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Legal Sidebar

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

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On March 4, 2024, the Supreme Court in *Trump v. Anderson* reversed the Colorado Supreme Court's decision in *Anderson v. Griswold* that former President Trump was ineligible to appear on the state's primary ballot due to his disqualification from holding future office under Section 3 of the Fourteenth Amendment (Section 3). In a per curiam decision, all nine Justices agreed that "responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States." Justice Amy Coney Barrett wrote a separate concurrence explaining her view that the Court should have gone no further than holding that states lack power to enforce Section 3 against presidential candidates. Justices Sotomayor, Kagan, and Jackson concurred in the judgment but disagreed with the Court's suggestion that Section 3 is enforceable with respect to federal offices only if Congress prescribes by law a method for determining who is disqualified.

On December 19, 2023, the Colorado Supreme Court became the first court to hold that former President 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. In a similar case, the secretary of state of Maine determined on December 28, 2023, that Mr. Trump is ineligible to appear on that state's ballot pursuant to Section 3 based on much of the same evidence reviewed in the Colorado case. After the Supreme Court's decision in *Anderson*, the Secretary withdrew the determination that the state could enforce Section 3 by keeping Mr. Trump's name off the ballot, but retained the determination that he had engaged in insurrection, a decision Mr. Trump is appealing on the basis of his view that she lacked jurisdiction to issue such a determination. Illinois determined in February 2024 that Mr. Trump was ineligible to appear on the presidential ballot, but the Court's ruling in *Trump v. Anderson* effectively invalidates that decision and effectively halts pending related litigation.

Challengers alleged that Mr. 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. In all

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cases that reached the merits, proponents argued successfully that these efforts amount to "engag[ing] in insurrection" within the meaning of Section 3. The Supreme Court did not address whether Mr. Trump's conduct constituted engaging in insurrection, but held that states have no authority to enforce Section 3 against him, unless Congress provides a means for them to do so.

This Sidebar provides background for Section 3 and discusses the Colorado case. Part 2 of this Sidebar series discusses eligibility requirements for a presidential candidate to be placed on the ballot, the Colorado Supreme Court's ruling in this case, including the procedural history, and a summary of other select state court decisions and administrative actions regarding ballot access. For further background on Section 3, see this Legal Sidebar and this Legal Sidebar.

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 Supreme Court in *Anderson* did not expressly resolve these issues, although the Court suggests that Congress has the authority under Section 5 of the Fourteenth Amendment to enact a means (subject to judicial review) to disqualify a former President from presidential ballots under Section 3. The Supreme Court, by not addressing these issues, leaves open the possibility that these issues could arise again and could become an issue for consideration in the event that Congress were to undertake legislation to enforce Section 3.

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, one 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 disenfranchisement provision narrowly survived a motion to strike in the House. When the Fourteenth Amendment was taken up in the Senate, 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 Mr. 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 could exclude the President from the ambit of Article VI's prohibition on religious tests (assuming the religious test applies only to those required to take the oath and the applicability of who is required to take such oath is not broadened by the inclusion of "public trust" along with "any office") as well as from the disqualification provisions 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 was the first 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 Mr. Trump from appearing on the primary or any subsequent ballot as a candidate for President in 2024. 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 Mr. 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 Mr. Trump's eligibility for office was not precluded by the political question doctrine. The court held that Mr. 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 pending Supreme Court review, and Mr. Trump's name appeared on the primary ballot.

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 President 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 President 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 in 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 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.

The Supreme Court's per curiam decision reversed the Colorado Supreme Court's decision and held that Section 3 does not empower states to determine the eligibility for federal office under the Fourteenth Amendment. The Court did not address whether the conduct at issue amounted to engaging in

insurrection. Rather, as explained more fully in Part 2 of this Legal Sidebar, the Court held that "States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency," at the same time suggesting that Congress does have that power under Section 5.

It is not clear if the Court's opinion *requires* implementing legislation for Congress to directly enforce Section 3 or whether, for example, Congress can enforce it by rejecting electoral votes under existing legislation. Congress in 1887 enacted the Electoral Count Act, which it most recently amended in the Electoral Count Reform and Presidential Transition Improvement Act of 2022. Under the Electoral Count Act, it might be possible for Congress to decide that certain electors are ineligible to cast votes in the Electoral College pursuant to Section 3's disqualification clause or that a presidential candidate is ineligible to hold office under the clause if either has engaged in insurrection. Section 15 of Title 3 of the *U.S. Code* establishes a procedure whereby Members of Congress in a joint session can object to "a certificate of ascertainment of appointment of electors" on the grounds that the electors were "not lawfully certified" or that the vote of one or more elector was not "regularly given." This statute potentially permits challenges to the lawfulness or regularity of slates of electoral votes based on electors' or candidates' constitutional eligibility under Section 3 if objections are raised on these specific factual grounds. Section 15 requires that the objection be made in writing and signed by at least one-fifth of the Senators and Representatives. In addition, Section 5 of Title 3 of the *U.S. Code* recognizes legal challenges on constitutional grounds (potentially including Section 3) in federal court with respect to the issuance of a certificate of ascertainment of appointment of electors. Section 5 permits an aggrieved candidate for President or Vice President to make legal challenges on constitutional grounds in federal court with respect to the issuance of a certificate of ascertainment of appointment of electors before a specially constituted three-judge panel, subject to expedited review by writ of certiorari before the Supreme Court in order to comport with the deadline for the meeting of electors. For more information on how electoral votes are counted, see *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress*.

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