

The Breakfast Club

Constitutional Minute for 24 October 2023

The 14th Amendment Issue Isn't Going Away

The Progressive Left is bound and determined to keep Donald Trump from winning the 2024 Presidential election, whatever it takes, even if it means contorting a provision of the Constitution intended to punish unrepentant Confederates.

Section 3 of the 14th Amendment is the provision at the center of the present controversy. It reads:

“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.”

Is it any surprise that the former Confederate states (other than Tennessee) refused to ratify the 14th Amendment. The “Radical Republicans” had to pass the 1867 Reconstruction Act keeping the Southern states under military governors until they ratified the 14th to get the amendment fully ratified. Even then three Northern states rescinded their ratifications and it is highly doubtful that Congress had met the threshold for ratification when Secretary of State Seward declared it certified. “Ratification at the point of a bayonet” exclaimed President Andrew Johnson – Congress showed no concern.

The Left contends that the “Disqualification Clause” (as it is called) in Section 3 applies not only to those who served the Confederacy but anyone, then or now, who questions a presidential election; at least that’s what I conclude from their efforts.

Well, ok, they contend that President Donald Trump either engaged in insurrection or rebellion himself against the United States or gave “aid or comfort to the enemies” of the United States. Which “enemies?” The ones who participated in the January 6th 2021 “demonstration-turned-riot” at the Capitol building. I’ve heard both charges (“insurrection” and “aid”) and I don’t frankly know which they claim occurred, nor does it seem to matter; if Trump’s not guilty of one he’s surely guilty of the other, they will retort.

In a June 12, 1823, letter to William Johnson, Thomas Jefferson wrote: "On every question of construction [of the Constitution], let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning

may be squeezed out of the text, *or invented against it*, conform to the probable one in which it was passed." (Emphasis added)

It should be obvious that there's some heavy-duty "inventing" going on these days.

As proof, [this paper](#)¹ by two Leftist college law professors, published on SSRN (Social Science Research Network, normally a respected portal for posting academic research papers). The two Lefties proclaim that since the 14th Amendment was ratified *after* the basic Constitution and the thirteen amendments which preceded it, it is not only self-executing (a contention questioned by many), it also *supersedes* everything which comes before it in the Constitution, including prohibitions "against bills of attainder or ex post facto laws," in Article 1 Section 9, "the Due Process Clause" (found in either the 5th or 14th Amendments), "and even the free speech principles of the First Amendment." Really? Due process is no longer applies to the provisions of this amendment because the 14th came after the 5th? Never heard that before.

They imply that any state judge or even any official involved in the enforcement of state election law can simply declare Mr. Trump guilty of "insurrection" or "aiding" and therefore disqualify him from appearing on their state's ballot. Needless to say, this conclusion sends shivers of ecstasy up the spines (or is it down the spines?) of every wild-eyed progressive. "We got him!" they say.

[A shorter essay](#)² by Mark Brown, a law professor at Capital University Law School, concludes similarly that Section 3 is self-executing, but Brown at least insists that judicial due process is necessary to invoke the disqualification. [Such suits](#)³ have already been introduced in at least four states, where the proponents have been charged with "judge-shopping." The main instigator is John Anthony Castro, a Texas resident and "a long-shot candidate for the **GOP** presidential nomination." Really? This is taking "never Trump" to a new level.

[This article](#) by Gerard N. Magliocca (yes, another law professor) was written before all the concern over Trump (but not before January 6th). Magliocca focuses on the amnesty aspects of Section 3, but he covers a lot of the history relevant to the present discussion as well.

More rational voices can also be heard in the cacophony which surrounds this issue. [This paper](#) by Kurt Lash (also on SSRN) takes a more reasoned view of the evidence from the drafting and

¹ Baude, William and Paulsen, Michael Stokes, *The Sweep and Force of Section Three* (August 9, 2023). University of Pennsylvania Law Review, Vol. 172, Forthcoming , Available at SSRN: <https://ssrn.com/abstract=4532751>

² <https://www.jurist.org/features/2023/10/12/trump-and-section-3-of-the-fourteenth-amendment-an-exploration-of-constitutional-eligibility/>

³ <https://www.newsweek.com/full-list-states-trying-kick-trump-off-ballot-where-cases-stand-1837398>

ratification of the 14th Amendment.⁴ If the article’s 53 pages terrify you, a shorter and more manageable rendering of Lash’s views was published recently on [Law and Liberty website](#).⁵

The Congressional Research Service (CRS) normally takes an unbiased look at things. Download their analysis by clicking [here](#). There are other analyses you can find if you go looking.

It looks like the previously mentioned “judge-shopping.” was successful in Colorado. On 23 October, a Colorado District Court judge denied a Trump team motion to stop the attempt by Colorado activists⁶ to remove Trump from that state’s ballot. Mr. Castro appears to be invoking the old saw “lets throw a bunch of things at the wall and see what sticks.”

This controversy will not be fully settled until the Supreme Court is allowed to express an opinion; and I believe that will happen before too long, probably before the end of this year. Unfortunately, I could see the court “punting” by declaring this to not be a legal question but a political one, one which only Congress can resolve. In that case, we may find the states free to take whatever course they want. If one Blue state is successful, others will try to copy.

The justice system in this country has been so corrupted by Leftist judges that it is hard to predict the outcome here. The Left long ago learned to use the Constitution’s words to their advantage. Let’s pray the Supreme Court does the right thing.

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⁴ Lash, Kurt, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment (October 3, 2023). Available at SSRN: <https://ssrn.com/abstract=>

⁵ Lash, Kurt, *The Fourteenth Amendment's Ambiguous Section Three*, available at <https://lawliberty.org/the-fourteenth-amendments-ambiguous-section-three/>

⁶ Calling themselves “Citizens for Responsibility and Ethics in Washington.”