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OPINIONCOMMENTARY

Trump Can't Be 'Disqualified' Over Documents

The law on government records is complicated, but the constitutional issues are simple. He can run in the 2024 presidential election.

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The warrant under which federal agents searched Donald Trump's Florida home hasn't been made public, but press leaks suggest that it was related to the former president's suspected mishandling of official documents. That has prompted speculation that Mr. Trump could be prosecuted under a law governing the misuse of federal government documents, which includes a provision for disqualification from federal office. According to this theory, if Mr. Trump is convicted, he would be ineligible to serve a second term as president. It won't work. The theory is deficient on both statutory and constitutional grounds.

Presidential records were traditionally considered the former president's personal property. Congress acknowledged this in the Presidential Libraries Act of 1955, which "encouraged"—but didn't require—ex-presidents to deposit their papers for the benefit of researchers and history.

After President Richard Nixon resigned in August 1974, he struck an agreement with the archivist of the United States to donate his papers, but he reserved the right to destroy certain

materials, including some of the infamous Watergate tapes. To prevent this, Congress enacted the Presidential Recordings and Materials Preservation Act of 1974. That law, which applied only to Nixon, required these materials to be secured by the government and ultimately made public under appropriate regulations. It provided for financial compensation to the former president, a further acknowledgment of his property interest in the materials.

The Presidential Records Act of 1978 addressed the handling of later presidents' papers. The PRA asserts government ownership and control of "presidential records," as defined in the statute, and requires the archivist to take possession of these records when a president leaves office, to preserve them, and to ensure public access. There are important exceptions—in particular, for qualifying materials designated by a lame-duck president to be held confidential for 12 years after he leaves office. These materials include "confidential communications requesting or submitting advice, between the president and the president's advisers, or between such advisers."

The law also directs presidents to "assure that the activities, deliberations, decisions, and policies" reflecting the execution of their office are "adequately documented." Once created, these records must be preserved and managed, or disposed of, in accordance with the statute. The PRA defines presidential records to include "documentary materials" created or received by the president or his immediate staff in carrying out activities related to his official duties. Presidential records don't include records of a "purely private or nonpublic character" unrelated to the execution of the office.

Significantly, while the PRA vests the U.S. District Court for the District of Columbia with jurisdiction over any action brought by a former president claiming a violation of his rights or privileges under the act, it establishes no penalties, civil or criminal, for its violation. The statute also guarantees that "presidential records of a former president shall be available to such former president or the former president's designated representative."

Other federal statutes may permit the prosecution of people who improperly dispose of presidential records, which are now considered government property. The one of most interest to Mr. Trump's foes appears to be 18 U.S.C. Section 2071(b), which imposes fines and up to three years' imprisonment on anyone having custody of records deposited in a "public office" who "willfully and unlawfully" mishandles these records. It provides that on conviction, the defendant "shall forfeit his office and be disqualified from holding any office under the United States."

But the Constitution forbids that result with respect to the presidency. Even assuming the government could prove beyond a reasonable doubt that Mr. Trump deliberately mishandled government documents knowing this to be a violation of federal statute—a difficult task, since the PRA itself guarantees his access to his presidential records and former presidents are generally entitled to receive classified information—a court couldn't disqualify him from serving as president.

The Constitution establishes the qualifications for election to the presidency: Only natural-born American citizens over 35 who have been U.S. residents for at least 14 years may serve. The Constitution also provides the only mechanism whereby an otherwise qualified person may be disqualified from becoming president: This penalty can be imposed (by a separate vote of the Senate) on someone who has been impeached and convicted for high crimes and misdemeanors. The proposed application of Section 2071(b) to the presidency would create an additional qualification—the absence of a conviction under that statute—for serving as president. Congress has no power to do that.

In *Powell v. McCormack* (1969) and *U.S. Term Limits Inc. v. Thornton* (1995), the Supreme Court decided comparable questions involving the augmentation of constitutionally established qualifications to serve in Congress. In the former case, the House refused to seat a constitutionally qualified and duly elected member, Rep. Adam Clayton Powell Jr. of New York, because it concluded he had diverted House funds to his own use and falsified reports of foreign-currency expenditures. The justices ruled that Powell couldn't be denied his seat on these grounds, as that would effectively add an extraconstitutional "qualification" for office. That, they concluded, would deprive the people of an opportunity to elect candidates of their choice, contrary to the Constitution's structure. The court cited Federalist No. 60, in which Alexander Hamilton wrote: "The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."

The high court reaffirmed that conclusion in *Thornton,* which struck down an Arkansas ballot measure imposing term limits on the state's U.S. representatives and senators. The justices articulated as their "primary thesis" that "if the qualifications for Congress are fixed in the Constitution, then a state-passed measure with the avowed purpose of imposing indirectly such an additional qualification"—in this case, not having already served a specific number of terms—"violates the Constitution."

Using Section 2071(b) to disqualify Mr. Trump (or anyone else) from serving as president is unsupportable under *Powell* and *Thornton*. Such a claim would be far weaker than the one the House made in *Powell,* as the constitution authorizes each congressional chamber to judge the "qualifications of its own members" but gives Congress no authority over presidential qualifications. The only constitutional means to disqualify a president for wrongdoing is through impeachment and conviction.

If preventing Mr. Trump from running in 2024 was the purpose of the Mar-a-Lago search, the government wasted its time and the taxpayers' resources.

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