US historians file brief with Supreme Court calling for Trump's exclusion from the ballot under the Fourteenth Amendment

Tom Mackaman
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A group of 25 American historians, including James M. McPherson of Princeton University, has filed a friend of the court brief with the United States Supreme Court calling on it to uphold the Colorado Supreme Court ruling barring Donald Trump from the ballot for his role in the January 6, 2021, insurrection and siege of the US Capitol.

Trump used his last months as president to organize an insurrection against the outcome of the 2020 election, which he lost to Joe Biden by more than seven million ballots and 76 Electoral College votes. January 6 was the result of elaborate planning orchestrated from the White House, leading up to the storming of the Capitol building. The insurrectionists threatened to take hostage or murder congressional leaders, as well as Vice President Mike Pence. The attempted coup d'etat, which played out over several hours and involved a still unexplained military stand-down, came very close to succeeding.

Nonetheless, Biden and the Democratic Party made no serious effort to punish or even impose legal sanctions on Trump and his fascist cadre, with Biden stating that his primary concern was maintaining "a strong Republican Party."

The historians' brief, called an *amicus curiae*, is airtight, factually speaking, at least. The Fourteenth Amendment to the US Constitution, ratified in 1868 in the Reconstruction period following the Civil War, plainly states:

> 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.

The language leaves little room for interpretation. Trump was "an officer of the United States"—indeed, the chief officer—who took "an oath… to support the Constitution," but who then "engaged in insurrection or rebellion." The clause also bars from public office those who have given "aid and comfort" to an insurrection. Trump is therefore barred from holding "any office" by the Fourteenth Amendment.

Trump's attorneys have mounted an eclectic defense, whose constituent elements are mutually contradictory. His counsel has argued, variously, that Trump did not engage in insurrection and gave no "aid or comfort" to one, that the president of the United States is not an officer of the United States, and, most absurdly of all, that the third clause of the Fourteenth Amendment is inoperative because Congress never enacted specific enabling legislation—an argument whose logic would overturn many of the 27 amendments to the Constitution, including the First, affirming freedom of speech and assembly, and the Thirteenth, abolishing slavery.

The historians call the documentary evidence from the 1860s and 1870s "most probative" against Trump's positions. The record shows, they conclude, that the "decision-makers crafted Section 3 to cover the President and to create an enduring check on insurrection, requiring no additional action from Congress." Among other salient facts from the historical record, the brief brings forward evidence revealing that:

• In the congressional debate over the amendment, inclusion of the president under Section 3 was expressly discussed and upheld.

• Contemporaries publicly stated that Section 3 barred the former president of the Confederate States of America, Jefferson Davis, from the office of the President of the United States.

• Leading Republicans from the period stated that Section 3 applied not only to the slave-holding insurrectionists of the 1860s, but to potential future insurrectionists as well.

• Contemporaries understood that no enabling legislation was required to enforce Section 3's ban on insurrectionists from holding public office.

• The President of the United States was referred to by contemporaries, as well as by the framers of the Constitution in 1787, as "an officer of the United States," in line with the language of the Fourteenth Amendment.

The historians' document is meticulously researched and presented. Those contributing to it have, collectively, written scores of books on the 19th century, the Civil War and Reconstruction. Besides McPherson, noted signatories include Orville Vernon Burton of Clemson University and the University of Illinois, Nell Irvin Painter of Princeton University, Manisha Sinha of the University of Connecticut, Steven Hahn of New York University, George C. Rable of the University of Alabama, David Roediger of the University of Kansas, Brooks D. Simpson of Arizona State University, and Thomas C. Holt of the University of Chicago.

Were the right-wing justices consistent in the application of their doctrine of "original intent"—which purports to channel the inner thinking of the Constitution's framers— they would be compelled by the historians' brief to remove Trump from the ballot. But, of course, they are not. "Original intent" is not a consistent legal doctrine, but an *ex post facto* justification used when suitable for preconceived political ends and jettisoned when not. Already, a quarter century ago, the Supreme Court proved itself willing to set aside "original intent" when it intervened in the Bush-Gore 2000 presidential election to stop the counting of ballots in Florida, handing the White House to Republican George W. Bush.

The Republican Party is by and large united behind Trump. There is no reason to doubt that the same applies to the fascistic majority on the

Supreme Court. Yet a section of the Democratic Party and those in its orbit hope that the Court or some other *deus ex machina* will make Trump go away and return American politics to a supposed state of normalcy.

Meanwhile, the dominant section of the Democratic Party fears doing anything that might offend the Republican Party. This thinking is behind several columns that have been published in recent months in the major organs of American liberalism, the *New York Times* and the *Washington Post*, opposing Trump's removal from the ballot under the Fourteenth Amendment. Their central argument, expressed most forthrightly by law professor Samuel Moyn, is that doing so would discredit a Biden victory, and might provoke another fascist insurrection. Writing in the *Times*, Moyn reasons that "rejecting Mr. Trump's candidacy could well invite a repeat of the kind of violence that led to the prohibition on insurrectionists in public life in the first place." Moyn's logic is tantamount to surrender. Of course, Trump's supporters will not accept a Supreme Court ruling against him. Neither will they accept the outcome of the 2024 elections should Trump lose.

The most extraordinary political indictment of Biden is that he is trailing Trump in the polls, including in most of the "swing states" that will decide the outcome in the Electoral College. Biden's cratering popularity—his approval rating is the lowest in history for an incumbent president seeking reelection, lower even than that of Trump four years ago—has everything to do with the fact that his singular policy has been war. He has done nothing to improve the lives of the working masses and youth, and he has left the COVID-19 pandemic to rage uncontrolled, ending even minimal public health surveillance and reporting. "Genocide Joe" has instead committed everything to Washington's proxy war with Russia in Ukraine and Israel's ethnic cleansing of the Palestinians. His administration has expanded the war in the Middle East to Yemen and is preparing to attack Iran. This is a government of war and social austerity.

The yawning chasm separating the needs of the masses from the two capitalist parties and their likely nominees, the fascist Trump and the warmonger Biden, is the basis of the greatest American political crisis since the Civil War. Like that titanic event, it is a crisis that will not be resolved within the normal "checks and balances" of the federal government. This is a crucial point missing from the historians' brief.

Perhaps the genre of the *amicus curiae* does not permit discussion of the most salient historical fact of all: That the Fourteenth Amendment was itself the outcome and culmination of a social revolution. Ratified in the period known as "Radical" or "Congressional" Reconstruction, the Fourteenth Amendment was the political highwater mark of the Civil War period, what McPherson has aptly characterized as "the Second American Revolution."

The assassination of Lincoln, just five days after the Confederate surrender at Appomattox, deprived that revolution of its central leader. Worse was to come. Lincoln's replacement, Andrew Johnson, a Tennessean brought on as vice presidential candidate in 1864 for Lincoln's second term, revealed himself to be a bitter opponent of the radical wing of the Republican Party, led by Thaddeus Stevens of Pennsylvania, and of the freed slaves and Republicans in the South.

Emboldened and unrepentant, the defeated leaders of the Confederacy, including figures such as the former Confederate Vice President Alexander Stephens, set to work to re-consolidate power. Across the South, "Black Codes" were imposed to oppress the former slaves. Some of these laws were so extreme that they required the freedmen to work for their former masters. Prominent voices even called for the reversal of the abolition of slavery. It was in this period that the Ku Klux Klan emerged, effectively the paramilitary wing of the southern Democratic Party, terrorizing and murdering black and white Republicans alike. Meanwhile, in the White House, Johnson attempted to use the veto to stymie congressional efforts to carry out the political and social reconstruction of the South.

But the Second American Revolution had not yet fully run its course. Thaddeus Stevens organized a counter-thrust, mobilizing a congressional majority that overrode Johnson's repeated use of the veto and made him a lame duck, whose central occupation was to fulminate against the House of Representatives. The 1866 elections turned into a referendum on the struggle between the president and Congress. The voters delivered a ferocious rebuke to Johnson and the Democrats.

To Thaddeus Stevens and the radicals, the people handed super-majorities of Republicans in the Senate (42-11) and in the House (143-49). Never has the American presidency been so weak. Impeachment charges were ultimately brought against Johnson, the Senate coming one vote shy of convicting him—the closest the Senate ever came to a guilty verdict and removal from office of a president charged with "high crimes and misdemeanors."

It was in this period that the Fourteenth Amendment was introduced and ratified. Arguably the most radical and important amendment after the First, it confirmed the longstanding republican policy of *jus soli* birthright citizenship for the children of immigrants and extended it to the freed slaves. It also established the "due process" clause to protect individuals from the predations of the state governments. Its third clause banning insurrectionists from public office, the center of the Colorado ruling presently before the Supreme Court, has never drawn much attention, receding before these other key features of the amendment. That the third clause is now relevant testifies to the depth of the present crisis.

The Roberts Supreme Court, which will soon rule on the Colorado case, *Trump v. Anderson*, is the most reactionary since the pro-slavery Taney Court of 1836-1864. It is highly relevant, in this connection, that the Fourteenth Amendment's citizenship clause was aimed at the Supreme Court's infamous *Dred Scott* decision of 1857. In that decision, Chief Justice Roger Taney and the court's majority used a freedom suit brought by a slave to issue a sweeping legal expansion of slavery, ruling that people of African descent had no rights under the Constitution and that Congress had no authority to ban slavery anywhere.

Abraham Lincoln, then emerging as a major political figure in the Republican Party, suspected a conspiracy involving his Illinois rival, Sen. Stephen Douglas, the former and current presidents, Franklin Pierce and James Buchanan, and Taney. In his famous House Divided speech of 1858, Lincoln responded to the Dred Scott Ruling by charging the conspirators:

> We cannot absolutely know that all these exact adaptations are the result of preconcert. But when we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen—Stephen, Franklin, Roger and James, for instance—and we see these timbers joined together, and see they exactly make the frame of a house … we find it impossible not to believe that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common plan or draft drawn up before the first lick was struck.

Some early historians accused Lincoln of hyperbole. But later historians found strong archival evidence to suggest that Lincoln was correct, and that there had been collusion between Buchanan and Taney.

Lincoln's indictment of a "Slave Power Conspiracy" still resonates. Like its forbear, the Taney Court, the present Supreme Court is the center of conspiracies against democratic rights, from the Bush-Gore stolen election down to the present. Indeed, Justice Clarence Thomas' own wife, Virginia Thomas, was centrally involved in plotting the January 6, 2021, insurrection. There can be little doubt that future historians will discover

further entanglements between Trump and the fascistic judges who comprise the court's majority.

Yet not only Trump and the Supreme Court, but the Biden administration and both major parties constitute, in essence, a permanent conspiracy against the population. All agree on the aims of expansion of war abroad, achieved by secretive means, and suppression of democratic rights within the US—especially the right to speak out against war, as seen in the hysteria directed against those who speak out against the genocide in Gaza at colleges and universities.

There is a critical history lesson in this: The Fourteenth Amendment, along with the other great achievements of the period—emancipation of the slaves and destruction of the Southern slave-owning ruling class—emerged out of a revolution that first had to overcome the entire political setup that existed before the Civil War, including the Supreme Court.