

Disqualification of a Candidate for the Presidency, Part I: Section 3 of the Fourteenth Amendment as It Applies to the Presidency

December 28, 2023

Numerous [lawsuits](#) across the country have sought or are seeking to prevent former President Donald Trump from appearing on state ballots for the upcoming presidential elections. In particular, these suits, filed in both state and federal courts, are requesting that various secretaries of state exclude the former President from the states' ballots for the upcoming presidential primary and general elections. Plaintiffs allege that Trump sought to impede the congressional certification of the 2020 electoral college vote on January 6, 2021, by, among other things, urging his supporters to travel to Washington, D.C., to protest the count at the U.S. Capitol in furtherance of his alleged effort to persuade then-Vice President Mike Pence to reject electoral votes from swing states where Joe Biden had prevailed. These proponents argue that these efforts amount to “engag[ing] in insurrection” within the meaning of [Section 3 of the Fourteenth Amendment \(Section 3\)](#). Plaintiffs contend that the former President is therefore disqualified as a candidate for the presidency.

On December 19, 2023, the [Colorado Supreme Court](#) became the first court to hold that Trump is ineligible to appear on the ballot because he is constitutionally disqualified from holding the office of the President, and the court directed the Colorado secretary of state to exclude the former President's name from the state's 2024 presidential primary ballot. That decision has been stayed until January 4, potentially enabling Trump the opportunity to appeal the decision to the U.S. Supreme Court before it goes into effect. (As of the date of this Sidebar, the Colorado State Republican Party has [reportedly filed](#) a petition of certiorari with the U.S. Supreme Court challenging the state court ruling.)

This Sidebar also discusses the recent case disqualifying Trump from the ballot in Colorado, *Anderson v. Griswold*. For further background on Section 3, see [this Legal Sidebar](#) and [this Legal Sidebar](#). Part 2 discusses eligibility requirements for a candidate to be placed on the ballot for the presidency and procedures for challenges based on the application of Section 3 to the 2024 presidential elections, including select judicial decisions on the matter.

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The Disqualification Clause

Section 3 of the Fourteenth Amendment provides:

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.

Section 3 disqualification appears to apply to any covered person who has taken an oath to support the Constitution of the United States and thereafter either (1) engages in insurrection or rebellion against the Constitution of the United States or (2) gives aid or comfort to the enemies of the Constitution of the United States, unless a supermajority of Congress “removes such disability.” The disability to hold office appears to disqualify offenders from Congress as well as from other federal or state governmental offices.

Concerning former President Trump’s eligibility to be President again, questions arise as to, first, whether he is a covered person—that is, one who took an oath to support the Constitution as an “officer of the United States”—and second, whether the presidency is an “office, civil or military, under the United States.” Scholars have weighed in on both issues, with some arguing that these terms are [legal terms of art](#) that [likely exclude](#) the office of the President and others arguing that the [plain text](#), read in the [context](#) of the [time](#), includes the office of the President.

The Presidency as an “Office Under the United States”

Those who argue that the presidency is a civil office under the United States within the meaning of the Disqualification Clause [view](#) it as a matter of the plain text of the Constitution bolstered by contemporaneous [opinions](#) of the Attorney General. Proponents of this view [argue](#):

The Constitution refers to the President holding an “Office” 25 times, including in the Oath of Office Clause. See U.S. Const. art. I, § 3, art. II, §§ 1, 4, amends. XII, XXII, XV. Because that “Office” is within the federal executive branch, it is necessarily an office “of the United States.” And one who holds an “office” is an “officer.”

Those opposed [argue](#) that the presidency is not a civil office under the United States because the drafters did not expressly include the presidency in a list of “the positions insurrectionists are disqualified from holding in descending order from the highest positions they cover (senators and representatives) to the lowest (officers of the states).” They appear to reason that the presidency would have been at the top of the list rather than included as a civil office ranking less important apparently than even members of the Electoral College.

Those who view the President as being exempt from disqualification [argue](#) that the drafters of the Fourteenth Amendment would not have relegated the presidency to a catch-all phrase describing federal civil officers while specifically identifying the federal elected officials (Senators, Representatives, and Electoral College members). They [suggest](#) that this conclusion is bolstered by an [interpretive canon](#) that presumes that the expression of one thing in a list of like things implies the intentional exclusion of others. It is arguable that congressional seats and [Electoral College](#) slots might not have been considered civil or military offices and that, in any event, Senators at the time (and some electors) were [chosen by state legislatures](#) rather than elected by popular vote, which seems to cut against the assumption that the drafters categorized as “like things” elected offices as a separate group from civil and military offices at the federal (but not state) level.

One scholar argues that [legislative history](#) buttresses the conclusion that the President was omitted purposefully. An earlier proposed amendment mentioned the President and Vice President, arguably suggesting that the omission of the language in the final amendment could be read to indicate that the drafters intended to omit the office of the Presidency from the offices subject to disqualification.

The reference to the earlier draft appears to be a separate proposal introduced by Representative Samuel McKee in February 1866, which was referred to the House Judiciary Committee but apparently not voted on in Congress or taken up by the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment. The McKee [proposal](#) stated:

No person shall be qualified or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate, who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the government of the United States, or has held or shall hereafter hold any office, either civil or military, under any pretended government or conspiracy set up within the same, or who has voluntarily aided, or who shall hereafter voluntarily aid, abet or encourage any conspiracy or rebellion against the Government of the United States.

The text of the proposal does not appear in the [Journal of the Joint Committee on Reconstruction](#). The first provision regarding disqualification that the Joint Committee appears to have considered was a proviso to a proposed constitutional [amendment](#) submitted by Representative Thaddeus Stevens on April 21, 1866, which stated:

That no person who, having been officer in the Army or Navy of the United States, or having been a member of the Thirty-sixth Congress, or of the Cabinet, in the year one thousand eight hundred and sixty, took part in the late insurrection, shall be eligible to either branch of the national Legislature until after the fourth day of July, thousand eight hundred and seventy-six.

This proposed amendment was [withdrawn](#) on April 23, 1866, and replaced with another, which contained the [following proposal](#):

Provided, until after the 4th day July, 1876, no person shall be eligible to either branch of the national legislature included any the classes, namely:

First: Persons who, having been officers of the Army or Navy of the United States, or having been members of the Thirty-sixth Congress, or having held, in the year 1860, seats in the cabinet, or judicial officers under the United States, did afterward take part in the late insurrection.

Second. Persons who have been civil or diplomatic officers of the so-called Confederate Government, or officers of the army or navy of said government above the rank of colonel in the army and of lieutenant in the navy.

Third. Persons in regard to whom it shall appear that they have treated officers or soldiers or sailors of the United States, whatever race or color, captured during the late civil war, otherwise than lawfully as prisoners of war.

Fourth. Persons with regard to whom it shall appear that they are disloyal.

The Joint Committee [approved](#) the amendment with the proviso after some revision concerning those to be held ineligible but then [voted](#) to reconsider. On April 28, 1866, Representative George Boutwell [moved](#) to add the essence of the proviso on ineligibility as a section of the constitutional amendment itself, but this effort was rejected. At that point, the text of what became [Section 3 of the Joint Committee's resolution](#) was [adopted](#). The proviso on ineligibility was then further amended with respect to the classes of persons to be excluded. The reference to offices those classes of persons were ineligible to hold was [amended](#) to remove the sunset and to replace "either branch of the national legislature" with "any office under the Government of the United States." The proviso was submitted to Congress as a bill rather than a constitutional amendment ([H.R. 544](#) and [S. 293](#)) but did not receive a vote.

Section 3 of the Fourteenth Amendment as [reported](#) by the Joint Committee was also an effort to prevent former Confederates from attaining excessive influence in government, but it took a different approach. As reported, it stated:

Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.

There was much opposition to the proposed Section 3, which some lawmakers thought too [harsh](#) and others too [lenient](#). The disqualification provision narrowly survived a [motion to strike](#) in the House. When the Fourteenth Amendment was [taken up](#), it became apparent that many Senators opposed it for various reasons, including [opposition to Section 3](#). Senate Republicans sought to postpone further consideration and [met in caucus](#) to resolve differences. They appointed a committee of their caucus members who had served on the Joint Committee to redraft the amendment. One of the caucus members, Senator Jacob Howard, had expressed approval for a substitute Section 3 [proposed](#) by Senator Daniel Clark:

No person shall be a Senator or Representative in Congress, or be permitted to hold any office under the Government of the United States, who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto.

When the Senate returned to the constitutional amendment, Senator Reverdy Johnson successfully [moved](#) to strike Section 3 from the proposed amendment as reported, after which Senator Howard introduced the [language](#) that had been worked out in the caucus committee, reflecting Section 3 as finally adopted.

During Senate debate on the final version of the amendment, Senator Johnson [commented](#) that Section 3 “did not go far enough” insofar as it permitted rebels to serve in the highest offices of the land:

I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them?

Senator Lot Morrill, a Republican Senator who had not served on the Joint Committee and who was therefore not directly involved in the drafting, [interjected](#):

Let me call the Senator’s attention to the words “or hold any office, civil or military, under the United States.”

Senator Johnson [responded](#), “Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives.” Senator Johnson had participated on the Joint Committee but as a Democrat and did not participate in the drafting of the final version of Section 3. Members of the drafting caucus who were present did not intervene to explain whether the presidency was a covered position or not.

After the Senate approved the proposed Fourteenth Amendment, the House [adopted](#) it on June 13, 1866.

This drafting history may undercut the inference that Congress deliberately deleted mention of the presidency from an earlier draft and therefore consciously intended to exclude the presidency from the disqualification. Although it is possible that the Senate Republican caucus committee considered Representative McKee’s separate proposal when drafting the final version of Section 3, there appears to be no direct evidence to support that assumption. Rather, it seems that the final version of Section 3 emerged as an edited version of Senator Clark’s proposal described above. There do not appear to be any records of the caucus deliberations.

The President as an “Officer of the United States”

Whether Trump is subject to disqualification under Section 3 [depends](#) on whether the President is an “officer of the United States” and whether he took an “oath to support the Constitution.”

Officer of the United States

Some [argue](#) that the President is an “officer of the United States” under the plain meaning of the phrase at the [time](#) of enactment and [point to](#) the numerous references in the Constitution to the presidency as an “office” to support this conclusion. Opponents [counter](#) that the phrase is a term of art and must be understood in light of the text of the Constitution, which they [assert](#) points to an understanding that officers of the United States are officials appointed pursuant to the [Appointments Clause](#), arguably excluding the President, who is elected and does not appoint himself. Those who believe the President is not an “officer of the United States” also emphasize the [Commissions Clause](#), which provides that the President “shall Commission all the Officers of the United States.” They find further support in the [Impeachment Clause](#), which explicitly applies to the “President, Vice President and all civil Officers of the United States,” possibly suggesting that the President is not included as a “civil Officer of the United States” whose oath of office would subject him to possible disqualification.

. . . Who Swore an Oath to Support the Constitution

[Article VI](#) requires that all legislative, judicial, and executive officers—both federal and state—take an oath swearing or affirming to support the Constitution. If the reference in Section 3 to taking an oath to support the Constitution of the United States is interpreted to cover the class of persons required to take the oath under Article VI, the President of the United States could be exempted. The presidential oath prescribed verbatim in [Article II](#) is different from the oath required in less specific terms for all other governmental offices, federal and state. The presidential oath does not include the word *support*, and it is [suggested](#) that taking it might not bring a President within the ambit of Section 3. On the other hand, the fact that the presidential oath is spelled out in Article II does not necessarily mean that it is not also an oath within the meaning of Article VI or Section 3. It may seem anomalous to conclude that the presidential oath excludes the President from the ambit of Article VI’s prohibition on [religious tests](#) as well as disqualification under Section 3 of the Fourteenth Amendment but that the Vice President would remain subject to both provisions.

Colorado: *Anderson v. Griswold*

Anderson v. Griswold is, to date, the only case to address the merits of the disqualification claim as to the former President. Six Colorado voters [petitioned](#) the court to [direct](#) the Colorado secretary of state to prevent Trump from appearing on the primary or any subsequent ballot as a candidate for President in 2024. The former President moved to dismiss the case on a number of grounds, including [freedom of speech](#), [non-justiciability](#), the [non-self-executing nature](#) of Section 3, [preemption](#) of the field by Congress, and [inapplicability](#) of Section 3 to the office of the President and with respect to the [violence at the Capitol](#) on January 6, 2021. The Colorado Republican State Central Committee [intervened](#) on behalf of the former President, who also moved to [intervene](#) after he was dropped as respondent. On November 17, 2023, following a five-day trial hearing evidence, a state district court [held](#) that then-President Trump engaged in insurrection as defined under Section 3 but that Section 3 does not apply to Trump or the office of President and does not disqualify his name from appearing on the ballot. Both sides appealed to the Colorado Supreme Court.

On December 19, 2023, by a 4-3 vote, the Colorado Supreme Court partially affirmed and partially reversed the district court. The court decided that Section 3 is [judicially enforceable](#) even without implementing legislation from Congress and that judicial review of Trump's eligibility for office was not precluded by the political question doctrine. The court [held](#) that Trump is disqualified under Section 3 from holding the office of President and that the Colorado secretary of state could not include his name on the 2024 presidential primary ballot. However, the court [stayed](#) its decision until January 4, 2024, in time for the Colorado secretary of state to finalize the ballot on January 5. (Trump has [said](#) he plans to appeal to the U.S. Supreme Court, and the Colorado Republican State Central Committee has [reportedly filed](#) a petition of certiorari to challenge the ruling.)

The court [found](#) that the district court did not err in determining that the 2021 siege of the Capitol constituted an insurrection, concluding:

In short, the record amply established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. Under any viable definition, this constituted an insurrection.

The court then examined whether the evidence supported the contention that Trump had “engaged” in the insurrection. Based on contemporaneous [dictionary definitions](#), the [1867 Attorney General opinions](#) on the Reconstruction Acts (which had [incorporated](#) Section 3 even prior to the ratification of the Fourteenth Amendment), relevant [case law](#), and evidence of [actions](#) Trump took to “lay[] the groundwork for a claim that the election was rigged” and then “[urging](#) his supporters to travel to Washington, D.C. on January 6” as part of a [plan](#) to have Congress “certify a slate of fake electors supporting President Trump or he could return the slates to the states for further proceedings,” the court [concluded](#), after reiterating the largely undisputed evidence before it of the events that ensued, that

President Trump’s direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. Moreover, the evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of power.

The court reversed the lower court to find that Section 3 applies to the former President this case because, based on a textual analysis of Section 3, the President is an [officer of the United States](#) and the presidency [constitutes an office](#) under the United States. The court [expressed](#) a preference for “a phrase’s normal and ordinary usage over ‘secret or technical meanings that would not have been known to ordinary citizens in the founding generation.’” The court did not accept the implication the lower [court relied on](#) to conclude that the inclusion of the President in constitutional provisions that also mention “officers of the United States” means its omission is always a deliberate exclusion, [observing](#) that the Constitution refers to the “office of the President” twenty-five times. The court concluded that the [ordinary usage](#), [contemporary meaning at the time of the constitutional amendment’s drafting and ratification](#), and the [structure and purpose](#) of Section 3 supported the inclusion of the President among officers of the United States. The court also [viewed](#) the President as an “executive ... Officer[]” of the United States under Article VI, albeit one for whom a more specific oath is prescribed,” rejecting the contention that the presidential oath precludes disqualification of one who took it and no other Article VI oath.

Rather than viewing the presidency as intentionally omitted from a list of federal elected offices, as the [lower court had](#), the Colorado Supreme Court interpreted Section 3 as listing [no specific offices](#) at all, inasmuch as, in its view, the positions of Senator, Representative, and presidential elector are not considered “offices” in the Constitution. The court [mentioned](#) that the Impeachment Clause permits the Senate to disqualify convicted officials “to hold and enjoy any Office of honor, Trust or Profit under the United States.” The court [commented](#) that “if the Presidency is not an ‘office ... under the United States,’

then anyone impeached—including a President—could nonetheless go on to serve as President. This reading is nonsensical.” The court also [observed](#) that an understanding that the presidency is not an office under the United States would permit the President to serve simultaneously in Congress despite the [Incompatibility Clause](#) and that the [Emoluments Clause](#) would “exempt the nation’s chief diplomat from these protections against foreign influence,” which would be at odds with [historical practice](#).

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