No. 23-719

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

BRIEF FOR PROFESSORS ORVILLE VERNON BURTON, ALLAN J. LICHTMAN, NELL IRWIN PAINTER, JAMES M. MCPHERSON, MANISHA SINHA, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The Court granted certiorari (23-719) on the following question presented:

Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

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INTEREST OF AMICI CURIAE[1]

We are twenty-five professional Ph.D. historians with appointments as faculty at institutions of higher learning in the United States.[2] Most of us have many decades of experience as researchers and teachers and are current or emeritus faculty with endowed chairs and positions as distinguished professors, the highest academic ranking. Several of us have testified extensively in civil and voting rights litigation. Our more than one hundred books have won numerous national prizes. Among other positions, some of us have served as President of the American Historical Association, the Organization of American Historians, the Southern Historical Association, the Society for Historians of the Early American Republic, and the Alabama Historical Association.

Our expertise encompasses the Civil War and Reconstruction, the Southern "redemption," and American history more broadly, including politics, voting, and elections. We understand that assessing historical precedent is crucial for resolving whether 1) Section 3 of the 14th Amendment covers the president and 2) whether its implementation requires an additional act of Congress. We have professional interests in helping the Court reach its decision by appropriately analyzing probative historical evidence.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

2. A complete list of the *amici* is set forth in the Appendix to this Brief.

SUMMARY OF ARGUMENT

For historians, contemporary evidence from the decision-makers who sponsored, backed, and voted for the 14th Amendment is most probative. Analysis of this evidence demonstrates that decision-makers crafted Section 3 to cover the President and to create an enduring check on insurrection, requiring no additional action from Congress.

During the congressional debates, Senator Reverdy Johnson of Maryland, a Democratic opponent of the 14th Amendment, challenged sponsors as to why Section 3 omitted the President. Republican Senator Lot Morrill of Maine, an influential backer of congressional Reconstruction and the 14th Amendment, corrected the Senator. Morrill replied, "Let me call the Senator's attention to the words 'or hold any office civil or military under the United States.'" Senator Johnson admitted his error; no other Senator questioned whether Section 3 covered the President.

Similarly, debates over the Amnesty Act of 1872 demonstrate that decision-makers understood that Section 3 barred former Confederate President Jefferson Davis from running for President of the United States, a disqualification that amnesty would remove. Republican Senator James Flanagan of Texas warned that "Jefferson Davis is living," and if "the disabilities of Jefferson Davis were removed," the Democrats in finding "candidates for the Presidency and Vice Presidency … would go no further than Jefferson Davis."

During the Andrew Johnson impeachment and trial, decision-makers who backed Section 3, explicitly recognized the President as a civil or constitutional officer of the U.S. In presidential proclamations, Andrew Johnson routinely identified himself as the "chief executive officer of the United States." In many instances, the framers of the original U.S. Constitution did not limit the designation of officers to appointed officials, but recognized the President as a national officer.

Contemporary information provides direct evidence of the enduring reach of the 14th Amendment. Congress had previously enacted disqualifying statutes but now chose to make disqualification permanent through a constitutional amendment. Republican Senator Peter Van Winkle of West Virginia said, "This is to go into our Constitution and to stand to govern future insurrection as well as the present…" To this end, the Amnesty Acts of 1872 and 1898 did not pardon future insurrectionists.

Other evidence demonstrates that implementation of Section 3 did not require additional acts of Congress. No former Confederate instantly disqualified from holding office under Section 3 was disqualified by an act of Congress. In seeking to quash his indictment for treason, Jefferson Davis argued that he was already punished through his automatic disqualification to hold public office under Section 3, which "executes itself … It needs no legislation on the part of Congress to give it effect." The government agreed but opposed quashing his indictment. Supreme Court Chief Justice Salmon Chase, serving as a Circuit Court judge, also agreed. Later, in *Griffin's Case*, Chase seemed to take a different position. However, his ruling that Section 3 disqualification required

congressional action applied only to officials lawfully in office before the states ratified the 14th Amendment.

ARGUMENT

I. The Disqualification Clause of Section 3 of the 14th Amendment Covers the President of the United States.

A. Contemporary Evidence From Congressional Debates Over Section 3 and Later Amnesty Demonstrates That the Section Covers the President.

For historians, contemporary evidence from decision-makers is most probative of the intent of a constitutional provision. The following colloquy between Senators during congressional debates demonstrates directly that backers of the 14th Amendment included the Presidency under the rubric of an "officer under the United States." In the May 30, 1866, Senate session, Democratic Senator Reverdy Johnson of Maryland, an opponent of the 14th Amendment who would vote against it, challenged backers as to why Section 3 excluded the President. He said, "I do not see that but any one of these [disqualified] gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them?" Republican Senator Lot Morrill of Maine, an influential backer of congressional Reconstruction and the 14th Amendment, corrected Johnson by noting that the language of Section 3 incorporated the President. Morrill replied, "Let me call the Senator's attention to the words "or hold any office civil or military under the United States." Senator Johnson then admitted his error, saying, "Perhaps I am wrong as

to the exclusion of the presidency, no doubt I am, but I was misled by noticing the specific exclusion in the case of Senators and Representatives."[3]

No other Senator challenged Morrill's construction of Section 3. Senator Morill used the phrase "under the United States" when explaining that Section 3 covered the President, although the actual wording was "of the United States." His unchallenged statement shows that decision-makers in Congress regarded the two phrases as interchangeable.

The congressional debates over amnesty demonstrate that decision-makers in Congress regarded Section 3 as disqualifying insurrectionists like Jefferson Davis, who had previously sworn to support the U.S. Constitution, from running for President, among other federal offices. The fervently partisan, anti-Confederate Republicans who crafted, backed, and voted for Section 3 worried that if the Amnesty Act of 1872 included Jefferson Davis, the lifting of his Section 3 disqualification would enable him to run for President on the Democratic ticket. During debates over the Act, Republican Senator James Flanagan of Texas advocated for excluding Davis from amnesty on this ground. He said:

"Now, sir, be it remembered that Jefferson Davis is living. He is not numbered with the dead. I think I understand the spirit of the South. I think I comprehend to some extent (for the man does not live who does comprehend to the whole extent) the intention of the

3. Congressional Globe, 39th Congress, First Session, 30 May 1866, p. 2898-2899.

Democrats of the country. If the disabilities of Jefferson Davis were removed, the Democrats would not find it necessary to ask the Congress of the United States to incorporate an additional amendment in the fundamental law to enable them to go broadcast throughout the civilized world to find candidates for the Presidency and Vice Presidency. No, sir; they would go no further than Jefferson Davis."[4]

John Bingham noted in a speech in July 1872 that because of the 14th amendment Jefferson Davis remained ineligible for the presidency as Confederate leaders had been excluded from the 1872 Amnesty Act. Bingham, chief drafter of the 14th Amendment, clearly believed that the Amendment applied to the presidency.[5]

B. Other Evidence Shows that Contemporaries Regarded the President as a civil officer of the U.S.

During the 1868 impeachment and trial of President Andrew Johnson, held after Congress had adopted the 14th Amendment, which occurred while it was still pending in the states, decision-makers in Congress identified the President as a federal officer. Republican Representative John Bingham of Ohio, the principal author of the 14th

4. Congressional Globe, 42nd Congress, 2nd Session, 25 January 1872, p. 586.

5. "Speech of Hon. John A. Bingham," Tiffin Tribune, July 18, 1872, 2. For a sample of the numerous Reconstruction-era mentions of how the 14th Amendment disqualification clause includes the presidency see "Rebels and Federal Officers," Gallipolis [OH] Journal, Feb 21, 1867, 2; "On the Eve of Battle," Montpelier Daily Journal, Oct 17, 1868, 2.

Amendment, said, "Did not the gentlemen know that it is written in the Constitution that the President, the Vice President, and **every other civil officer** of the United States shall be removed from office on impeachment for and conviction of high crimes and misdemeanors."[6] (emphasis added)

Influential Republican Senator John Sherman said: "The power of removal is expressly conferred by the Constitution only in cases of impeachment, and then upon the Senate, and not upon the President":

> "The electors may elect a President and Vice-President, but the Senate only can remove them. The President and the Senate can appoint judges, but the Senate only can remove them. These are **the constitutional officers**, and their tenure and mode of removal are fixed by the Constitution."[7]

Sherman was a moderate Republican who voted for the 14th Amendment. He had previously served in the U.S. House and would later serve as President Pro Tem of the Senate, Secretary of the Treasury, and Secretary of State.

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6. Quoted in James A. Heilpern and Michael T. Worley, "Evidence that the President is an 'Officer of the United States'" for Purposes of Section 3 of the Fourteenth Amendment," SSRN, 1 January 2024, pp. 47-48, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4681108, p. 48.

7. Id. The lack of the word "military" did not exclude the President from this designation. The President's constitutional authority included that of "Commander-in-Chief" of the armed forces.

Contemporary evidence from presidential proclamations confirms that Section 3 covered the President as an "officer of the United States." President Andrew Johnson said that upon Lincoln's death, "it became my duty to assume the responsibilities of the chief executive **officer** of the Republic." In numerous subsequent proclamations, President Andrew Johnson continued to term himself the "chief executive **officer** of the United States." (emphasis added) He also referred to the President and Vice President of the Confederacy as "chief executive **officers**." He further noted that these Confederate officers were excluded from the benefits of "this proclamation and of the said proclamation of the 29th day of May 1865," which issued pardons to certain former Confederates.[8] James A. Heilpern and Michael T. Worley also provide compilations of statements by members of the U.S. House and Senate identifying the President as an executive officer.[9]

On June 20, 1867, the Adjutant General of the War Department responded to a request from southern military commanders for analysis of the Military Reconstruction Act of 1867 that disqualified from participation in reconstructed southern governments, those "excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States." Congress had passed the Amendment, which the states had not yet ratified. He wrote:

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8. See James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, Andrew Johnson, June 17, 21, & 30 1865, July 13, 1865, April 10, 1867, September 7, 1867, https://www.gutenberg.org/files/12755/12755.txt/.

9. Id., Heilpern and Worley, pp. 47-48.

> "Officers of the United States. As to these the language is without limitation. The person who has at any time prior to the rebellion held any office, civil or military, under the United States, and as taken an official oath to support the Constitution of the United States, is subject to disqualification."

This official clarified that disqualification applies to elected executives and judges (when elected) in the states:

"All the executive or judicial officers of any State who took an oath to support the Constitution of the United States are subject to disqualification, including county officers. They are subject to disqualification if they were required to take, as a part of their official oath, the oath to support the Constitution of the United States."[10]

C. Also probative is the explicit recognition by the framers of the original Constitution of 1787 that the President is a "national officer of the United States."

Debates in the Constitutional Convention of 1787 demonstrate that the framers of the original Constitution did not limit the designation of national officers to appointed officials but included the President. For example, an early version of the impeachment clause in the Convention placed the impeachment process in the judiciary, not the Congress, and generically referred to "national officers:"

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10. War Department, Adjutant General's Office, June 20, 1867, 40th Congress, First Session, House and Senate Documents, compiled 11 July 1867.

The clause read: "That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, **impeachments of any national officers**, and questions which involve the national peace and harmony" (emphasis added)

The rationale for later substituting Congress for the courts demonstrates that the term "national officers" in the original clause included the President. On July 14, 1787, the Convention unanimously approved an amendment to strike the words "impeachments of national Officers out of the 13th resolution," which had lodged the impeachment process in the judiciary. As explained by delegate George Mason of Virginia, the Convention removed the impeachment powers from the judiciary because the President -- a potential subject of impeachment and trial as a "national officer" -- appointed federal judges. He explained, "The mode of appointing the Judges may depend in some degree on the mode of trying impeachments, of the Executive. If the Judges were to form a tribunal for that purpose, they surely ought not to be appointed by the Executive."

Gouverneur Morris agreed, saying, "It would be improper for an impeachment of the Executive to be tried before the Judges. The latter would in such case be drawn into intrigues with the Legislature and an impartial trial would be frustrated." During the impeachment trial of U.S. Supreme Court Justice Samuel Chase, Luther Martin, a delegate to the Constitutional Convention, further explained, "Who are the **officers** liable to impeachment? The President, the Vice President, and all **civil officers of Government**. In the election of the two first, the Senate have no control."

The final form of the impeachment clause relating to trial by the Senate adopted by the Convention recognizes that presidents are officers of or under the United States. The clause (Article 1, Section 3, Clause 7) reads:

> "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

Given that the President is subject to impeachment, he must hold an office of the United States, or the phrase "removal from **Office**," would have no meaning. Similarly, the presidency must be one of the "offices of honor, trust, or profit **under** the United States," otherwise a convicted president could run for the presidency again. The terms "honor, trust, or profit" add nothing to the term office; all federal offices, whether elected or appointed, convey honor, require trust, and are paid.

As enacted in the Convention, the Constitution's foreign emoluments clause covered the President, even if the President is not explicitly cited as in Section 3. The clause (Article 1, Section 9, Clause 8) reads:

> "No Title of Nobility shall be granted by the United States; And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

The framers intended this generic prohibition to cover the President, who holds the most powerful and influential federal office. Gouverneur Morris of Pennsylvania (known as the "Penman of the Constitution") observed that "no one would say that we ought to expose ourselves to the danger of seeing the first magistrate [the president] in foreign pay, without being able to guard against it by displacing him." Governor Edmund Randolph of Virginia, a delegate to the Constitutional Convention, told his state's ratifying Convention that the Constitution guarded against "the President receiving emoluments from foreign powers. If discovered, he may be impeached . . . I consider, therefore, that he is restrained from receiving any present or emoluments whatever. It is impossible to guard better against corruption."[11]

James Madison worried that the corruption of the powerful American President by foreign interests could shatter America's fragile republic. He warned that the President "might betray his trust to foreign powers ... In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic."[12]

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11. "If Discovered, He May Be Impeached: President Trump and the Foreign Emoluments Clause," *American Constitution Society for Law and Policy,* February 2, 2017, http://www.acslaw.org /acsblog/%E2%80%9Cif-discovered-he-may-be-impeached %E2%80%9D-president-trump-and -the-foreign-emoluments-clause.

12. Max Farrand, The Records of the Federal Convention of 1787, vol. 2, Friday, July 20, 1787, https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-2. Although it is not clear whether the foreign emoluments clause applies to commercial transaction that is a separate issue from its application to the president.

Other clauses of the Constitution as adopted in 1787 refer to the presidency as an office and the President as an officer (Article 2, Section 1, emphases added in every example):

> The President "shall hold his **Office** during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows." (Clause 1)
>
> "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the **Office of President**; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States." (Clause 5)
>
> "In Case of the Removal of the **President from Office**, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what **Officer** shall then act as President, and such **Officer** shall act accordingly, until the Disability be removed, or a President shall be elected." (Clause 6)
>
> "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:- I do solemnly swear (or affirm) that I will

> faithfully execute the **Office of President** of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." (Clause 8)
>
> The President's constitutional oath does not include the word "support." However, the presidential oath represents the functional equivalent of support for the Constitution, in especially compelling terms: I "will to the best of my ability, preserve, protect and defend the Constitution of the United States." During debates over the 14th Amendment, no U.S. Senator or Representative made this allegedly exclusionary claim about the presidential oath. The oath requirement of Section 3 was supposed to apply broadly, and the word "support" is not talismanic.

II. Section 3 Enduringly Protects the Nation From Future Insurrections, With No Further Action Required of Congress.

A. Congressional debates demonstrate that framers of Section 3 advisedly choose to disqualify insurrectionists enduringly by a constitutional amendment rather than by statute.

Contemporary evidence demonstrates that Section 3 of the 14th Amendment was not limited to keeping ex-Confederates from holding federal or state offices. The framers crafted it to guard against the corruption of government by anyone involved in future insurrections

who had taken an oath to support the U.S. Constitution. The framers did not require further action from Congress to effect the disqualifications under Section 3.

The framers could have achieved the limited goal of disqualifying former Confederates by statute. Before it adopted the 14th Amendment, Congress had already included a disqualification clause in the 1862 Confiscation Act: "To suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." Sections 2 and 3 of the Act read as follows:

> "SEC. 2. *And be it further enacted,* That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding $10,000, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.
>
> SEC. 3. *And be it further enacted,* That every person guilty of either of the offenses described in this Act **shall be forever incapable and disqualified to hold any office under the United States.**" (emphasis added)[13]

13. Full text in Abraham Lincoln, "Proclamation 92 - Warning to Rebel Sympathizers," July 25, 1862, American

On July 25, 1862, President Lincoln issued a Proclamation based on the Act directed against Confederates. He referred to Section 6 on the confiscation of rebel property. Lincoln warned:

> "All persons within the contemplation of said sixth section to cease participating in, aiding, countenancing, or abetting the existing rebellion or any rebellion against the Government of the United States and to return to their proper allegiance to the United States on pain of the forfeitures and seizures as within and by said sixth section provided."[14]

Congress enacted another disqualification law targeted at former Confederates. After the Civil War, Southern states under President Johnson's lenient Reconstruction plan held constitutional conventions with only whites eligible to vote for delegates. The succeeding all-white governments enacted so-called "Black Codes" that restricted the freedom of African Americans and facilitated their domination by white supremacists. Outrage in the North and landslide Republican victories in the midterm elections led to the Military Reconstruction Act of 1867 that Republicans enacted over President Johnson's veto.

Congress passed this Act after it enacted the 14th Amendment but during a stalled state ratification process. The Act required as conditions for readmission to the Union by former Confederate states (except Tennessee),

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Presidency Project, https://www.presidency.ucsb.edu/documents/proclamation-92-warning-rebel-sympathizers.

14. Id.

ratification of the 14th Amendment, and convening of new constitutional conventions, with Blacks authorized to vote for delegates, but not "such as may be disfranchised for participation in the rebellion or for felony at common law." The law additionally disqualified former rebels from serving in the reform conventions:

> "That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States, shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any person vote for members of such convention."[15]

The 14th Amendment was not yet part of the Constitution. So, only this disqualification statute had the force of law.

In defense of disqualification under the Reconstruction Act, Republican Senator Charles Sumner of Massachusetts stressed the need for Congress to control former rebels. He said, "As loyalty, beyond suspicion, must be the basis of permanent governments, republican in form, every possible precaution must be adopted against rebel agency or influence in the formation of these governments." He added, "The new governments must be founded on an unalterable basis of loyalty, and to that end no rebels must be allowed to exert any influence or agency in the formation of tile new governments."[16]

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15. First Reconstruction Act, March 2, 1867, https://loveman.sdsu.edu/docs/1867FirstReconstructionAct.pdf.

16. Congressional Globe, 40th Congress, 1st Session, March 11, 1867, pp. 50-51.

Contrary to many laws that targeted former Confederates in southern states, Section 3 enshrined disqualification in the Constitution with generic language that does not reference the rebellion or former rebels. Unlike statutes, as part of the Constitution, Section 3 endures indefinitely, free of tampering by future Congresses. Republican Senator Peter Van Winkle of West Virginia said during debates over the 14th Amendment, "This is to go into our Constitution and to stand **to govern future insurrection** as well as the present; and I should like to have that point **definitely understood**."[17] (emphases added)

Decision-makers in Congress rejected versions of Section 3 that would have limited its temporal reach. One version that came to a vote in the Senate would have restricted the future application of the proposed Section 3 by limiting its coverage to those who had taken an oath to support the Constitution "at any time within ten years of January 1st 1861." The Senate rejected this proposal by a vote of 32 to 10.[18] Another rejected version of Section 3, would have limited its application to the year 1870. Republican Representative Rufus Spalding of Ohio found this proposal "objectionable … for the reason that the duration of the period of incapacity is not extended more widely." He explained:

> "I take my stand here that it is necessary to ingraft into that enduring instrument, called the Constitution of the United States, something

17. Congressional Globe, 39th Congress, First Session, May 30, 1866, p. 2900.

18. Id.

> which shall admonish this rebellious people and all who shall come after them that treason against the Government is odious; that it carries with it some penalty, some disqualification…"[19]

B. Amnesty Acts passed by Congress after ratification of the 14th Amendment did not pardon future insurrectionists.

In 1872 and 1898, Congress enacted amnesty laws under Section 3. These laws were backward, not forward-looking. They pardoned persons previously disqualified under Section 3 but did not vitiate this provision of the Constitution by exempting future insurrectionists or rebels from its coverage.[20] The 1872 law reads as follows:

> "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

19. Congressional Globe, 39th Congress First Session, 9 May 1866, p. 2509.

20. In the case of *Madison Cawthorn v. Constitutional Accountability Center*, the Fourth Circuit Court of Appeals considered whether the "1872 legislation also prospectively lifted the constitutional disqualification for all future rebels or insurrectionists, no matter their conduct." It ruled that the legislation did not do so, but only applied to prior disqualifications: "We hold only that the 1872 Amnesty Act does not categorically exempt all future rebels and 29 insurrectionists from the political disabilities that otherwise would be created by Section 3 of the Fourteenth Amendment." United States Court of Appeals for the Fourth Circuit, Madison Cawthorn v. Constitutional Accountability Center, No. 22-1251, 24 May 2022, at 4, 28-29.

> 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."[21]

The plain meaning of this statute shows that it applies to persons previously disqualified from holding office. It does not constitute a blanket exemption for all those who might fall under the rubric of Section 3 in future insurrections or rebellions. It refers in the past tense to "disabilities **imposed**." (emphasis added) Second, even for those already disqualified from holding office, the statute is not a comprehensive amnesty but includes exceptions.

Our study of the records of Congress demonstrates that debates centered on amnesty for those involved in the Southern Rebellion, not on amnesty for future insurrectionists. Decision-makers affirmed that the bill only applied to removing disqualification, with exceptions, from persons already disqualified under Section 3 for involvement in the Southern Rebellion. Senator Charles Sumner of Massachusetts said without dissent that the amnesty bill involved "the removal of the disabilities of rebels."[22] Republican Representative Benjamin Butler of Massachusetts further elaborated:

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21. 17 Stat. 142. The 36th and 37th Congress sat from1865 through 1869.

22. Congressional Globe, 42nd Congress, Second Session, 13 February 1872, p. 983.

> "The committee have instructed me to report a general bill, removing disabilities from all persons, with the exception of four classes … this is done with a desire to pass a bill which will remove disabilities from as many as can be done in the present juncture of affairs."[23]

The report of the House Committee on the Judiciary during the consideration of a second amnesty bill in 1898 explained that the 1872 bill "removed political disabilities from all persons who had participated in the rebellion," except for the specified classes.[24] The Committee "was satisfied that the survivors or those once engaged in rebellion against this Government are loyal to the Union, and that it would be a fitting act before they all pass away, and while some of them are left, to remove the disability imposed by this amendment."[25]

In 1898, Congress enacted a second amnesty law that removed the exceptions of the 1872 Act. The bill stipulated that ("[T]he disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." This legislation, too, is backward rather than forward-looking. It refers to disqualifications "heretofore incurred," not to future eventualities. As explained by the Judiciary Committee's Report, the bill was designed to eliminate the disqualification of those few former, still living Confederates excluded from the 1872 amnesty law. The

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23. Congressional Globe, 42nd Congress, Second Session, 13 May 1872, p. 3382.

24. Congressional Globe, 55th Congress, Second Session, 1 June 1898, p. 5404.

25. Id., 5405.

Committee Report referenced Republican Representative James G. Blaine of Ohio, who, during debates on the 1872 amnesty bill, said that he had ascertained "the number of gentlemen in the South still under disability." The Judiciary Committee's Report noted that:

> "The committee are satisfied that the survivors or those once engaged in rebellion against this Government are loyal to the Union, and that it would be a fitting act before they all pass away, and while some of them are left, to remove the disability imposed by this amendment."[26]

C. Adverse consequences followed from requalifying former Confederates under amnesty.

After amnesty, many former Confederates gained election to leadership positions in southern states. The offices included governorships and other statewide offices, state legislative positions, and local offices. None were elected before amnesty. At least 20 ex-Confederates who had previously sworn an oath to support the U.S. Constitution served as governors of former Confederate states after amnesty.[27]

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26. Id., p. 5405. The amnesty acts of 1872 and 1898 did not deter the US House from attempting in 1919 to disqualify Socialist Victor Berger from an elected House seat under Section 3. Berger had been convicted under the Espionage Act of 1917. The action became mooted when the US Supreme Court overturned his conviction. *Berger et al. v. United States*, 255 U.S. 22, 41 S.Ct. 230 (1921).

27. Stephen M. Hood, *Patriots Twice: Former Confederates and the Building of America after the Civil War* (Savas Beatie, 2020).

Pardoned former Confederates participated in the imposition of racial discrimination in the South that vitiated the intent of the Reconstruction 14th and 15th Amendments to protect the civil and political rights of the formerly enslaved people. White supremacists who regained power in the 1870s suppressed Black rights through violence and intimidation and during the rest of the century through laws and constitutional provisions that established Jim Crow discrimination. Ironically, the former Confederates under amnesty, who had the freedom to vote and hold office, participated in snuffing out Black voting in the South, first through intimidation and then through mechanisms such as literacy tests, poll taxes, and white primaries.[28]

Some states enacted "Grandfather Clauses" that exempted from literacy tests persons whose ancestors had previously voted, essentially ruling in former Confederates and ruling out Black people. A study by J. Morgan Kousser found that although state-sanctioned and sponsored violence and intimidation had reduced Black suffrage in elections before legal disfranchisement, it declined more steeply after that. Another study by Kent Redding and David R. James found that Black presidential turnout in the eleven former Confederate states tumbled from an average of 61 percent in 1880 to but 2 percent in 1912.[29]

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28. On the development of post-Reconstruction discrimination as related to voting and elections, see Allan J. Lichtman, *The Embattled Vote in America, From the Founding to the Present* (Harvard University Press, 2018), pp. 93-98.

29. J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880–1910* (Yale University Press, 1974), pp. 238-264; Kent

D. The framers did not require any additional actions by Congress to effectuate Section 3.

Section 3 was very explicit about what Congress was required to do and not to do: Congress could lift any disqualification for office only by a two-thirds vote. Strikingly, however, the Section did not require any action by Congress to disqualify insurrectionists. Section 3 mirrored other constitutional disqualifications based on age, residence, and birth that did not require any action from Congress.

No former Confederates whom Section 3 instantly disqualified from holding office were disqualified by an act of Congress or a criminal conviction for insurrection or rebellion. Former Confederate President Jefferson Davis recognized, for example, that Section 3 had automatically disqualified him from holding public office on the day the states ratified the 14th Amendment. Davis argued that he should be immune from prosecution for treason because of the penalty already imposed by this disqualification. Section 3, said Davis' lawyer, **"executes itself, acting proprio vigore. It needs no legislation on the part of**

Redding and David R. James, "Estimating Levels and Modeling Determinants of Black and White Voter Turnout in the South, 1880 to 1912," *Historical Methods* 34 (2001): 141–158. For the implications of Reconstruction and its aftermath see, Orville Vernon Burton and Armand Derfner, *Justice Deferred: Race and the Supreme Court* (Belknap Press, 2021). See also, Adam H. Domby, *The False Cause: Fraud, Fabrication, and White Supremacy in Confederate Memory* (University of Virginia Press, 2020);Karen L. Cox, *No Common Ground: Confederate Monuments and the Ongoing Fight for Racial Justice* (University of North Carolina Press, 2021

Congress to give it effect." Thus, the disqualification "punishment of Mr. Davis **commenced upon the date of the adoption of the fourteenth article**, and he therefore could not now be punished in any other way." (emphasis added).

The government did not dispute the self-executing impact of Section 3 but opposed quashing the indictment. Chief Justice Salmon Chase, who was serving as a Circuit Court Judge, indicated he accepted Davis' claim and would quash the indictment. Circuit Court Judge John Underwood did not agree to quash. However, the prosecution dropped the indictment prior to any resolution of the matter. Davis lived freely, although still under disqualification for a presidential run.[30]

Statutory disqualifications, during the pendency of the 14th Amendment in the states, did not require congressional action or court order. Yet, they were essential for restoring loyal governments in the South, readmitting rebel states to the Union, and eradicating the Black Codes. As indicated by the memo of the Adjutant General of the War Department on June 20, 1867 cited above, disqualifications, based on the text of Section 3, were enforced summarily by military commanders under the authority of the Reconstruction Act of 1867.[31]

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30. "Trial of Jeff Davis," New York Times, 4 December 1868, p. 1; *Case of Davis*, Chase, 1; 3, p. 55; Am. Law Rev. 368, at 54-55; Ellen C. Connally, "The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis," Akron Law Review: 42 (2009), pp. 1198-1199.

31. The Confederate Records of the State of Georgia,, Reconstruction Act, March 2, 1867, p. 136, The Confederate

In the 1869 *Griffin's Case*, Justice Chase, again sitting as a Circuit Judge, denied the habeas corpus claim of convicted defendants to abrogate their sentences because the presiding judge was disqualified under Section 3. Justice Chase recognized that "The amendment applies to all the states of the Union, to **all offices under the United States** or under any state, and to all persons in the category of prohibition, and **for all time present and future**."[32] (emphasis added) He thus recognized no limitation of the offices to which Section 3 applied or any temporal restrictions. However, he ruled narrowly that the prohibition cannot be applied to invalidate the actions of officials lawfully seated before the ratification of the 14th Amendment:

> "It results from this examination that persons in office by appointment, or election, before the promulgation of the fourteenth amendment, are not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in the third but that legislation by Congress is necessary to give effect to the prohibition, by providing for such removal."[33]

Griffin's was not a U.S. Supreme Court case but a ruling by a single justice sitting as a Circuit Court judge.

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records of the State of Georgia: Georgia. General Assembly: Free Download, Borrow, and Streaming : Internet Archive.

32. United States Circuit Court. District of Virginia. Ex parte Cæsar Griffin The American Law Register (1852-1891), Vol. 17, No. 6, New Series Volume 8 (Jun., 1869), at 362-363.

33. Id., at 366.

Legal authorities have criticized the ruling.[34] Regardless, his ruling applies only to those in lawful office before July 9, 1868, the date of ratification.

In the *Davis* case, with no lawfully elected official involved, Chase had agreed with Davis' argument that he had already been punished under the "self-executing" Section 3 and "the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States."[35] Thus, *Griffin*'s ruling has no bearing on the issue of disqualifying candidates for office.

CONCLUSION

For all the foregoing reasons, the Court should take cognizance that Section 3 of the 14th Amendment covers the present, is forward-looking, and requires no additional acts of Congress for implementation.

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34. William Baude and Michael Stokes Paulsen, "The Sweep and Force of Section Three," University of Pennsylvania Law Review, 172 (forthcoming 2024).

35. Id., *Case of Davis*, p. 80.

APPENDIX

TABLE OF APPENDICES

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