JURISPRUDENCE

The Supreme Court Must Unanimously Strike Down Trump's Ballot Removal

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Former President Donald Trump speaks at a campaign event on Tuesday in Waterloo, Iowa. Scott Olson/Getty Images

Donald Trump is an astoundingly dangerous candidate for president. He is a pathological liar, with clear authoritarian instincts. Were he elected to a second term, the damage he would do to the institutions of our republic is profound. His reelection would be worse than any political event in the history of America—save the decision of South Carolina to launch the Civil War.

That fact has motivated many decent lawyers and law professors to scramble for ways to ensure that Trump is not elected. On Tuesday, the Colorado Supreme Court gave these lawyers new hope by declaring that Section 3 of the 14th Amendment bars Donald Trump from the Colorado ballot. That decision will certainly reach the United States Supreme Court as quickly as any. And if that court is to preserve its integrity, it must, unanimously, reject the Colorado Supreme Court's judgment. Because Section 3 of the 14th Amendment does not apply to Donald Trump.

The puzzle in Section 3 is that it seems as if the framers of that text were just sloppy in their enumeration. The clause bars insurgents from being "a Senator or Representative in Congress, or elector of President and Vice President, or [to] hold any office, civil or military,

under the United States, or under any State." The obvious question is why they would enumerate "Senator or Representative"—not to mention "elector of President"—but not the president.

Defenders of the Section 3 argument suggest this was a mere drafting error but that the clause applies to the president nonetheless, since the president occupies an "office … under the United States." And in any case, these lawyers argue, it would be "absurd" to read the clause to apply to every elected official, including electors for president, but not the president.

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Law professor Kurt Lash has shown that the crafting of Section 3 to omit the president was not an oversight. As his work shows, an earlier draft of the clause expressly mentioned the president; that mention was removed. And many (digital) trees have been felled to address a related issue: Whether the president is properly described as occupying an "office of the United States"? At best, that work is ambiguous, though the Colorado Supreme Court made a strong argument that the president is.

But what is not ambiguous is whether it would be "absurd" to exclude the president from the reach of Section 3: because it is plainly not absurd. Indeed, excluding the president and vice president from the scope of the clause makes perfect sense.

Lash argues that it could make sense because the framers of that clause likely expected it to apply to Civil War insurrectionists alone. No one, he argues, feared an insurrectionist presidential candidate after 1865. What they feared was insurrectionists in Congress. Other parts of the 14th Amendment are plausibly read as targeting the Civil War alone. This clause, on that understanding, could be so read as well.

But even if one assumes that Section 3 was meant to be prospective, there is an obvious reason why the only two nationally elected officers would be excluded from its reach. It took mere moments after the Colorado Supreme Court's ruling to see why, as Texas Lt. Gov. Dan

Patrick threatened to remove President Joe Biden from the Texas ballot as retribution. You see, with every other officer excluded under the provision, the state official or state court effecting that exclusion would feel the political costs of their decision *alone*. If the Missouri secretary of state decides that Josh Hawley was an insurrectionist—for both advancing a plainly illegal theory under which Congress could reverse the electoral votes of Pennsylvania, and for rallying the rioters on Jan. 6 with his now-infamous salute—then Missouri and its voters will bear the political costs of that decision *alone*. Its act would not impose a cost on other states. But if state officials from blue states can remove red state candidates, or vice versa, that state bears no cost. Instead, it gains a political victory. In the language of economics, the decision imposes an externality on the nation, which is exactly the kind of decision that states alone should not be making for other states. Such behavior is obvious to lead to a tit for tat and a breakdown of our entire electoral system.

All this will be enough for the Supreme Court to see why there is no argument from absurdity that justifies stretching the words of the 14th Amendment to cover this extreme case. It also suggests the wisdom in the compromise of including "elector of President" in the list of excluded officers. For this language makes clear that the framers of the 14th Amendment—like the framers of the 12th Amendment—expected electors to exercise judgment. In this case, the framers decided simply to ensure that the people who would elect the president were not themselves insurrectionists. But if these noninsurrectionists themselves decided to support a candidate who was, that judgment, those framers plainly believed, was a judgment properly vested in them. Better that the college called into being for the sole purpose of selecting a president decide the matter than for sitting politicians or state officials.

These considerations will lead the Supreme Court to reject Colorado's judgment. For the sake of the institutional integrity of the Supreme Court, I hope it rejects the judgment unanimously. One does not need to like Donald Trump in order to see that the law does not preclude him from being a candidate. Or at least, such must be true, if the rule of law is indeed about law, and not about this awful man.

No doubt, and again, electing Trump would be the worst political decision of the nation since the Civil War. But excluding him, wrongfully, by a close vote of the Supreme Court could well trigger the next Civil War. We must defeat him politically—not through clever lawyer interpretations of ambiguous constitutional texts.