

# Should Trump be on ballot? An Originalist interpretation.

By Jeffrey Boutwell

The U.S. Supreme Court will likely pass judgment next month on a ruling from Colorado that disqualifies former President Donald J. Trump from holding political office and thus seeking re-election to the presidency in that state in 2024.

The Colorado Supreme Court based its recent decision on Section 3 of the 14th Amendment, which was adopted by Congress in 1866 and enshrined in the Constitution in 1868 when ratified by the states. Section 3 of the amendment states that those who, “having previously taken an oath... as an officer of the United States... to support the Constitution of the United States [and] shall have engaged in insurrection or rebellion against the same” are barred from holding “any office, civil or military, under the United States, or under any State.”

The Colorado court ruled, in a 4-3 decision, that Donald Trump engaged in insurrection by aiding and abetting the mob attack on the U.S. Capitol on Jan. 6, 2021, that had the express intent of preventing Congress from certifying the results of the 2020 election. By doing so, the majority opinion reasoned, Trump’s actions are covered by Section 3.

The U.S. Supreme Court may well reverse the Colorado ruling on the grounds that

only Congress, not the courts, has the power to enforce Section 3, or because the justices find the wording of Section 3 does not cover the Office of the President.

These are pertinent issues, yet possibly beside the point. If one takes an “originalist” position and examines the motives of those who framed Section 3, which this Supreme Court might well do, then it can be persuasively argued that Section 3 does not apply, and should not apply, to Donald Trump’s actions on Jan. 6, whatever one thinks of them.

As first proposed in early 1866, Section 3 had a very clear goal: to prevent former Confederate officers and officials from being elected to positions of authority in the U.S. and state governments, and thus able to gain in the political arena what they had lost on the battlefields of the Civil War.

The initial draft of Section 3 was proposed on April 28, 1866, by Massachusetts Congressman George S. Boutwell, a family relation of mine and a member of the Congressional Joint Committee on Reconstruction that drafted the 14th Amendment. It referred specifically to “the late rebellion” and listed those Confederate officials, military officers and agents who should be “forever ineligible to any office under the United States.”

In making this proposal, Boutwell and his allies on the committee, most notably Thad-

deus Stevens, were motivated by the very real concern that the resumption of white supremacist political power in the South could help President Andrew Johnson and the Democratic party win the presidential election in 1868 and overturn Congress’ Reconstruction program of protecting Black civil rights.

Boutwell’s motion was initially voted down within the Joint Committee, but he successfully moved that it be considered as a separate piece of congressional legislation. In its place as part of the proposed amendment was a new section 3 that denied voting rights in federal elections, until July 4, 1870, for “all persons who voluntarily adhered to the late insurrection.” During House-Senate negotiations on the amendment in May, however, the Senate restored Boutwell’s emphasis on preventing Confederate office holding, not wanting to interfere with the authority of the individual states in the granting of voting rights.

This was the state of play when Congress adopted the 14th Amendment on June 13, 1866, and submitted it to the states for ratification. During previous debate, references to Confederate officials in Section 3 had been dropped. The aim of seeking to prevent the resurgence of political power by southern white supremacists, who were already undermining Black

civil rights, remained, however. Indeed, Thaddeus Stevens had stated his preference for prohibitions on voting rights, not office holding, leading historian Eric Foner to correctly conclude that Section 3 “had more to do with who would exercise political power in the South than with punishing treason.”

Protecting Black civil rights and the political gains of Reconstruction, not punishing treason or insurrectionist activities, was the motivating factor behind Section 3 of the 14th Amendment. An “originalist” interpretation along these lines might conclude that Boutwell, Stevens and others were seeking to limit the political influence of former Confederates and those who aided the rebellion, not providing a roadmap for how to deal with future insurrectionists such as Donald Trump and those who assaulted the U.S. Capitol and American democracy on Jan. 6.

If Trump’s threat to democracy and American constitutionalism is to be defeated, the effective method would be at the ballot box.

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