

GUEST ESSAY

Trump Should Not Be Disqualified by an Ambiguous Clause

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By Kurt Lash

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Challenges to disqualify Donald Trump from the office of president under Section 3 of the 14th Amendment are popping up all over the country. On Thursday the secretary of state of Maine ruled that Mr. Trump would be ineligible for the state’s primary ballot, a decision that can be appealed to the state’s Supreme Court. On Wednesday the Michigan Supreme Court ruled narrowly that the state will allow Mr. Trump to stay on the primary ballot but left open a potential future challenge to his inclusion on a general-election ballot.

But so far only one — the Colorado Supreme Court’s ruling that bars Mr. Trump from the primary ballot — has reached the doorstep of the U.S. Supreme Court.

The Supreme Court should take the case and reverse the Colorado Supreme Court ruling and do so for the very reason cited by the Colorado judges. According to the Colorado court (quoting an earlier, unrelated case), Section 3 should be interpreted “in light of the objective sought to be achieved and the mischief to be avoided.”

That is exactly right. The Colorado court failed, however, to follow its own advice.

When Congress passed the 14th Amendment, there wasn’t a person in the Senate or House who worried about loyal Americans electing a former rebel like Jefferson Davis as president. Instead, Republicans feared that the leaders of the rebellion would use their local popularity to disrupt Republican Reconstruction policy in Congress or in the states. Section 3 expressly addressed these concerns and did so without denying loyal Americans their right to choose a president.

To date, much of the debate over Section 3 has focused on whether the president is an “officer” who takes an “oath.” This is an issue in the second part of the provision. What neither scholars nor courts have yet focused on is the first part of Section 3. The threshold issue is whether the framers and ratifiers thought that the president holds a “civil” office “under the United States.” This is a much more specific and historically difficult question.

Here are the key opening words of Section 3: “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.”

The text begins by expressly naming offices that rebel leaders might secure for themselves on the basis of their local popularity. The greatest fear was that these rebels would return to Congress and join Northern Democrats in thwarting Republican Reconstruction policy.

As Representative Thaddeus Stevens warned his colleagues, without a properly worded Section 3, “that side of the House will be filled with yelling secessionists and hissing copperheads” — a reference to Northern Democrats who had opposed the Civil War. It was possible that a coalition of Southern and Northern Democratic presidential electors would nominate a “hissing copperhead.”

Congressional Republicans were so concerned about mischief in the Electoral College that they delayed the passage of the 14th Amendment in order to make sure the issue was properly addressed. The joint committee's draft of Section 3 prohibited rebels from voting for presidential electors, but this left open an enormous loophole. As Representative John Longyear pointed out, this prohibition would be "easily evaded by appointing electors of president and vice president through their legislatures."

Senator Jacob Howard agreed that Section 3 would not "prevent state legislatures from choosing rebels as presidential electors," and he led the effort to rewrite Section 3 in a manner that closed the loophole. The result is the final version that prohibits leading rebels from serving as presidential electors, whether elected or appointed.

The only reason to secure a trustworthy Electoral College is in order to secure a trustworthy president. So Section 3 focuses on state-level decision making. It expressly addresses three key positions for which leading rebels might use their remaining popularity to disrupt Republican Reconstruction: the Senate, the House of Representatives and state-selected presidential electors.

Radical Republicans like Thaddeus Stevens would have gone further and completely disenfranchised anyone who had participated in the rebellion, leader or not. Moderate Republicans, however, were more optimistic. As Senator Daniel Clark noted, once leading rebels were removed, "those who have moved in humble spheres [would] return to their loyalty and to the government."

The strategy worked. In 1868, despite the scattered participation of former rebel soldiers as presidential electors, Southern Black voters helped elect the Republican Ulysses S. Grant over the Democrat Horatio Seymour.

It is possible to read Section 3 as impliedly including the office of president as one of the "civil" offices "under the United States" covered by the general catchall provision. It would be odd to stuff the highest office in the land into a general provision that included everything from postmasters to toll takers, but the text is ambiguous enough to make this a possible reading.

However, if the framers meant the catchall provision to include presidents and postmasters, they were remarkably negligent. According to longstanding congressional precedent and legal authority, the phrase "civil office under the United States" did not include the office of president of the United States. As Joseph Story explained in his influential "Commentaries on the Constitution of the United States," the congressional precedent known as Blount's case established that the offices of president, senator and representative were not civil offices under the government of the United States; they *were* the government of the United States. The phrase "civil office under the United States" referred to appointed offices.

In addition to legal authority, there is also common sense to guide us. The text of Section 3 is structured in a manner that moves from high federal office to low state office, and the apex federal political offices are expressly named. As the former Attorney General Reverdy Johnson explained, "the specific exclusion in the case of senators and representatives" led him to initially presume that the framers excluded the office of president. He accepted a colleague's suggestion to the contrary, but if the text created such a presumption in the mind of a former attorney general, it is reasonable to think it may have created the same presumption in the minds of ratifiers.

Actually, we have no idea whether the ratifiers shared Mr. Johnson's initial presumption. This is because no one has discovered a single example of any ratifier discussing whether Section 3 included the office of president of the United States. Despite extraordinary efforts by researchers, no one has yet found evidence that any ratifier even considered the possibility that Section 3 abridged the people's right to choose their president.

The silence of the ratifiers on this point is important. Those favoring the disqualification of Mr. Trump insist that there is nothing antidemocratic about constraining the presidential choices of the national electorate. The Constitution, after all, contains a number of provisions that deny the people the right to elect whomever they wish. Article II, Section One, for example, prevents the people from electing anyone who is under age 35 or who is a foreign-born candidate.

Those qualifications are expressly declared in the text, and they received robust vetting and debate in the ratifying conventions. In the case of Section 3, the Supreme Court is being asked to impose new constraints on the democratic process by way of textual implication and in the absence of any public debate whatsoever.

Such a reading is neither democratically appropriate nor textually necessary. And it was most certainly not “the objective sought to be achieved [or] the mischief to be avoided” by Section 3.

At best, the text of Section 3 is ambiguous regarding the office of president. The Supreme Court should limit the clause to its historically verifiable meaning and scope.

Let the people make their own decisions about Donald Trump.

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