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The United States of America v. Donald J. Trump

A Criminal Defense Lawyer and Former Prosecutor Weighs the Potential Case Against the President

By Russell Bikoff / Washington, D.C.

The U.S. Supreme Court is sure to have the last word on any prosecution of the President

The big question is what becomes of Donald Trump now? The intentions of U.S. prosecutors in the District of Columbia are not clear. The acting United States Attorney announced that people at all levels will be investigated, but a day or two later his chief deputy said the opposite. In any event, the U.S. attorney will be replaced by the new Administration, but that timing is unknown.

Any decisions by the District of Columbia's U.S. attorney (USAO- D. C.) will be made in coordination with the Assistant Attorney General in charge of the Criminal Division of the U.S. Justice Department and under the ultimate supervision and direction of the new Attorney General and the new deputy Attorney General, presumably Merrick Garland and Lisa Monaco, respectively, after their Senate confirmations.

In the case of Donald Trump's potential criminal exposure, only two statutes in Title 18 (the criminal part) of the U.S. code seem to apply: Section 2383 governing rebellion or insurrection and section 2384 on seditious conspiracy. Neither one has ever been applied in a situation like this, because never has a President committed arguably criminal acts like this during his term of office. Since this is a novel question, there would be difficulties using these statutes, but perhaps not insurmountable ones.

We would expect the U.S. Supreme Court to have the last word on whatever prosecution is attempted or concludes with a conviction of Mr. Trump. He will certainly have a favorable forum there since he appointed fully one-third of the justices. The overarching question is whether these three justices would face pressure to recuse themselves and whether they would do so, which is up to each one individually. Such a Supreme Court case might be of academic interest (except for Donald Trump), because by the time the case is decided by the Supreme Court, Trump would be long gone from the presidency.

If a conviction for rebellion or insurrection stands, it is important to note that one public benefit is that Mr. Trump would be forever barred from holding any U.S. office, including the presidency. Thus, this is a different route from impeachment to reach the same result: preventing Trump from running in 2024 or beyond and again serving as President.

To be convicted of rebellion/insurrection, a jury would need to find beyond a reasonable doubt that all the elements defining that crime were satisfied. Appeals courts would also need to find after conviction that for each element, as they interpret it, the facts at trial are sufficient to sustain a finding of guilty by the jury. Let us look briefly at these laws.

The first law, on rebellion and insurrection, requires (as with all criminal laws) that there be an act. The acts are defined as "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." Rebellion and insurrection need to be defined, so the prosecutors and courts would look to the case law.

It is interesting that the statute does not lay out any state of mind requirement, normally another element of any criminal statute. Thus, the courts would define a state of mind requirement by reading one into the statute, as they usually do when that element is left unstated in the statute. The strictest requirement would be that the defendant "intended" to engage in the proscribed acts. This is usually known as "specific intent."

Or, a looser mental state could be used, that the defendant "knowingly" engaged in the above conduct or that he "knew or should have known," which is more of a negligence standard. This would cover a person who argues he did not know he was inciting or assisting a rebellion or insurrection. He could still be held liable if he should have known; that is, if a reasonable person in these circumstances would have known he was inciting or assisting an insurrection or rebellion. Punishment upon conviction is up to 10 years in prison plus a fine and disqualification from federal office.

The second statue is seditious conspiracy, and to be convicted of that a person must once again act. The criminal act is defined as two or more persons conspiring, which merely means agreeing, to overthrow the U.S. government or make war against the U.S. government or " by force to prevent, hinder, or delay the execution of any law of the United States." It seems that this last requirement would be satisfied in Trump's case by the mob's success in preventing, hindering, and delaying the important ceremonial and constitutional duty of the Congress in certifying the results of the presidential election.

Once again there is no (criminal) state of mind that is specified, so the courts would import one into the statute. It is likely to be either "knowing" or "know or should have known," that he entered into an agreement with others (to overthrow the government or, in this case, to prevent, hinder, or delay the execution of any law of the U.S.), which is once more the negligence standard. The punishment upon conviction is up to 20 years in prison plus a fine.

Prosecutors if inclined could proceed in the grand jury on either or both statutes and try to obtain an indictment against Mr. Trump. They would have a choice of how broadly to define the rebellion or insurrection in the first statute and a conspiracy in the second statute. If they did so narrowly, they might focus only on Trump's words and conduct in the one or more weeks leading up to the events of January 6, and specifically his words at the rally at the Ellipse.

These statutes do not punish speech but punish verbal conduct that threatens a clear and present danger, in Justice Oliver Wendell Holmes Jr.'s formulation, of causing events that the government is empowered to prohibit, such as an attack by a mob on the U.S. Capitol. Thus, there is unlikely to be a successful defense that everything the President said was protected by the First Amendment. On the other hand, a jury must be able to draw a reasonable inference that Trump's words (either on January 6 or in earlier Tweets and other messages from him) were a call to his followers to "stop the steal" by stopping the Congressional count by illegal means.

It may be that the test of words Trump spoke is to visualize the effect on the "hearers" of Mr. Trump's words. Given the relationship and course of conduct between Trump and the mob of January 6, how would a "reasonable Trump supporter" (some would say this is an oxymoron) have understood Trump's words, their meaning and message?

The issue for prosecutors and the grand jury under the first statute thus might be summarized: Did Donald Trump know or should he have known that his words would "incite or set on foot or assist" a rebellion or insurrection against the authority or law of the U.S. in the form of an assault by a mob on the U.S. Capitol? Under the second statute the issue might be summarized as, did Donald Trump knowingly agree (or should he have known he was agreeing) with two or more persons in the crowd or among his followers to "by force

prevent, hinder, or delay" the execution of any law of the United States, namely, the counting of electoral votes by the U.S. House and Senate and their certification of the winner of the November 2020 presidential election?

It is a basic feature of conspiracy law that an illegal agreement may be proved by circumstantial evidence. Courts have noted through the years that those planning with others to commit crimes normally do not leave behind written records of their agreements. Also, under the Pinkerton rule (from an old Supreme Court case), each member of the conspiracy may be held liable for other crimes committed by members of the conspiracy in furtherance of that conspiracy and during its existence. One condition for this "vicarious liability" is that the members who did not commit the crime, for example, striking a Capitol police officer in the head, leading to his death, must nevertheless possess the mental state element required by that offense. In other words, if government is going to charge ringleaders of the riot or even Trump with murder or manslaughter in the death of the officer, the prosecutors must prove that those ringleaders intended for a member of the conspiracy to cause death or serious bodily injury to that officer.

The agreement must have an objective that is itself illegal or criminal. Here, there arguably is probable cause to believe that the objective was to illegally stop the certification of Biden's electoral vote victory. Finally, a conspiracy that constitutes a crime, not just an abstract agreement to do something illegal, must contain at least one "overt act." This is any action by any one of the parties to the agreement that brings closer the accomplishment of the objective of the agreement. Here, marching to the Capitol or breaking into the Capitol building might be an overt act, or many of them.

The prosecutors also have the choice of a wider focus in framing the counts of an indictment involving these two federal statutes. For example, they might look at all of Donald Trump's conduct before and after the election that might be evidence of a strategy to annul the results of the election if he lost, and to find illegal or extra-legal means to certify the actual loser (Trump) of the election as the officially designated winner.

Seen in this light, the events of January 6 would be just one more tactic, though an admittedly historic and infamous one, taken in an evolving strategy to nullify the election and prevent the certification and ultimately the inauguration of Joseph Biden as President. The actual satisfaction of the elements of the statute on waging rebellion or insurrection and the other statute on seditious conspiracy would probably be the same as with a narrower focus. But framing it in larger terms would allow prosecutors to tell a big story of political intrigue and treachery to the jury and to the American public. This would allow evidence of bogus lawsuits and, critically, pressure brought to bear on multiple officials in Georgia, on state legislators from Michigan and Pennsylvania, and even on Trump's unfortunate Vice President, Mike Pence.

There are other miscellaneous issues to mention in passing. One question may be the effect of a self-pardon. This would ultimately be up to the Supreme Court, although many legal scholars and judges believe that such a pardon would not be legally effective. It is hard to see how the principal officer of the federal government can be the judge and jury of his own case, if we still claim to be a government of laws, not men. In any event, a self-pardon would not affect an impeachment process by the Congress.

One might also ask what Donald Trump's defenses would be if he were indicted on either or both federal statutes under discussion. One could expect that he would move to dismiss the several counts of the

indictment on various grounds. If he got to trial and the government's case survived a motion to dismiss, which is the usual occurrence, Trump would be permitted to raise his defense case. He would certainly focus on the ambiguity, on their face, of the words he spoke at the Ellipse, and try to rebut the prosecutors' arguments that, given the relationship between him and his followers, and the context of the counting in Congress that day, they all understood his meaning, even if his words were somewhat Delphic. We could expect his defense to focus on his state of mind, and (as commentator Hugh Hewitt has written) Trump would testify and his lawyers would argue that he had no idea that the mob would break into the Capitol. Rather, he only foresaw them marching near the Capitol and possibly surrounding it at a distance behind barricades and chanting for members of Congress to stop the certification.

This defense may be hard to square with the President's reported behavior while watching the horrific scene unfold on television. This reportedly involved excitement at seeing the Capitol breeched, coupled with frantic phone calls to several Senators to urge them to postpone the certification of the vote at least until Thursday, the following evening. Also, it will be hard for Trump to argue that his speech sending the crowd down Pennsylvania Avenue to the Capitol was less than reckless; as we have seen, negligence (a less culpable mental state than reckless) in his words might be enough under these statutes, if Trump "should have known" that his words would incite an insurrection or seal a conspiracy to delay or hinder the vote certification by Congress. In any event, such testimony by Trump and legal argument would be a matter of credibility and the jury is free to reject this defense.

We may also wonder what legal exposure Rudy Giuliani and Donald Trump, Jr., who both also spoke to the crowd at the Ellipse on January 6, may face. It depends on whether any of the words they used can reasonably be viewed as an incitement to use illegal force and violence at the Capitol. Are Trump's allies inside the halls of Congress during the count of electoral votes also in legal jeopardy? After all, one might say that they were the inside cohort, allies of Trump seeking to replace Biden with Trump as the Congressionally certified electoral vote winner of the election, while the mob outside was attempting to reach the same result. However, the senators and congressmen are protected by a Constitutional privilege and they cannot be questioned for whatever they do or say on the floor of either House of Congress. One can argue, however, that they should pay a political price for abusing and manipulating the Constitution and a federal statute, the Electoral Count Act of 1887, to arrogate to Congress the power of selecting the president and vice president, a power that Congress was not explicitly given and has never exercised. To my knowledge, the Speech and Debate clause does not prevent each house of Congress from censuring or disciplining members like Josh Hawley and Ted Cruz in the Senate and minority leader Kevin McCarthy in the House, with sanctions up to and including expulsion.

There is also the matter of the actual rioters, especially those who entered the Capitol building. The law makes no distinction between those who went into the building and those who stayed elsewhere on the Capitol grounds. Rioters both indoors and outdoors are at legal risk for crimes under the D.C. Code in D.C. Superior Court, the local court, as well as under the D.C. Code and the federal criminal (U.S.) code in U.S. District Court. For example, crimes prosecuted in D.C. Superior Court against the January 6 rioters include misdemeanors, such as unlawful entry, destruction of property, assault, threats, and rioting. Crimes specific to unlawful conduct in Congress are also in this category, including disorderly conduct, parading and demonstrating, entering or remaining on the floor of either House or the galleries, and "engaging in any act of physical violence" on the Capitol grounds or within any Capitol building.

By contrast, there are a set of specific crimes under the D.C. code that can only be prosecuted in U.S. District Court and as felonies. Section 10-503.16 of the D.C. Code makes it a felony, punishable by up to five years in prison, to carry or use in the buildings or grounds of Congress a firearm, dangerous weapon, explosives, or incendiary devices. Notably, somebody who "knowingly, with force and violence," enters onto the floor of either house of Congress, is also subject to felony conviction with up to five years imprisonment. It is an open question whether felony riot on the Capitol grounds and in the buildings (requiring that a person suffer serious bodily harm or there be property damage beyond $5,000, notably two conditions satisfied in the January 6 riot) under the D.C. Code would be prosecuted in Superior Court or must be in U.S. District Court only. The penalty for felony riot is a maximum of 10 years prison and a fine.

The prospect of Donald Trump facing a jury of his peers in the District of Columbia might be delicious to contemplate for many people. There is a good chance that the judge would be female, as would some or all the prosecutors. The jury, of course, could have among its 12 members and two alternates many African-Americans, perhaps half or more of its members. While this might be a nightmare for Trump, it could be a dream come true for many other people, depending on how you feel about accountability and the rule of law, as well as irony. Deciding whether to bring a criminal case will be a challenging decision for the Biden Administration, and particularly its new Attorney General. Any decision will have political costs and perhaps limited benefits. However, a strong argument can be made that when a Chief Executive plays a crucial role in sending a mob to assault the legislature, a co-equal branch of the national government, the criminal law should be used to instruct the public and posterity that no person stands above the law, even the President of the United States. The consequences of sending the opposite message may sound the death knell of a democratic republic.

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