

History Argues For Disqualifying Trump

What The Civil War And Reconstruction Teach Us About The Proper Use Of The 14th Amendment

By David French Opinion Columnist
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One Of The Most Difficult Things To Ask A Judge To Do Is Issue A Ruling That He Or She Believes Is Actually Dangerous. Even If You Can Make A Strong Case That The Letter Of The Law Is On Your Side, Judges Are Tempted To Narrow The Reach Of Disfavored Laws Or Sometimes Virtually Rewrite Them In Order To Avoid Outcomes That Are Deemed Too Radical Or Disruptive.

Thus, It's Incumbent On Good Lawyers To Argue Not Merely In Favor Of The Letter Of The Law But Also For The Underlying Merit Of The Law Itself. My Newsletter Two Weeks Ago Focused Mainly On The Legal Argument For Disqualifying Donald Trump From The Presidency On The Basis Of The Text And History Of Section 3 Of The 14th Amendment. I Made The Case That The Plain Language Of The Amendment Should Disqualify Trump Regardless Of The Consequences, Which Many Observers — Including Some Strongly Opposed To Trump — Believe Would Be Dire And Violent.

Today, By Contrast, I Will Make The Case That *Even The Consequences* Argue For Trump's Disqualification. Or, Put More Directly, **That The Consequences Of Not Disqualifying The Former President Are Likely To Be Worse Than Those Of Disqualifying Him.** This Is The Lesson Of History Both Recent — The Trump Era And Jan. 6, 2021 — And More Distant. The Profound Mistakes Of The Reconstruction-Era Congress, Just Years After The Civil War And The Ratification Of The 14th Amendment, Teach Us About The High Cost Of Welcoming Insurrectionists Back Into High Office.

I Addressed These Points Briefly In A [Short Post](#) For Our [New Opinion Blog](#), But They Deserve More Attention. Critics Of Applying Section 3 To Trump Have Correctly And Eloquently Argued That Removing Him From The Race Could Trigger A Convulsive And Potentially Violent Backlash In The American Body Politic. Millions Of Americans Would Feel As If Their Choice Was Taken From Them And That Scheming Elites Were Destroying American Democracy.

But Doesn't That Sound Exactly Like MAGA's Response To The Last Election? In 2020, Trump Faced The Voters, Participated In A Free And Fair Election, And Refused To Accept The Outcome. He Triggered Arguably The Greatest Threat To American Democracy Since The Civil War. He Sent A Single Message, Loudly And Clearly, To His Opponents: He Will Not Admit Defeat. **Victory Is The Only Election Outcome He Recognizes.**

Given That History, Why Does Anyone Believe It Will Be Safer To Keep Him On The Ballot? Why Presume That The Upheaval And Violence That Could Greet His Defeat At The Polls Would Be Any Less Than The Upheaval And Violence That Could Greet His Disqualification From The Ballot?

And That Assumes He Loses. What If He Wins? Or, To Put It Another Way, Does More Power Somehow Make A Seditious Man Less Dangerous? He Has Pledged "[Retribution](#)." [His Allies](#) Are "Drafting Plans To Potentially Invoke The Insurrection Act On His First Day In Office," Which Would Grant Him The Authority To Deploy Troops In American Cities.

Moreover, America Has Already Run An Experiment With Allowing Insurrectionists Back Into Office, And The Results Were Catastrophic. To Understand The History, I Highly Recommend [This 2021 Law Review Article](#) By The Indiana University Law Professor Gerard N Magliocca. He Traces The History Of The Amnesty Act, The 1872 Law That Allowed Most Confederates Back Into Office Who Had Previously Been Barred By The 14th Amendment. Reading Magliocca's Article Reminds Me Of The Quote From [Ecclesiastes](#), "There Is Nothing New Under The Sun." The Very Themes That Dominated The Amnesty Debates In The 1870s Also Dominate The 14th Amendment Debate Today.

First, Just As Fear And Fatigue Are Now Prevalent In American Politics, They Were Prevalent After The Civil War. “Amnesty,” Magliocca Writes, “Partly Resulted From Fatigue In The North With Ongoing Sectional Strife.” In Other Words, After Four Long Years Of War And Seven Years Of Military Occupation Of The South, Many Americans Were Ready, By 1872, To Simply Move On.

Moreover, The Insurrectionists Were Still Active. The Ku Klux Klan Was On The Rise, And There Was A Worry That Prohibiting Former Confederates From Holding Office Was Contributing To The Group’s Appeal. Both President Ulysses S Grant And Congressional Leaders Believed That Section 3 Could Inflammate Conflict “By Giving White Southerners An Excuse To Aid The Ku Klux Klan.”

As Magliocca Observes, Congress Thus Took A Carrot-And-Stick Approach To Southern Intransigence. In 1871, It Enacted The Second Ku Klux Klan Act, Which Beefed Up The Ability Of Federal Officials To Respond To Klan Violence, And In 1872 It Passed The Amnesty Act, Which Gave Thousands Of Former Confederates Access To High Office.

In Retrospect, The Reconstruction-Era Congress Was Almost Painfully Naive. A Faction Of Republicans Actually Wrote That “Universal Amnesty Will Result In Complete Pacification In All Sections Of The Country.” In Reality, Magliocca Says, Amnesty Was “A Harbinger Of Reconstruction’s Doom And The Contraction Of The 14th Amendment In The Supreme Court.”

While Section 3 Of The 14th Amendment Didn’t Disqualify All Confederates — It Didn’t Apply To Those Who Hadn’t Previously Hadn’t Taken An Oath Of Office — It Did Apply To A Substantial Portion Of The Confederate Elite. And As Soon As Congress Granted Amnesty, That Same Confederate Elite Regained Its Access To The Halls Of State And Federal Power. By The Late 1870s, Former Confederates Were Flooding Into Congress And Dominating State Governments.

The Result Wasn't "Pacification." It Was Jim Crow. It Turned Out That When Congress Gave The Keys To The State Kingdoms Back To Confederates, They Created The Closest Thing They Could To A Renewed Version Of The Confederacy. Slavery Was Abolished, But In The Almost-Century Between The End Of Reconstruction And The Passage Of The Civil Rights Act, Generations Of Black Americans Lived And Died In A Virtual Apartheid Substate. The Fatigue And Fear Of The North Enabled Systematic Lynching And Oppression In The South.

I'm Not Arguing That The Amnesty Act Was The Sole Cause Of Jim Crow. It Took Years Of Capitulation, Culminating In The Compromise Of 1877 — In Which Southern Democrats Permitted The Republican Rutherford B Hayes To Become President In Exchange For The Removal Of Union Troops From The South — Before The Federal Government Completely Abandoned Black Southerners.

But The Amnesty Act Does Stand As An Example Of The High Cost Of Misguided Mercy. While Defeated Confederates And Seditious Trumpists Are Not Morally Equivalent — Slavery And White Supremacy Are Among America's Cardinal Sins — They Do Share A Common Characteristic: Continued Commitment To Their Rebellious Cause.

Trump Is Openly Running As An Instrument Of Vengeance. The MAGA Community Itself Is Not Only Still Committed To The Stolen Election Narrative, Its Most Extreme Elements Are Engaged In An Escalating Campaign Of Threats And Intimidation. These Actions Are Creating Both Fear And Fatigue In The Larger Body Politic, With Millions Of Americans Understandably Desperate To Avoid A Deeper Conflict.

But History's Lesson Is Clear. Unrepentant Insurrectionists Use Their Power To Continue Their Insurrection. In The Post-Reconstruction South, That Meant Recreating The Conditions Of the Confederacy As Much As The White Southern Elite Could. In The Modern Context, Refusing To Apply Section 3 Means Granting Vindictive Rebels Access To State Power As An Instrument Of Personal Revenge.

The Sad Reality Of American History Is That The Post-Civil War Generation Began Abandoning The Plain Text And Meaning Of The 14th Amendment Almost As Soon As It Was Ratified. An Exhausted Nation Simply Didn't Possess The Legal, Cultural Or Political Will To Enact The Amendment's Great Promise Of Equal Protection Under The Law. Nor Did It Possess The Will To Continue To Bar The Confederate Elite From Political Power. The Result Was Calamitous. Black Americans Faced More Suffering And Injustice, While Former Confederates Enjoyed The Fruits Of Wealth And Power.

Congress After The Civil War Thought The Amnesty Act Could Provide A Degree Of Social Peace Without Sacrificing Justice. It Was Wrong. The Post-Reconstruction South Was Neither Peaceful Nor Just. **And If We Believe That We Can Bring Peace Or Justice To The United States By Appeasing MAGA, Then We'll Simply Repeat Our Ancestors' Mistakes.**

The Language Of the 14th Amendment Is Clear *And* It Is Wise. The Law And History Both Teach Us The Same Lesson: Donald Trump Is More Dangerous In The Oval Office Than He Is At Mar-a-Lago, And The Safest Course For The Constitution Is To Keep An Insurrectionist Out Of the White House.

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