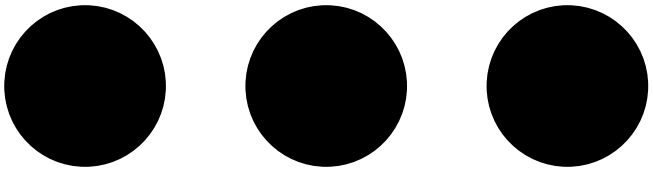
Written by **Joe Wolverton, II, J.D.** on June 24, 2016

Would a Statute re: Mishandling of Gov't Documents Disqualify Hillary From Presidency?

Given that U.S. Attorney General Loretta Lynch was called into President Barack Obama's office immediately after he endorsed Hillary Clinton's campaign for the White House, it seems increasingly unlikely that Clinton will be indicted for her use of personal e-mail servers to conduct official State Department business.



Despite the Obama administration's apparent gift of a "Get Out of Jail Free" card to Clinton, there are some who are pointing to a federal statute that may be an alternative avenue for those who wish to see Clinton punished or at least prevented from occupying the Oval Office.

U.S. Code Title 18, Section 2071(a) and (b) read:

> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.
>
> (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term "office" does not include the office held by any person as a retired officer of the Armed Forces of the United States.

This section of the statute would seem to disqualify Hillary Clinton from holding the office of the presidency for a couple of reasons.

First, there is no question that during her term as U.S. secretary of state, Clinton's handling of State

Department correspondence constituted the unlawful concealing and/or removal of official government records that should have been in the custody of a public office (as set out in section a, above).

As the *Washington Times* summarized the server situation:

> There is no question that her work-related emails as secretary of state qualify as official records and, since she kept them on a server in her basement under her sole control, there is no question that Mrs. Clinton was their custodian. But did she do any of the things forbidden by the statute and, if the server was wiped clean, how would we ever know? The answers are "yes" and "Sidney Blumenthal."

Back in June, in response to a subpoena issued by the House committee investigating the Benghazi attack, Blumenthal provided copies of dozens of e-mails he sent to Clinton on the situation in Libya. Nine of these e-mails did not appear at all in the records that Clinton had turned over to the State Department. So we know that when she wiped her server, she destroyed at least nine records covered by U.S. Code Title 18, Section 2071(b).

Maybe this was an accident. When you are turning over 30,000 e-mails, it's not surprising that a few might get overlooked. Do we really know that Clinton did this "willfully and unlawfully," and if so, how do we know? Once again, the answers are "yes" and "Sidney Blumenthal."

Six of the e-mails that Blumenthal turned over to Congress were in the e-mail dump that Clinton turned over to State. Sort of. Because six of the e-mails that Blumenthal sent to Clinton were edited before she turned them over. In one case, for example, a warning that a new Libyan government would probably be "founded on Shariah" was removed from an e-mail sent by Blumenthal before Clinton provided that e-mail to the State Department. Clinton also deleted Blumenthal's concerns that democracy might never take hold in Libya — even after holding elections and "fulfilling a list of proper democratic milestones."

So that seems to satisfy the first element of the crime described in Title 18 Section 2071. That's not enough, however, to enforce that provision's prohibition on holding government office. Just which of all the government offices were meant to be included in the restriction is a critical consideration.

The analysis begins by examining first, whether the Congress intended to include the presidency under the "office of the United States" umbrella; and second, whether the Congress would have the power to do such even if it intended it.

Writing for *National Review*, Matthew Franck answers "no" to both of those important inquiries. He explains:

> But a mere statute cannot legally disqualify a person from eligibility to the presidency, if he or she possesses the constitutional qualifications. Anyone who is a native-born citizen, 35 or older, who has been 14 years a resident of the country, and who receives a majority of the electoral votes cast for president as certified by the joint session of Congress held to count the ballots (or in the event of no such majority, the one who wins a majority of the states in the contingency balloting of the House), shall be sworn in as president. That is all in the Constitution, and it is not possible for Congress to add the further qualification "and who has not been convicted of felony X." A decisive further indication that the Congress that wrote this statute did not have the office of the presidency in mind comes in the language just before the part I emphasized — a part not quoted by Kelly last night — saying that a serving officer convicted of this offense "shall forfeit his office." (Kelly understandably didn't quote it because Clinton holds no current office she can forfeit.) No one in Congress could have thought that such a provision applied to the president, who can lose his office

> against his will only by being impeached by the House and convicted, after an impeachment trial, by the Senate. Even a conviction of a sitting president on a federal felony charge would not accomplish his removal from office. It follows that a statute that could not result in the removal of a sitting president does not contemplate the disqualification of any person to become president.

Is Franck's interpretation of the code and its possible application correct? Maybe, but probably not. Here's my take.

First, when terms in a statute are ambiguous, the legal standard applied to the interpretation is "the plainest meaning of the words." That is to say, since Congress didn't define "office of the United States" in the statute, courts in the United States would be required to define key terms of the law according to the plain meaning of the words at issue. In this case, it is plainly understood that the presidency is an office of the United States; thus, someone who violates Title 18 Section 2071 would be barred from occupying any federal office, including the Oval Office.

Next, while it is certainly true that Congress cannot repeal by statute the constitutional qualifications for president, it can certainly clarify the qualifications, as it does so regularly with equally constitutional terms such as "commerce," "general welfare," "shall not infringe," etc.

Franck argues that "it is not possible for Congress to add the further qualification 'and who has not been convicted of felony X.'"

Would the Constitution mandate that if a serial killer were to meet all the requisites for the presidency set out in Article II of the Constitution he should be allowed to hold the office? On its face, perhaps, but what about the spirit of the law?

Furthermore, when it comes to the interpretation of laws, the legal maxim demands that the plainest understanding of otherwise ambiguous terms be applied. How could this principle be squared with what Planck says about the Constitution trumping any sort of legislative attempt to add qualifications beyond those included in Article II?

I would offer this solution: While the Congress has no power to change the Constitution without going through the amendment process defined in Article V of the Constitution, the Congress may — arguably — clarify key terms, an act that would forbid certain classes of convicted criminals from even being allowed to have their qualifications considered. In other words, if a person has been found guilty of committing a crime against the United States (which is what is defined in Title 18 Section 2071), then that person cannot be qualified to hold an office under the United States, the very entity he tried to harm.

Would anyone support the idea that a person convicted of trying to damage the government of the United States should be allowed to seek a position of authority — including the presidency — in that government?

That would be like allowing the fox to rule the hen house.