

Should Trump be sentenced to prison?

Two opposing views.

Now that Donald Trump has been convicted on 34 felony counts, his sentencing hearing looms on July 11. Below are two legal experts weighing in on the critical question of whether Mr. Trump ought to receive a prison sentence.

The case for prison time for Trump

Having witnessed every day of Donald Trump's criminal trial for falsifying business records to conceal a sex scandal that threatened his presidential campaign, I strongly believe the former president should be sentenced to incarceration.

I am a lawyer, not a judge, but I have practiced criminal law for over three decades. Under New York law, sentencing should be based on the gravity of the crime — and the 34 offenses on which Mr. Trump has now been convicted are profoundly serious. To find him guilty of felony business record falsification, the jury had to determine that he intended to commit, and to conceal a second crime by making or causing false entries.

Juries were given only one option for that second offense. That was the payment of cash money to hide damaging information, "a criminal scheme to corrupt the 2016 presidential election" under New York's criminal code. Joshua Stenglass, one of the prosecutors, underscored the significance of that in his closing argument, telling jurors, "Democracy gives people the right to elect their leaders, but to him [Trump] on the premise that the voters have access to accurate information about the candidates." Mr. Trump sought "to deny that access, to manipulate and defraud the voters, to pull the wool over their eyes in a coordinated fashion," Mr. Stenglass said.

Because the legitimacy of our entire system of government rests on free and fair elections, this offense is deserving of punishment.

Sentences should take into account outcomes in comparable cases. When Justice Juan Merchan sentenced Mr. Trump, he will do so against a backdrop of many other defendants who have been convicted



DOUG MILES / The New York Times
Former President Donald Trump delivers remarks at Trump Tower in New York on May 31. Trump, the first U.S. president to become a felon, excoriated prosecutors, the judge in his case, and President Biden in remarks to reporters and a small crowd of vetted supporters at Trump Tower in Midtown Manhattan.

of this felony. My research for a book about the case, "Trying Trump: A Guide to His First Election Interference Criminal Trial," included examining almost 10,000 prosecutions for falsifying business records in New York since 2015.

In the most serious of these cases, about 10 percent of the total, incarceration was imposed. Mr. Trump's assault on our democracy is as serious as or more serious than any of those others. My research also showed that first-time offenders like Mr. Trump are not exempt from sentences of incarceration, nor should they be if, like the former president, their offense is serious enough.

Moreover, Mr. Trump has shown absolutely no contrition. On the contrary, he has been defiant in the extreme. Almost every day, he left the courtroom to stand before a gathering of reporters in the courthouse and spread disinformation about the case as well as vilify the judge, the Manhattan district attorney, Alvin Bragg, and others in the most outrageous and inflammatory terms. On 10 occasions, Mr. Trump defied the gag order that the judge imposed to protect witnesses and jurors. Under New York law, all of that can and should weigh in favor of imposing a

prison sentence on Mr. Trump.

The court may also take account of the defamation, sexual assault and civil fraud verdicts that have already been levied against him. This is allowed under the principle that the defendant's history and character bear upon his sentence, and this aberrant history suggests prison time is warranted.

Finally, sentencing is about not only accountability but also deterrence. A prison sentence would send a message to Mr. Trump and his followers that you cannot get away with conspiracies to interfere with an election. Because we know that Mr. Trump faces charges related to attempted election interference in 2020 — the election he still claims he won — and is once more seeking the presidency, a criminal sentence and the deterrence it may bring is singularly important to justice and as an alarm bell to the American people.

—Norman Eisen

The case against prison time for Trump

Donald Trump was convicted of a serious felony — 34 counts of falsifying business records with the intent to unlawfully influence the

2016 election. While the statute under which he was convicted permits imprisonment, I would not send him to prison.

I do not have the information that Justice Juan Merchan will have at sentencing — the presenting report about Mr. Trump prepared by probation officers and the arguments from the prosecution and defense. My conclusions are based on the public record, my years of experience as a federal judge and a criminal defense lawyer and my decades teaching courses on sentencing at Yale and Harvard Law Schools.

Because falsification of business records in the first degree is a Class E felony under New York law, the possible sentence for each count ranges from probation to up to four years in state prison, a fine or a period of supervised probation that ends with the charges being dismissed as long as Mr. Trump has fully complied with the terms of the probation. New York judges have discretion to pick a punishment within the statutory limits.

One starting point in considering the sentence is looking at treatment other defendants have received who were convicted of the same or similar offenses. While defendants convicted of this offense can be sentenced to some prison time, most are not, especially first offenders, as Mr. Trump is. To be sure, this case is unique. It involved more than falsification; it was about efforts to interfere with an election.

Some have pointed to the fact that Mr. Trump showed no remorse after the verdict. Anyone who has a pending appeal — as he will have after he is sentenced — cannot admit to the charges. His admissions would make it impossible for him to defend himself in a second trial, were this conviction overturned.

But not expressing remorse for the crime is one thing. Attacking the jury is another. Prosecutors, like Alvin Bragg, the Manhattan district attorney, are elected officials who exercise discretion in bringing charges. They are fair targets for a defendant. Still, his decision was tested by a jury of 12 neutral citizens who spent six weeks of their lives listening to the evidence, against a standard of proof beyond a reasonable doubt, in an adversary system in which Mr.

Trump had virtually unlimited resources to hire lawyers. There is no question that his attacks reflect a fundamental lack of respect for the rule of law, which points to imprisonment.

I would also consider Justice Merchan's contempt findings. Mr. Trump willfully ignored the court's rules — behavior that strongly suggests that he will not follow other laws.

As far as other pending criminal charges in the District of Columbia and in Georgia relating to the Jan. 6 insurrection and the Florida charges concerning the unlawful retention of classified information, I would not rely on them. Federal law, like New York State law, permits but does not require judges to consider charges that were never adjudicated by a jury. I chose not to consider pending charges while I was on the bench. I believed that it was unfair. Justice Arthur F. Engoron's civil ruling in February that Mr. Trump engaged in repeated and persistent business fraud is a closer question because it was a civil case with a lower standard of proof, though it reflected conduct similar to what he was convicted of in this criminal case.

But the bottom line is this: The factors pointing to imprisonment are outweighed by Mr. Trump's unique position. Justice Merchan pulled his punches in imposing fines, not detention, for Mr. Trump's repeated violations of his court orders. Anyone else would have been jailed. Mr. Trump no doubt will be treated differently — that is, less harshly — than other criminal defendants in our extraordinarily punitive criminal legal system. But we shouldn't equalize the treatment of defendants by ramping up everyone's punishment. Our criminal legal system is far too retributive and leans too heavily on imprisonment, no matter what the crime. Besides, Mr. Trump is different, because he was president and could become president again.

—Nancy Gertner

Norman Eisen was special counsel to the House Judiciary Committee for the first impeachment and trial of Donald Trump. Nancy Gertner, a senior lecturer in law at Harvard Law School.

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