North Carolina Board Asserts Right to Disqualify Madison Cawthorn as an “Insurrectionist”

USA: The North Carolina elections board declared this week that it has the power to bar Rep. Madison Cawthorn (R-N.C.) from running for office due to his actions related to the Jan. 6, 2021, Capitol riot. It insists that it can enforce Section 3 of the Fourteenth Amendment and declared that he is an insurrectionist. It is a position that, in my view, is wholly outside of the language and intent of this provision. Cawthorn is right to challenge any such action as unconstitutional.

In a filing to dismiss a lawsuit by Cawthorn, the board wrote

> “The State does not judge the qualifications of the elected members of the U.S. House of Representative. It polices candidate qualifications prior to the elections. In doing so, as indicated above, States have long enforced age and residency requirements, without question and with very few if any legal challenges. The State has the same authority to police which candidates should or should not be disqualified per Section 3 of the Fourteenth

Amendment."

The asserted authority would invite partisan and abusive practices by such boards. It is also wrong on the purpose of this constitutional provision. Moreover, there is a vast difference between enforcing an objective standard on the age of a candidate and enforcing the subjective standard whether that candidate's views make him an "insurrectionist."

As I have previously written, (here and here and here), Democrats are playing a dangerous game with the long-dormant provision in Section 3 of the 14th Amendment — the "disqualification clause." The provision was written after the 39th Congress convened in December 1865 and many members

Stephens, the Confederate vice president, waiting to take a seat with rate senators and military officers.

Ironically, it was Justice Edwin Reade of the North Carolina Supreme Court who later explained, "[t]he idea [was] that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again." So, members drafted a provision that declared that "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 mantra that this was an insurrection does not meet the standard. The Constitution fortunately demands more than proof by repetition. In this case, it requires an actual rebellion. The clause Democrats are citing was created in reference to a real Civil War in which over 750,000 people died in combat. The confederacy formed a government, an army, a currency, and carried out diplomatic missions.

While Senate Minority Leader Mitch McConnell this week called it an "insurrection," there are ample legal reasons to reject that characterization in court. (I agree with McConnell in his other comments criticizing the sanctions against Republicans supporting the House committee investigating Jan. 6th).

Jan. 6 was a national tragedy. I publicly condemned President Trump's speech that day while it was being given — and I denounced the riot as a "constitutional desecration." However, it has not been treated legally as an insurrection. Those charged for their role in the attack that day are largely facing trespass and other less serious charges — rather than insurrection or sedition. That's because this was a riot that was allowed to get out of control by grossly negligent preparations by Capitol Police and congressional officials. While the FBI launched a massive national investigation, it did not find evidence of a conspiracy for an insurrection. Only a handful were charged with seditious conspiracy, a broadly defined offense.

I still believe that Jan. 6 was a protest that became a riot. That is not meant to diminish the legitimate outrage over the day. It was reprehensible — but only a "rebellion" in the most rhetorical sense. More importantly, even if you adopt a dangerously broad definition of "insurrection" or "rebellion," members of Congress who supported challenging the electoral votes (as Democrats have done in prior years) were exercising constitutionally protected speech.

Before the riot, Cawthorn declared "The Democrats, with all the fraud they have done in this election, the Republicans hiding and not fighting, they are trying to silence your voice," he said. "Make no mistake about it, they do not want you to be heard." While he later voted against certifying President Biden's victory, he also later signed a letter congratulating Biden on the win.

That does not make Cawthorn an insurrectionist and this Board is not tasked with enforcing the 14th Amendment's disqualification clause. The board's position is itself a threat to democracy and free speech. It is only the latest first anti-democratic measure being used in the name of democracy.

The board interpretation would allow partisan members to toss opponents from ballots to prevent voters from making their own decisions. That is something that has been a practice in countries like Iran, not the United States. Hopefully, a court will make fast work of any such effort in this case. If Democrats believe Cawthorn to be an insurrectionist, they are free to use that label in the campaign. However, the voters, not board members, should be the final arbiters of such questions in a democratic system.

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