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The Courts Are Not the Way to Beat Donald Trump

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Will Donald Trump be president again? The prospect of another Trump presidency is exciting for roughly half the nation and a nightmare for the other half.

Those who dread a second Trump presidency hope that something — anything — will derail him.

They've hoped he wouldn't run. No such luck.

They've hoped he'd run out of money. But he's got a lot, plus plenty more capacity to raise and spend.

They've hoped he'd be indicted. That's happened four times now, actually five if we count the superseding indictment in the classified documents case. But the indictments haven't backed him off.

They hope he'll be declared ineligible to serve under the XIV Amendment for supporting an insurrection, as advocated in a recent law review article. It's reported that lawsuits seeking this remedy are soon to be filed. That issue may end up in the Supreme Court.

All this sturm and drang have had no negative effect on Trump's electability. Among Republicans, he's more popular now than six months ago. Maybe that's because, as Michael Smerconish argues, Republicans resent what they perceive as external meddling in their nomination process. And among all voters, Trump is even with or ahead of President Biden. For sure, Trump can win.

What if Trump is convicted in one or more of these cases? He would not be automatically disqualified from running, getting on the ballot, being elected, or serving as president. Yes, there are legal arguments that might be made, but these issues are mostly untested, and there's no guarantee that any court case would deny him the presidency.

But what if another Trump presidency were somehow derailed in the courts? Would that be a good thing? I suggest it would be potentially catastrophic.

Our representative democracy is fragile. Had Mike Pence caved into pressure or had a few state secretaries of state had not followed the law, we might have a second Trump term right now.

The correctness of their conduct was buoyed by their knowledge that Trump lost fair and square. They believed in democracy and in their role to protect legitimately certified democratic judgments.

So too, the men and women who guarded our capital from the mob knew they did so in the service of the will of the people.

We need to be concerned that if Donald Trump is denied a second term by a process widely deemed illegitimate, some number of people may exercise civil or violent disobedience to prevent the orderly transition of power and its ongoing peaceful exercise.

The spear's tip of that risk may be seen in the millions of Americans who still believe the 2020 election was stolen from Donald Trump, in the 70% of Republicans who view Trump favorably and who earnestly believe that these indictments are nothing more than the political weaponization of the criminal justice system.

That viewpoint is aided by the facts that the Manhattan and Atlanta prosecutions are brought by Democrats in Democratic cities, that the former is widely seen as substantively trivial, and the latter is mostly duplicative of the second federal indictment.

The federal indictments are questioned by many. Federal prosecutions are an executive branch function, so there's no getting around the appearance issues associated with the Biden administration prosecuting his chief rival.

But those appearance issues are magnified by the botching of the plea negotiations in the Hunter Biden case and the very large amounts of money paid to Hunter Biden by Chinese interests, contrary to his father's representations during the presidential campaign. The direction of the Hunter Biden investigation is ominous in multiple ways.

Yes, rhetorical diversion to Hunter Biden is a classic case of whataboutism, but we must be clear-eyed and recognize that political legitimacy rests not just on substance; it also rests on appearance.

Seventy years ago, President Truman seized the nation's steel mills during a labor dispute so as to maintain industrial production during the Korean War. The Supreme Court overturned his

unilateral seizure of private property. In an extraordinarily influential opinion, Justice Robert Jackson addressed the fundamental issues around legitimacy where, as here, the president acts without the authorization of Congress.

Jackson suggested that an enormously consequential act such as the seizure of the steel mills must be the product of the will of the people as expressed through their elected representatives. Permitting one person to arrogate that power would topple the principle that political legitimacy relies on the consent of the governed.

We may be headed for another moment of political illegitimacy. Denying Donald Trump the presidency through the vote of twelve jurors or nine justices would deprive the couple of hundred million voting-age Americans of their role in choosing the president. It would be even more illegitimate than the presidential seizure of an American industry because no private property is as precious as the right to vote. We should expect that lots of Americans wouldn't put up with it.

If Donald Trump is to be denied the presidency, let it be at the ballot box. There's no appropriate judicial shortcut.

If you are among the millions of Americans who don't want Trump back in the White House, it's your political activism that's needed to stop him.

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