Trump and the American Problem of the Commons

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Americans missed another opportunity on Monday to reduce the threat Donald Trump presents to constitutional democracy in the United States and in other countries. Section Three of the Fourteenth Amendment forbids present and former officeholders who engage in an insurrection from holding any state or federal office. Governing officials in Colorado, Maine, and Illinois determined that Trump was not constitutionally eligible for the presidency under this provision because the former president on January 6, 2021, had instigated and actively participated in an assemblage that used force and violence to prevent the peaceful transfer of presidential power. The Supreme Court in *Trump v. Anderson* unanimously overturned these decisions. Three justices acknowledged that Trump is an "oathbreaking insurrectionist." None challenged that characterization or in any way questioned the substantive conclusions reached by Colorado, Maine, and Illinois officials that Trump committed treason on January 6. Nevertheless, in an unsigned per curium opinion that had some basis in policy, but little or no foundation in the constitutional text or history of the Fourteenth Amendment, the justices ruled that states had no power to determine whether persons were eligible for the presidency under Section 3.

The Supreme Court's decision makes some sense as a practical matter. Giving all voters the same ballot in a national election seems reasonable. Voters in many presidential systems choose from among the same candidates no matter where they live. If the vote is to determine the president of the entire United States, then the menu should not be different in Georgia than in Colorado. Or so the Supreme Court argued with great vigor.

One problem with this argument is that, for better or worse, presidential elections in the United States are not national elections. Each state makes the rules for the presidential election in that state. The ballot voters receive in Georgia is different from the ballot voters receive in Colorado. The rules for casting ballots in Georgia are different than the rules for casting ballots in Colorado. The names on Georgia ballots for the presidency may differ from the names on the Colorado ballot. Congress is authorized under the Constitution to mandate greater uniformity, but in the absence of federal legislation, states are given wide leeway in running presidential elections. This may be bad policy, but the constitutional rules in the United States permit substantial variation in how states conduct presidential elections.

The second problem with the argument in *Trump v. Anderson* is that the Supreme Court's holding that states could remove state officials from the ballot under Section Three but not federal officials has no basis in the constitutional text or constitutional history that conservative justices maintain are authoritative when implementing other constitutional provisions, including other provisions of the Fourteenth Amendment. The text of the Fourteenth Amendment does not provide different procedures for removing federal officers than those used for removing state officers. No person during the ratification debates suggested that the procedures would be different. The per curium opinion noted that state officials only disqualified one potential federal officeholder before Congress granted a general amnesty but fails to note any other federal officeholder who was subject to disqualification. Good reason exists for thinking none were. During the period between the ratification of the Fourteenth Amendment and the passage of the Amnesty Act of 1872, some former confederate states were not immediately represented in Congress, blacks voted in all former confederate states, and many former confederate states disenfranchised former confederates. The result was that these states sent to Congress either Republicans who had opposed seces-

sion or blacks who had formerly been enslaved. None were subject to Section Three disqualification.

Most attention in the United States has focused on the difference between the per curium opinion, the separate opinion issued by Justice Amy Coney Barrett, and the separate opinion issued by Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson. The per curium opinion maintained or at least appeared to maintain that courts could not disqualify federal officials and that constitutional limits existed on congressional efforts to disqualify federal officials. The separate concurrences would have limited the opinion to the rule that states may not disqualify federal officials in the absence of federal legislation. At least all opinions assume that a former president who had never held another office was subject to disqualification. The justices did not even bother discussing the nonsensical idea that presidents are not officers of the United States or officers under the United States.

Attempts to disqualify Trump highlight how, to paraphrase the late Abba Eban, opponents of the former president never miss an opportunity to miss an opportunity. Had Republicans coalesced around a single candidate in the 2016 party primaries, Trump would not have been on the ballot in that year's presidential election. Had a few more Republicans voted for impeachment after the events of January 6, Trump would have been constitutionally ineligible for the presidency in 2024. Had legal elites who detested Trump united around disqualification efforts, some of the court's conservatives who may also detest Trump might have preferred law to pretext and sustained the Colorado decision removing Trump from the ballot.

Professor Michael Dorf of Cornell Law School captured an important truth when he declared that *Trump v. Anderson* "[offered] unpersuasive grounds for leaving to other actors a task that they know those other actors almost certainly will not undertake." Popular support, even among Republicans, does not explain how Trump survives to inflict catastrophic damage on constitutional democracy in the United States and abroad. Numerous Republicans privately acknowledge Trump is an oathbreaking insurrectionist. Some publicly support Trump because they fear backlash from Trump's base. Others insist Republicans rally around them rather than some other candidate as the alternative to Trump, thus preventing the united front necessary to stop the oathbreaking insurrectionist. Anecdotal evidence indicates many Republican officeholders privately hope the court will disqualify Trump. One suspects from the per curiam's refusal to engage with the claim in the Sotomayor/Kagan/Jackson concurrence that Trump is an "oathbreaking insurrectionist" that some Republicans on the Court hope that Congress does the deed.

Related divisions exist among never-Trumpers and Democrats. Some excoriate the disqualification effort for relying on courts when the left should be mobilizing voters. Others question whether reviving an obscure provision was the right means for ridding the body politic of Trump. Still others, while acknowledging Trump to be a criminal who should never even be allowed to be a federal dogcatcher, think the case that Trump was an insurrectionist not definitely established, maintain the claim that Trump is not subject to Section Three disqualification is of some merit, who insist disqualification come from Congress. Broad agreement exists that Trump must be removed from American constitutional politics, but no agreement existed on any means other than the electoral process, even as agreement existed that Trump has a reasonable probability of winning the election legally and an even greater probability, given intimidation of election officials and attacks on non-partisan electoral institutions, of winning the election illegally.

The result is a distinctive American variation of the problem of the commons. The traditional problem of the commons occurs when united action will benefit everyone, but each individual has an incentive to defect. We will all benefit if our cows graze on common land for one hour a day, which will not deplete the grass, lose out if everyone grazes for two hours, which will deplete the grass, but each of us has an incentive to cheat and have our cows graze for two hours while our neighbors' cows graze for only one hour. The American problem of the commons is that all will benefit if Trump is disqualified from running for office, but many people have an interest in someone else

taking responsibility for disqualification while others insist that only their way is proper for defeating Trump. The result is likely to be a Trump victory in November that no one desires because no agreement exists on the best means for preventing that outcome.

The good news is that other opportunities remain for preventing Trump's return to power. Trump is subject to four criminal prosecutions. Members of Congress are introducing legislation facilitating his disqualification. Former governor Nikki Haley is considering withholding her endorsement, a decision that could turn the 2024 national election in favor of President Biden. Other circumstances will arise for weakening Trump's hold on the American electorate.

The bad news is that the same or related excuses exist for not taking advantage of these opportunities. Presidential immunity from criminal prosecution is a complex constitutional issue that may require the deliberate speed for consideration that will enable Trump to order the prosecutions dropped after winning the national election. Individual members of Congress, while agreeing that some federal legislation implementing Section Three is necessary, may disagree on the best legislation. Haley may find her political prospects for the presidency in 2028 better served by fealty to Donald Trump than by sacrificing her career to preserve constitutional democracy in the United States.

The result of this American problem of the commons may well be the election of a President most citizens believe is a menace to constitutional democracy domestically, a champion of authoritarianism abroad, and a threat to humanity everywhere. Each of us will have one cause for solace as we watch constitutional collapse in the United States, Putin triumph in the East, and the disastrous carnage inflicted by global warming. This never would have happened, we will remind our neighbor, if everyone had agreed to our preferred means for stopping Trump.

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