Legal Sidebar

The Insurrection Bar to Holding Office: Appeals Court Issues Decision on Section 3 of the Fourteenth Amendment

June 1, 2022

On May 24, 2022, the U.S. Court of Appeals for the Fourth Circuit issued a decision in *Cawthorn v. Amalfi*, a case involving Section 3 of the Fourteenth Amendment (Section 3). That constitutional provision bars certain people who have "engaged in insurrection or rebellion against" the United States from holding specified state and federal government offices. The specific question in the case was whether a Reconstruction-era statute granting amnesty to former Confederates barred application of Section 3 to persons who engage in any future rebellion or insurrection. The Fourth Circuit held that the 1872 statute did not have that effect and instead lifted the constitutional disqualification only for acts that had already occurred. The decision is relevant to Congress, both because Section 3 has been invoked against several legislators who allegedly participated in or supported the January 6, 2021, unrest at the Capitol and because the case raises broader constitutional considerations about what role state officials, federal courts, and Congress can play in determining the eligibility of congressional candidates.

Section 3 and the 1872 Amnesty Act

Section 3 of the Fourteenth Amendment provides, in its entirety:

> 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. But Congress may by a vote of two-thirds of each House, remove such disability.

Ratified after the Civil War, Section 3 was intended to bar individuals who had held government office before the war and then sided with the Confederacy from holding certain state or federal offices. Section 3 was occasionally invoked against former Confederates during the Reconstruction Era, but the provision also sparked opposition. Some viewed it as overly harsh or ineffective; others objected to the practical

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burden it placed on Congress to consider removing the office-holding bar on an individual basis. In 1872, Congress enacted a statute known as the 1872 Amnesty Act, which provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein)*, That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

The 1872 Amnesty Act granted broad amnesty to many people who would otherwise be barred from office under Section 3, but it did not apply to certain groups whose participation in the Confederacy was deemed particularly culpable. Congress later enacted additional legislation granting amnesty to some of the excluded officials.

January 6 Unrest and District Court Proceedings

On January 6, 2021, a crowd gathered on the U.S. Capitol grounds, breached police barriers, entered and occupied portions of the Capitol building, and clashed with law enforcement. The incident resulted in at least five deaths, dozens of injuries, and damage to federal property. Members of Congress and the Vice President, who were counting electoral votes for the 2020 presidential election, were forced to evacuate in response to the unrest.

In January 2022, a group of North Carolina voters living in the electoral district represented by Representative Madison Cawthorn filed a challenge with the North Carolina board of elections alleging that "Representative Cawthorn encouraged the violent mob that disrupted the peaceful transition of power by invading the United States Capitol on January 6, 2021, and that encouragement constituted 'insurrection' and disqualifies Representative Cawthorn for further service in Congress." In response, Representative Cawthorn sued the election board members in federal court. He argued that the pending proceeding before the board must be enjoined because it (1) infringed his First Amendment right to run for office; (2) violated his constitutional right to due process; (3) interfered with Congress's power under Article I, Section 5, of the Constitution to judge the qualifications of its Members; and (4) violated the 1872 Amnesty Act.

In March 2022, the district court ruled in favor of Representative Cawthorn, holding that the 1872 Amnesty Act lifted the ban on holding government office for Members of Congress who committed both past and future acts of rebellion or insurrection and thus barred the challenge to his candidacy. The court relied in part on broad language in the Act providing that, subject to certain inapplicable exceptions, "*all political disabilities imposed* by [Section 3] are hereby removed *from all persons whomsoever*" to conclude that, in passing the Act, "Congress removed the disability stated in Section 3 for all members of Congress." The court summarized the import of the Act as Congress having "decided by statute, with two-thirds of both houses concurring, to reserve to Congress the right to decide whether one of its members has engaged in insurrection." Based on its statutory interpretation, the district court enjoined proceedings before the board of elections. The court declined to reach the remaining constitutional questions.

Although the state election board members actively litigated the case in district court, they declined to appeal the decision. As a result, a group of voters sought leave to intervene to pursue an appeal. (Most of the voters who sought to intervene were not in the group of voters who originally challenged Representative Cawthorn's eligibility for office, because the North Carolina Supreme Court ordered the use of different electoral maps while the litigation was pending. However, at least one voter was a member of both groups.) The district court denied leave to intervene. The voters appealed to the Fourth

Circuit, challenging both the denial of intervention and the district court's holding on the merits that the 1872 Amnesty Act applied to Representative Cawthorn.

The Fourth Circuit's Decision in *Cawthorn v. Amalfi*

On May 24, 2022, a three-judge panel of the Fourth Circuit reversed the district court, holding that the voters should have been allowed to intervene and that the 1872 Amnesty Act did not apply to Representative Cawthorn. The majority opinion, authored by Judge Heytens and joined by Judge Wynn, held that the 1872 Amnesty Act applied only to acts of rebellion or insurrection that occurred before the statute's enactment. In reaching that conclusion, the majority relied primarily on the text of the statute, particularly the fact that the statute referred to "'political disabilities *imposed*' in the past tense rather than new disabilities that might arise in the future." The majority found additional support for this reading in the Act's "history and context," including an enacting Congress that was "laser-focused on the then-pressing problems posed by the hordes of former Confederates seeking forgiveness." Finally, the majority held, reading the 1872 Amnesty Act to apply prospectively "would raise potentially difficult questions about the outer limits of Congress's power under Section 3 of the Fourteenth Amendment," because the text of Section 3 suggests that Congress may "remove" the office-holding ban only with respect to past offenses. The majority concluded by stating that it "express[ed] no opinion about whether Representative Cawthorn in fact engaged in 'insurrection or rebellion' or is otherwise qualified to serve in Congress." The court also did not decide the various constitutional questions presented.

The third member of the Fourth Circuit panel, Judge Richardson, concurred in the majority's judgment but applied different reasoning. Judge Richardson would have held that the district court should not have interpreted the 1872 Amnesty Act at all, because doing so usurped the authority of Congress to determine the qualifications of its Members. Article I, Section 5, clause 1, of the Constitution provides that the House "shall be the Judge of the Elections, Returns and Qualifications of its own Members," and the Supreme Court has held that the House "is the sole judge" of such qualifications. Judge Richardson argued that the insurrection bar contained in Section 3 of the Fourteenth Amendment is one such qualification and that "the district court's opinion interpreting the meaning of the 1872 Amnesty Act as applied to Representative Cawthorn was necessarily a judging of his qualifications." Because he concluded that such a determination fell within the exclusive authority of the House of Representatives, Judge Richardson would have held that the district court had no jurisdiction to consider Representative Cawthorn's claim under the 1872 Amnesty Act. While Judge Richardson focused on the authority of the *courts* and noted that the issue of the *state's* authority to regulate elections "is not before this court yet," he also stated that "any attempt to regulate candidates or ballot access for federal office is an implicit attempt to regulate the qualifications of members of Congress, which is not allowed."

Judge Wynn joined the majority opinion and also wrote separately to respond to Judge Richardson's concurrence. In particular, Judge Wynn objected to Judge Richardson's statement that "only Congress—not the states, and not the courts—may judge the qualifications of members or would-be members." Reading Judge Richardson as suggesting "that every State in the Union is completely powerless to regulate candidates or ballot access," Judge Wynn countered that no court has ever held "that Article I, Section 5 prevents States from enacting eminently reasonable measures to prevent twelve-year-olds or noncitizens, for example, from running for congressional office." Judge Wynn distinguished *candidates* for Congress from *elected Members* and contended that, notwithstanding Congress's authority to judge the qualifications of its Members, "States have typically enjoyed broad powers to regulate candidates pursuant to the Elections Clause." He further stated, "it stands to reason that as a matter of common sense, and as a matter of comity, our Constitution permits States to have a say in regulating the candidates who seek to represent their interests and the interests of their citizens."

Considerations for Congress

The Fourth Circuit's majority opinion in *Cawthorn v. Amalfi* focused on the relatively narrow statutory question of whether the 1872 Amnesty Act removed the Section 3 barrier to holding office for future acts of rebellion or insurrection. It did not address constitutional questions, including Representative Cawthorn's First Amendment and due process claims, or his assertion that proceedings based on Section 3 before the state board of elections usurp Congress's power under Article I, Section 5. It is possible the district court could address those claims on remand. However, shortly before the Fourth Circuit issued its decision in this case, Representative Cawthorn lost his bid for re-election. Soon after the Fourth Circuit's opinion was published, Representative Cawthorn's attorney expressed surprise that the court issued a decision because he believed "[t]he case is moot." The Fourth Circuit left the question of mootness to the district court.

Voters have recently sought to invoke Section 3 to disqualify several other elected officials from holding office based on alleged participation in the January 6, 2021, Capitol unrest. On May 9, 2022, the Arizona Supreme Court rejected a challenge to the eligibility of one Arizona state representative and two U.S. Representatives. The court noted possible constitutional issues, including that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce" Section 3 and that "Article 1, Section 5 of the United States Constitution . . . appears to vest Congress with exclusive authority to determine whether to enforce [Section 3] against its prospective members." However, the court ultimately based its holding on Arizona state law, holding that the challengers had not used the proper proceeding to bring their Section 3 challenge. On May 6, 2022, the Georgia secretary of state rejected a Section 3 challenge to the candidacy of Representative Marjorie Taylor Greene, adopting an administrative law judge's finding that the challengers failed to establish that the Congresswoman engaged in insurrection or rebellion against the United States. The challengers have stated that they will appeal the decision. In a related court case, a federal district court denied Representative Greene's request to enjoin the Georgia administrative proceedings.

As discussed in two previous Legal Sidebars, at the time of the Capitol unrest, Section 3 had not been invoked in more than a century, and there was limited precedent interpreting the provision. The cases discussed above, as well as judicial decisions in any future Section 3 litigation, may provide new guidance on the scope and function of the provision.

Congress may also play a role in implementing Section 3 through impeachment, censure or removal of Members, or legislation. For instance, the January 2021 article of impeachment against President Donald Trump charged the President with incitement of insurrection in violation of Section 3, alleging that he "incit[ed] violence against the Government of the United States" in connection with the January 6 Capitol unrest. Some Members of the 117th Congress have also introduced resolutions that would censure a Member for "inciting . . . acts of insurrection" or remove the Member based on alleged violations of Section 3 related to the January 6 events. Congress has previously invoked Section 3 to refuse to seat Members, most recently in 1920.

Section 5 of the Fourteenth Amendment provides that "Congress shall have the power to enforce" the Fourteenth Amendment "by appropriate legislation." Congress previously enacted legislation to enforce Section 3 in the Reconstruction-era Enforcement Act of 1870, which authorized U.S. attorneys to seek a court order removing a disqualified officeholder but excluded from its scope Members of Congress and state legislators. A current (but seldom used) criminal statute, 18 U.S.C. § 2383, allows for disqualification from "holding any office under the United States" of any person who "incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States." While some of the language in that statute is similar to language in Section 3, Congress originally enacted the statue in 1862, six years before the Fourteenth Amendment was ratified.

A 2021 legislative proposal, H.R. 1405, would seek to implement Section 3 by "provid[ing] a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States." The proposal would authorize the U.S. Attorney General to bring a civil action for declaratory and injunctive relief, including removal from office, against specified government officeholders who have engaged in "insurrection or rebellion." Covered officeholders comprise a wide range of federal and state officials, including the President and Vice President, Members of Congress, federal judges, heads of executive agencies, and others.

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