraud the United States.

Typically, this law is seen as applying to financial fraud against the US government. But that's only one of its intended applications. In a 1924 opinion, Supreme Court Justice William Howard Taft explained that "it also means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery -- or at least by means that are dishonest." An ongoing attempt to defraud our democracy by an ex-president would certainly seem to qualify.

It's true that these criminal statutes are rarely invoked by prosecutors -- but then insurrection attempts rarely occur in America. And these laws exist for a reason. We should use the tools that we've been given.

Attorney General Merrick Garland has pledged to "defend our democratic institutions from attack," and that the actions taken thus far "will not be our last." But, even if the Justice Department decides not to charge all the coup-plotters in a naïve attempt to return to normal, there are still legislative remedies Congress can make to strengthen the guardrails of our democracy.

The best of these -- like strengthening voting rights and stopping election subversion efforts in the states -- seem to be DOA at the hands of Republicans' filibuster. Even Biden-backed common-sense efforts to reform the filibuster by returning to its traditional requirement that opposing senators actually speak on the floor seems unlikely.

Ultimately, changing the violent anti-democratic impulses in our politics requires changing the incentive structure in our politics -- that means having more genuinely competitive general elections through redistricting reform which will incentivize politicians to try to persuade the reasonable edge of the opposition rather than solely playing to the base.

But barring that, there are two broad baseline reforms -- which have received some bipartisan support -- and which could actually be passed by this Congress.

The first is a fix to the 1887 Electoral Count Act to protect against election subversion efforts. This is the ambiguously written Reconstruction-era law that Trump's legal team tried to use and abuse to overturn the will of the voters.

It's time to fix this hot mess, by clarifying the role of the vice president in certifying the election as a mere functionary, restricting the ability of states to submit alternate slates of electors and expanding the threshold for contesting electors so that the will of the voters is not usurped by a handful of hyper-partisans in Congress.

The good news is that it's already got cross-aisle appeal, backed by scholars at center-right think-tanks like American Enterprise Institute and the libertarian Cato Institute, as well as Republican election law guru Ben Ginsberg at the National Review. Even Republican Senate Leader Mitch McConnell has indicated openness to this reform.

The second baseline is reforming the social media algorithms that have helped our nation go collectively insane over the past several years by elevating the most extreme, combative and conspiracy theorist voices over actual, factual information.

While Republicans and Democrats want social media reform for very different reasons, there are at least two current bipartisan bills that propose modest steps toward fixing our addiction to socially destructive algorithms. The Filter Bubble Transparency Act, backed by conservatives and liberals in the House and the Senate, would give people the ability to opt out of algorithms that target them based on personal information.

Another bipartisan Senate bill would impose transparency on social media companies by requiring them to release internal algorithm data to independent researchers vetted by the National Science Foundation. This would give the public a lot more information about how our information is being used.

These legislative remedies are not silver bullets. They would not begin to solve all that ails our democracy. But they are literally the least that this Congress can do -- solid steps with demonstrated bipartisan support.

Doing nothing is by far the most dangerous option. One year after the attacks of January 6, we should all know that we cannot take our democracy for granted. Basic guardrails must be strengthened. We need to apply the law -- fairly but without flinching -- because bullies only respect strength, and without strict accountability we will only invite future insurrections.

We need to be at least as determined to defend our democracy as Trump and his flunkies were in trying to destroy it.