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### Grimm Scenarios

**With Rep. Michael Grimm facing an indictment, there appears to be only one way for him to get off the ballot if Republicans want to run someone else**

By Jerry H. Goldfeder | Apr 28, 2014 |

The anticipated indictment of Rep. Michael Grimm has raised questions about his viability as a candidate and the chances of his Democratic challenger, former New York City Councilman Domenic Recchia. It also has prompted a whirlwind of speculation about if and how he could be replaced as the Republican Party's nominee.

I will leave the political prognosticating for another day. Here I will address the ballot issues.

Two sets of rules come into play: New York Election Law and the United States Constitution. According to New York law, designating petitions for the Republican line were due on April 10, and Grimm duly filed them. He had until four days later, April 14, to “decline” the nomination. Candidates do that from time to time for a variety of reasons, usually because they want their Committee to Fill Vacancies (political allies and supporters) to choose a replacement. Declination is rare; in any event, Grimm did not opt to do so. Moreover, no one submitted petitions to run against him in the Republican primary. Grimm is the Republican nominee.

Assuming, however, that Congressman Grimm decides to spend his time fighting federal fraud charges and give the Republican Party a chance to run an alternative candidate, could he take his name off the ballot? Unlikely.

Generally for state offices, if one moves out of the state or is convicted of a felony, a candidate is no longer eligible for public office. Not so here. According to the United States Constitution, eligibility to serve in the House of Representatives requires one to be a resident of the state (not the district, by the way) *on Election Day*. This has been interpreted to mean what it says: one need not be a resident of the state before that. Thus, moving out of the state before Election Day would not allow Grimm's name to be stricken from the ballot. After all, he could change his mind and move back home.

Precedent supports this analysis. In 2006 Rep. Tom DeLay (R-Tex.), under indictment at the time, wished to get off the ballot for the general election so that Republicans would have a shot of retaining his House

seat. The GOP would be able to replace him if he were no longer eligible, so he moved to Virginia and swore that he wasn't going back to the Lone Star State. As a non-resident, he argued, he was no longer eligible for Congress, and, under Texas law, another candidate could take his place. Applying federal constitutional law, however, the courts saw it differently. In that he could potentially move back to Texas on Election Day, he was not yet ineligible. Even Justice Scalia weighed in on this legal imbroglio, and DeLay remained constitutionally eligible to run for the seat.

Thus, were Grimm to move to another state, the DeLay precedent would undoubtedly be invoked by New York Democrats to keep him on the ballot.

(By the way, under Texas law, DeLay was able to take his name off the ballot by "withdrawing" from the race, but in that he was not ineligible, the GOP couldn't replace him. As a result, there was no candidate on the GOP line, and a write-in campaign for a Republican was mounted. New York law doesn't permit such withdrawals.)

What about a guilty plea or a speedy disposition leading to a felony conviction? Under New York law, Grimm would lose his vote, but the federal Constitution's eligibility requirements for Congress are fixed, and do not include criminal justice status. Thus, states cannot restrict felons from running: in Louisiana this year, for example, former Gov. Edwin Edwards, a felon who served eight years in prison on racketeering charges, is running for Congress; in 2002, former Rep. James Traficant from Ohio, ran for Congress while in prison on federal corruption charges, and actually garnered 15 percent of the vote.

There appears to be only one way for Grimm to get off the ballot. In that New York law forbids a person from running for two public offices at the same time, Grimm could be nominated for another office. The tried and true method in our state for doing this would have the GOP nominate him for Supreme Court Justice in late September. Once nominated, he would relinquish his ballot position as a congressional candidate, and GOP leaders could nominate someone else—presumably a candidate with sufficient name recognition and fundraising prowess to wage a campaign in six or seven weeks.

Of course, whether the GOP would nominate an indicted member of Congress for a judgeship is a calculus that only it could make. It might be a Faustian bargain, but, as Finley Peter Dunne used to say, "politics ain't beanbag."

One last word: This analysis is predicated on Grimm's willingness to cut and run, rather than fight to the end to retain his seat. I don't know the man, and it could be weeks, or even months, until the public learns how strong the government's case is, or what his defense looks like. So I won't bet on any outcome. Until we know more, all scenarios are speculative.

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