Destroying Democracy to Save it? Court Advances Effort to Block GOP Candidates from Ballots

Description

 USA: Below is my column in the Hill on the recent decision of a federal judge

to allow a challenge to Rep. Marjorie Taylor Greene (R., Ga.) from appearing on the ballot as an insurrectionist. In my view, the underlying claim is meritless. The theory, supported by figures like Harvard Professor Lawrence Tribe, runs against the clear language and history of the Disqualification Clause of the 14th Amendment.

Here is the column:

As the country braces for the midterm elections, the left seems to be rallying behind three D's: Democracy, Disinformation and Disqualification. The latter effort just received a huge boost from a judge in Georgia who has allowed a challenge to knock Rep. Marjorie Taylor Greene (R-Ga.) off the ballot as an insurrectionist. Nothing says "democracy" like preventing others from voting.

Many of us have criticized Greene for her inflammatory rhetoric and her extreme views. No less dangerous, though, is the means being used by some of Greene's critics to get rid of her. It is all part of a new movement to defend democracy by denying it. To paraphrase the Vietnam strategy, democracy can only be saved by destroying it through the denial of speech or the right to vote.

Many Democratic politicians and pundits have long pushed for censorship as vital to freedom.However, if such freedom-is-tyranny claims seem Orwellian, they are nothing compared to the push to disqualify dozens of candidates from appearing on ballots.

Judge Amy Totenberg ruled that critics could potentially strip Greene from the ballot due to her public comments before and after the Jan. 6, 2021, riot in Congress. Totenberg ruled that Greene's critics could bring a challenge under the Constitution's 14th Amendment, known as the "Disqualification Clause." This is the same clause cited by some liberal members of Congress and legal experts as a way to bar dozens of Republicans, including former President Trump, from office for allegedly

ction against the United States or giving aid and comfort to its enemies.

This argument most recently was used against Rep. Madison Cawthorn (R-N.C.), who also has been opposed by House colleagues on both sides of the aisle. Cawthorn prevailed in a federal court, which dismissed that effort; an appeal of that ruling will be heard May 3 by the U.S. Court of Appeals for the 4th Circuit in Richmond, Va.

There are similar efforts to block members like Arizona GOP Reps. Paul Gosar and Andy Biggs from appearing on state ballots.

Totenberg gave a green light to these constitutional claims despite both the constitutional text and history showing that the claims are meritless.

Section 3 of the 14th Amendment was written after the 39th Congress convened in December 1865, following the end of the Civil War. At the time, many members were not pleased to see former Confederates like Alexander Stephens (D-Ga.), the Confederacy's vice president, appear in Congress to retake the very oath they previously violated by waging war against the country.

Whether Jan. 6 was a riot or an actual insurrection remains a matter of deep and largely partisan disagreement — but the disqualification clause was written in reference to a real Civil War in which more than 750,000 people died in combat. The Confederacy was a separate government with its own army, currency and foreign policy.

There is another problem: To the extent that a person can be disqualified under the 14th Amendment, it requires action from Congress, not a local board of election. Despite an otherwise long, careful opinion, Totenberg blithely set aside such details, including an 1869 decision by then-Chief Justice Salmon P. Chase. The case in question challenged the right of Hugh W. Sheffey to hold a Virginia state court office, given his support for the Confederacy. Chase ruled that Section 3 did not disqualify

Sheffey because “legislation by Congress is necessary to give effect to” Section 3 of the 14th Amendment, and disqualification from office “can only be provided for by Congress.”

Congress later passed the Amnesty Act of 1872, which overrode the Disqualification Clause except for “Senators and Representatives of the thirty-sixth and thirty-seventh Congresses.”

The Supreme Court has repeatedly ruled that states cannot impose their own qualifications for Congress because it would “erode the structure envisioned by the Framers.” Under such an approach, partisan state election boards could simply conclude that a member is an insurrectionist and prevent voters from being able to make such choices for themselves.

Totenberg simply insists that barring an insurrectionist is the same as barring someone from running for president who is not a natural-born citizen or who does not meet the age requirement for Congress. However, age and citizenship are easily ascertainable qualifications stated in the Constitution for all candidates. There is no additional finding or action required for such disqualifications. Totenberg is suggesting that a local board declaring a representative to be an insurrectionist is the same as confirming the age or place of birth of a candidate.

As with the calls to censor disinformation, the growing calls for disqualification represent a serious threat to our democracy. Countries like Iran routinely strike candidates from ballots due to their underlying views or perceived disloyalty. Just as free speech allows good ideas to counteract bad ideas, free elections allow good candidates to prevail over bad candidates. The problem is that you have to be willing to live with the judgment of your fellow citizens rather than control what they read or who they may vote for.

In fairness to the court, Totenberg complained that “the parties devoted little time and few pages to the complicated questions inspired by this novel situation.” As such, she did not feel comfortable in granting an injunction for Greene. However, that expression of reluctance at the end of the opinion belies the sweeping language used to get there.

With the other pending cases, this issue may now be headed for a Supreme Court showdown. In the meantime, the Democrats will likely see in November whether the “three D’s” resonate as well with voters as they did with this judge.

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