

Messy, Brokered GOP Convention Lies Ahead

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(CN) - The last of the morning coffee was barely cooled at the bottom of the cup when the image of Donald Trump filled the television screen.

The Republican frontrunner was making the rounds of the morning news shows, and he was explaining, with a strained patience, why he felt even if he came up 100 votes short of securing GOP's presidential nomination outright, the party should still give it to him.

Denying him, he said, could create "civil unrest."

"I think you'd have riots," Trump said. "I'm representing thousands and thousands and thousands of people."

In any normal presidential election cycle, Tuesday night would likely have gone a long way toward settling the race for the White House. Instead, it merely made the future much more complicated.

Trump did manage to chase Sen. Marco Rubio from the contest with a decisive win in Florida.

But Gov. John Kasich's victory in his home state of Ohio, and the 99 delegates it gave him and denied Trump, made it far more likely that the billionaire real estate developer will be unable to secure the 1,237 delegates he needs to get the nomination on the first ballot.

After that, the party's nominating convention in Cleveland this summer could become a free-for-all.

As it stands now, Trump has 661 delegates, Sen. Ted Cruz of Texas has 406, Rubio has 169, and Kasich, 149.

To sort out what might be a very messy Republican nomination process and the legal questions that could arise from it, Courthouse News turned to Trevor Potter, who leads the Political Law Group at Caplin & Drysdale in Washington, D.C.

Potter, one of the most experienced campaign and election lawyers in the country, is both a former chairman of the Federal Election Commission and former counsel to several presidential campaigns. Most recently he was among those advising Michael Bloomberg as the former New York City mayor considered an independent run for the White House earlier this year.

What's understood by everyone is that the closer the delegate count between the remaining Republican candidates is when primary and caucus voting wraps up in June, the greater the odds of controversy, procedurally, legally and otherwise.

"If Trump has an insurmountable lead, it could still be a very messy convention, but I think there are fewer legal questions," Potter said.

"However, if it's close, and he doesn't have a majority of the delegates pledged to him on the first ballot, then I think you get to very interesting legal territory," he said.

The main reason for this is because the Republican presidential nominating system is a complete hodge-podge,

with different rules regarding delegate obligations dictated by the states from which they come.

It's even more complicated this year because the national party itself changed the rules for delegate selection to compensate for recent, dramatic changes in the campaign finance landscape, and to enable a strong frontrunner -- presumably a member of the GOP establishment, to secure all the delegates he needs for nomination before the convention.

At this point, it might be worth stepping back and looking at how changes in campaign finance distorted the time-honored primary process.

Historically, once a candidate began racking up wins and appeared to be unbeatable, other candidates would begin to fall by the wayside. Most of the time, the reason for their leaving the race was because his fundraising dried up in face of mounting losses at the polls.

"People don't want to invest in a losing proposition," Potter said.

Others times, even when candidate still had cash in the case, he stepped aside because he realized his effort was futile and he didn't want to be perceived as a spoil sport. Better to come back and fight another day, and in the meantime be seen as someone who wanted to help unite the party, the thinking went.

"Things have changed in the last two election cycles," Potter said. "It used to be that the people who dropped out because they had no money, did so because raising more was difficult. People were forced to raise money in thousand dollar increments from individual donors.

"That changed with the passage of the McCain-Feingold Act in 2002, which amended the rules for the financing of political campaigns," he continued. "Among other things, McCain-Feingold changed the amount that an individual could contribute to a candidate to an inflation-adjusted figure, which now stands at \$2,800.

"Now, that's still not a lot of money, and if you're losing primaries, people are still going to stop giving to you," Potter said. "But that brings us to 2012, when we saw another major change, the arrival of the super PACs, funded by one or two major donors.

"What that meant is that if a candidate was supported by a billionaire, and the billionaire was willing to stay in, despite mounting losses, a candidate could continue to run," he explained. "What we saw in 2012 was that even when the candidates themselves ran out of money, the super PACs could still run TV ads for them in key primary states. As a result, in some of the later primary states, almost all of the spending was by the super PACS and that artificially prolonged the race in 2012, allowing candidates like Newt Gingrich to stay in far longer than they would have in the past."

The party's tinkering with the process is why early contests like those in Iowa, New Hampshire and South Carolina exclusively awarded delegates proportionately, and also why, beginning last Tuesday night, some states began holding winner-take-all primaries.

The hope was that the new regime for awarding delegates would allow a frontrunner to build momentum and then begin dramatically building on their lead -- in essence restoring the historic nature of primaries and creating an environment where - in a typical year -- also-rans would eventually withdraw.

But this has been far from a typical year in presidential politics.

"What we've seen develop is a dynamic where it's Trump versus everyone else, and there's every sign that outside PACs will support candidates they believe will help keep Trump below the magic number of delegates needed for nomination," Potter said.

"So there's no reason for the other candidates to withdraw so long as they can still hope to pick off delegates here and there, in the later primaries," he said.

"Unless Trump sweeps the remainder of the primaries and caucuses, we may be in a situation where there's a very close delegate count going into the convention," Potter added.

That's where the legalities come in.

Anyone who has followed politics even casually has heard the statement that delegates awarded in the primaries and caucuses are bound on the first ballot at the convention to vote for the person who either won their primary, or, in states where delegates are bestowed proportionally, to the person to whom their support has been pledged based on the vote counts in their states.

As so much in life, this is true as far as it goes.

And it's not true of every state's delegation. There are some states in which the primary vote is considered advisory or informational, but not binding by law. The delegates for these states are free to hold what are called "beauty contests" at the convention, allowing candidates to woo them.

Thanks to the aforementioned changes in party rules, the Republican National Committee now has members -- national committee men and women -- from each state who go to the convention automatically, and participate in the nomination process. In essence, they serve the same role as the "super delegates" at a Democratic convention.

"In some states, they are bound to support the primary winner, in others they are not. They are free agents," Potter said.

Another assumption some people make is that when they hear on primary night that a candidate has won a certain amount of delegates, the candidates then have a say in who those delegates are. This isn't always the case either.

In some states, under Republican rules, a candidate does get to choose his own slate of delegates to go to the convention.

"People assume this is what happens everywhere, but it doesn't," Potter said.

In reality, in most states there's a separation between the outcome of the primary and who the delegates are. Potter lives in one of those states, the Commonwealth of Virginia. Trump won the primary there, and because the contest was for a percentage of the delegates, he got the lion's share.

But in Virginia, neither Trump nor any of the other candidates who were awarded delegates gets to choose who goes to Cleveland. Instead, in April, county Republican committees from across the state will hold a convention at which they will select convention delegates -- and who they are committed to -- based on the primary results in each congressional district in the state.

Shortly afterwards, the state GOP will hold its own convention and will choose "at-large" delegates to go to Cleveland.

Why is understanding this process important? Because the people selected to go to the convention in a state like Virginia, as opposed to those that allow the candidate to select the slate of delegates, are more likely to be party stalwarts, officials of the local county party and the like.

While those deemed "Trump delegates" are bound by law to vote for him on the first ballot of the nomination, they are not bound to him in any other way. They don't have to follow his directions or vote for him on rules changes, credentials challenges -- where people might try to object to Trump's delegates to get them replaced by someone else's delegates -- the party platform, or anything else.

"So one of the foreseeable things is that there will be an attempt to change the rules of the party, at the convention, to enable more people to be nominated from the floor," Potter said. "To go back, once again, to the changes the party made in reaction to the race in 2012, one of the things they did was make it harder to nominate people.

"It used to be that you needed a majority of five delegations at the convention -- in other words, five states that you won in the primaries -- to put someone's name in nomination for president; the current standard is eight," he said. "Now it could be that by then Cruz or Kasich has that, but if they don't, you could see a proposal to change the rules and roll it back to five.

"So as you can see, even though they're obligated to vote for him on the first ballot, the pledged delegates can also make it much harder for him to win," Potter said.

"In the end, it all has to do with who is in Cleveland, who these people are, what they are seeking to do, and what their views are ... and that's state by state," he added.

What this means is that the outcome of the convention will depend entirely on the temperament of the room; on the number of those who might be inclined to feel Trump won the nomination fair and square, versus the number of those who loathe the thought of him being the party's representative and want to do everything they can to stop his run in Cleveland.

This is where the courts might be brought into the equation, Potter said.

"One possibility is you could have someone -- i.e. Trump -- try to sue to keep the party from changing the rules at the convention," Potter said. "He could sue in state court. He could sue in federal court. However, I think by and large those lawsuits would fail because the courts have been pretty deferential to the parties over the years, letting them sort out their own internal battles.

"But what happens in the case of delegates who simply refuse to vote?" he asked, floating a hypothetical.

"What happens if, on the first ballot, those allocated to cast a vote for Trump, simply don't? How do you enforce that?"

"Does the convention simply reject those votes? Ignore the abstention? Well, not if it's an anti-Trump convention," Potter said.

"Does Trump then go to court seeking an emergency order requiring the delegates to vote the way state law requires them to vote? Probably," he said. "But is it quick enough? Does he win? What happens if they refuse to vote for him and he's denied the nomination on the first ballot, and then the court says that was wrong?"

After posing all these questions, Potter admitted, even with all his experience in politics and the law, he doesn't know the answers.

He pointed out that situations like those he was suggesting as possibilities do occur from time to time in the Electoral College. In those cases it an elector decided to vote contrary to the way his or her state voted.

"That's called a 'faithless elector,'" Potter said.

Faithless electors are members of the Electoral College who do not vote for their party's designated candidate. Since the founding of the Electoral College, this has happened 157 times. The Supreme Court ruled that states may empower political parties to require formal pledges from presidential electors to vote as expected, but 21 states still don't require members of the Electoral College to do so.

Even states that have been more proactive on the issue of faithless electors have dealt with them rather gently, charging them with a misdemeanor at most, and subjecting them to a small fine. States that have laws against faithless electors include South Carolina, North Carolina, Virginia, California, Oklahoma, Michigan and Vermont.

"But that situation is a different because the Electoral College was established by the Constitution; political conventions were not," Potter said.

"I suspect a state can bind people at the convention on the first ballot, forcing them to vote as pledged, but how do you pursue the case n court if they don't? And how do you get the remedy in time? We've never found that out," Potter said. "We've never been in that situation."

Of course, after the first ballot at the convention, most states say the delegate is free to vote for whoever they want. In theory, all pledges are off.

"But then again, it depends on what the party has done with its rules," Potter said. "You can be in the bizarre situation where there is only one candidate who has qualified by winning eight states under the current rules, but a majority of the convention doesn't want to vote for him."

Potter imagined a situation where enough delegates abstain so that the single qualifying candidate doesn't get enough votes to secure the nomination, setting the stage for a second ballot.

"But if you're in the group that wants to bring that candidate down and support somebody else, you've still have to go through the whole process of changing the rules to get the other person nominated on the second ballot," he said.

The fact of the matter, Potter said, is "you can look down the road and come up with all kinds of scenarios that suggest this could get very messy. Whether we get there, who knows?"

But the almost endless possibilities raise other questions.

For instance, if a candidate -- for argument's sake, Donald Trump -- was denied the Republican party's nomination and truly believed he was entitled to it, couldn't he sue to either have it awarded to him or to prevent someone else from, as he would see it, "run in his place."

"Sure, he could," Potter said. "Anyone can file a lawsuit. But any chance of success would depend on the specifics."

"If he could argue that he was cheated because the party broke its own rules and failed to follow its lawful procedures, then he'd have a better shot at it. That said, I still think the odds of any court intervening in that situation, and ordering the party to basically go back and do it over, are exceedingly slim. I think the courts would stay out of it."

"In the meantime, the party nominee would go ahead and campaign, assuming the party was going to win ... but there would be an ongoing lawsuit in court," Potter said.

Then of course there's the possibility of Trump opting out of the potential brokered convention and running as an independent.

"But that's pretty murky," Potter said.

"Some states have very early deadlines for filing as an independent," he explained. "For instance, the Texas deadline is May 9, and in order to file, you actually have to get 79,000 signatures, which would be an enormous effort.

"If someone were hoping to get on the Texas ballot this year, they'd be collecting signatures now, and Trump can't do that because he doesn't know yet that he'd be forced to run as an independent," Potter said.

"So -- again, speaking hypothetically -- *when* he knows for certain that the party is going to deny him the nomination is critically important to his deciding whether to make an independent run," he continued. "If it's in Cleveland, it's really too late. However, if he decides in June that the odds are stacked against him, that he's not going to get a clear majority on the first ballot and that as a result, he's not going to get the nomination, then he would still have time to get on a number of state ballots.

"Some states have very low thresholds for qualifying to be on the ballot; others, very high thresholds. But he could gather signatures and get on some. Or, he could become the nominee of parties, third or fourth parties, that already exist in various states, like the Conservative Party in New York ... or the Libertarian Party elsewhere.

"Not that I think they would have him, but he could look around and see if there are parties that would put him on as their nominee and that would allow him to skip the petition process," Potter said.

In short, if Trump were to try an independent run, he'd be facing hurdles that grow more insurmountable by the day.

Potter said those very hurdles were something that figured in Michael Bloomberg's thinking even in January and early February.

"The advice he was given was that if he was going to run, even with his billions, he would still have to be running by mid-March -- because of the Texas filing deadline. That's one reason I also don't see anyone else trying to run as an independent," he said.

"It takes money, of course. So it's much more convenient to contemplate if you're a billionaire -- and much harder if you are not -- but there are all kind of other issues to deal with. That's why I don't put much stock in it when I hear that political consultants in Florida and elsewhere are advising wealthy Republicans on how to mount an independent candidacy."

"I say, 'Well, who's your candidate going to be? You don't have a candidate.' Presumably, it's not going to be someone like Rubio who has already lost a bunch of primaries and no one is enthusiastic about," he said.

"So ... who? [Mitt] Romney? To back someone for such a run, you have to have a pretty well-known name who is ready to step in, and my guess is most of those well-known names want to wait to see what's going to happen at the convention ... and by then, as I said, I think it's too late to get on the ballots."

Even if Trump were to get on a number of ballots, at this late date, Potter said it would be unlikely that he could get on enough to win the presidency.

"But he could certainly get on enough ballots to cause enormous trouble for the Republican nominee. I mean, it doesn't take being on many ballots in what ought to be Republican states to knock the bottom out of a Republican candidacy," Potter said.

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