

The Breakfast Club

Constitutional Minute for 31 May 2022

The 14th Amendment's "Insurrection" Clause

Ok, this is it, the last clause of the 14th Amendment we'll consider for the time being:ⁱ the Insurrection Clause, more properly and officially known as the Disqualification Clause. The Left has made this clause the issue du jour, so we can't really ignore it.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, **shall have engaged in insurrection or rebellion against the same**, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

An immediate question is raised by this amendment: what qualifies as an insurrection?

[Shays' Rebellion of 1786-1787](#), the [1790 Whiskey Rebellion](#) (sometimes called the Whiskey Insurrection, and [Fries Rebellion of 1799](#) are commonly considered acts of insurrection.

Post-Civil War, the [Wilmington Insurrection](#) (1898) was far worse than what happened on January 6th. The [Battle of Athens](#), Tennessee in 1946 qualifies. There, citizens, including some World War II veterans, took over the town and forced a corrupt sheriff to hide in the jail clinging to his stuffed election ballot boxes until he surrendered. The citizens' favored candidate was eventually declared to have won the election. These were insurrections; January 6th was a protest of a rigged election which was allowed to get out of hand by a woefully ill-prepared Capitol Police force. Offers of federal troops were turned down by Nancy Pelosi, in my view, because the Left had hoped the protest would get out of hand and had planted instigators in the crowd to help ensure that outcome.

There is no confusion over the intent of the framers of this section of the 14th Amendment: to penalize former officials, civil or military, of the U.S. and state governments who had joined the Confederacy, and to prevent them from simply saying "sorry about that" and resuming their former offices. An early draft of the amendment had set a time limit of 1870 to the disqualification, but that restriction was removed in the final version, leaving a less severe but potentially more permanent ban.

While it might seem a violation of ex post facto to apply this disqualification to officials who had previously participated in the rebellion, ex post facto only applies to criminal law; all this provision did was change the qualifications for holding federal or state office from the ratification date onward.

Today, the Disqualification Clause is being used in an attempt to try to keep Donald Trump (and certain Congressmen) from running for reelection. The problem with this strategy is it "puts the cart before the

horse.” The disqualification applies to someone previously convicted in court of insurrection. What does that take? Here’s where it gets a little sticky. Beginning with the 13th Amendment, Congress began adding a final section to almost all subsequent amendments which reads: *“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”* Some scholars contend that this gives Congress the power to bring and perfect a charge of insurrection, other scholars contend that doing so remains a judicial responsibility since insurrection is indeed a crime in the US Code:

18 U.S. Code § 2383 - Rebellion or insurrection: *Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.* (Note that the Code does not define either “rebellion” or “insurrection.”)

It is important to note that *none* of the J6 prisoners have been charged with insurrection, instead largely [facing trespass and other less serious charges.](#)ⁱⁱ

Regarding the final sentence in the amendment: removing the “disability” (of disqualification): “[t]he right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of certain individuals. In 1872, the disabilities were removed, by a blanket act, from all persons *except* “Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses,” officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States. Twenty-six years later, Congress enacted that ‘the disability imposed by section 3 . . . incurred heretofore, is hereby removed.’”ⁱⁱⁱ At least one current court thinks the 1898 action does not affect current charges of insurrection.

Despite the fact that the FBI, after a massive investigation, [did not find evidence of an insurrection](#), a progressive group, Free Speech For People, filed suit in North Carolina against Congressman Madison Cawthorn. A federal district judge ruled against the group, saying the 1872 act of Congress had removed the disability of disqualification, but [a federal appeals court recently overruled](#) the judge and said the suit may proceed. Cawthorn recently was defeated in the Republican primary, but the group intends to press the suit anyway in hopes of setting a precedent.

The same group filed a similar suit in March to have a federal court declare Georgia’s Congresswomen Margorie Taylor Greene ineligible to run for reelection based on remarks she made in support of the J6 protest. On May 7th [a Federal Administrative Law Judge ruled](#) that the plaintiffs *“have failed to prove their case by a preponderance of the evidence... that Rep. Greene...engaged in insurrection or rebellion.”*

At least [one modern writer](#) believes that Section 3 of the 14th Amendment is “vestigial,” i.e. a constitutional provision that is operative but written for a specific purpose that is no longer relevant. Perhaps it is, but as long as Democrats see a glimmer of hope in bringing the clause to bear against Donald Trump and others, they will not stop pushing. As the say goes: the jury’s still out.

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ⁱ There are other clauses in the amendment we have not discussed, but those will have to wait; there are many, many more parts of the Constitution we must discuss.

ⁱⁱ Sedition, yes, insurrection, no. Several members of the Oath Keepers movement have been charged with sedition. But sedition is handled in a different section of the U.S. Code. See: 18 U.S. Code § 2384 - Seditious conspiracy.

ⁱⁱⁱ https://constitution.congress.gov/browse/essay/amdt14-S3-1-1/ALDE_00000848/