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Prof. Michael McConnell, Responding About the Fourteenth Amendment, "Insurrection," and Trump

"We must not forget that we are talking about empowering partisan politicians such as state Secretaries of State to disqualify their political opponents from the ballot, depriving voters of the ability to elect candidates of their choice. If abused, this is profoundly anti-democratic."

EUGENE VOLOKH | [THE VOLOKH CONSPIRACY](#) | 8.12.2023 6:58 PM

I'm delighted to be able to pass along this response by Prof. Michael McConnell (Stanford Law School) to a couple of items that were posted on the blog in the last few days:

There is a recent flurry of interest in Section 3 of the Fourteenth Amendment, which bars any person who has "engaged in" an "insurrection or rebellion" (after having previously taken an oath to support the Constitution) from holding state or federal office. This provision has played no significant role in American governance since 1872 and was regarded by many scholars as moribund. The revival of interest in Section 3 is sparked by scholarship by several scholars with impeccable conservative credentials, including my friends [Will Baude](#), [Michael Paulsen](#), and [Steve Calabresi](#). See [here](#) and Their work advocates a "broad, sweeping" interpretation of the disqualification provision, and claims that under Section 3, Donald Trump is ineligible to run for a second term, without any further process, hearings, or adjudications. Already it has drawn the attention of the [New York Times](#), and presumably will fuel efforts to keep Trump off the ballot.

I have no truck with Trump, for whom I have low regard. But in the haste to disqualify Trump, we should be wary of too loose an interpretation of Section 3.

We must not forget that we are talking about empowering partisan politicians such as state Secretaries of State to disqualify their political opponents from the ballot, depriving voters of the ability to elect candidates of their choice. If abused, this is profoundly anti-democratic. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The broader and more nebulous the definition of engaging in insurrection, and the fewer the procedural safeguards, the greater the danger.

Section 3 speaks of "insurrection" and "rebellion." These are demanding terms, connoting only the most serious of uprisings against the government, such as the Whisky Rebellion and the Civil War. The terms of Section 3 should not be defined down to include mere riots or civil disturbances, which are common in United States history. Many of these riots impede the lawful operations of government, and exceed the power of normal law enforcement to control. Are they insurrections or rebellions, within the meaning of Section 3?

I have not done the historical work to speak with confidence, but I would hazard the suggestion that a riot is the use of violence to express anger or to attempt to coerce the government to take certain actions, while insurrections and rebellions are the use of violence, usually on a larger scale, to overthrow the government or prevent it from being able to govern.

Moreover, Section 3 uses the verb "engage in," which connotes active involvement and not mere support or assistance. Significantly, Section 3 also uses the term "give aid and comfort to"—but this is reserved for giving aid and comfort to the "enemies" of the United States, which has historically meant enemies in war. *Bas v. Tingy* (1800). That Section 3 uses both terms, with different referents, strongly suggests that "engage in" means more than just give "aid and comfort" to an insurrection. Baude and Paulsen maintain that Section 3 "covers a broad range of conduct against the authority of the constitutional order, including many instances of indirect participation or support." They explicitly state that Section 3 trumps the First Amendment. The terms "broad range of conduct" and "indirect support" are ominous, especially since they also say that Section 3 trumps the First Amendment and does not require due process. What could go wrong?

Putting together my friends' broad definitions of "insurrection" and "engage," and lack of concern about enforcement procedure, I worry that this approach could empower partisans to seek disqualification every time a politician supports or speaks in support of the objectives of a political riot. Imagine how bad actors will use this theory. If that is what Section 3 necessarily means, we have to live with it. But in my opinion, we should seek the narrowest, most precise, least susceptible to abuse, definition that is consistent with history and precedent. In the absence of actual engagement in actual insurrection, judged as such by competent authorities, we should allow the American people to vote for the candidates of their choice.

Congress has enacted a statute, 18 U.S.C § 2383, which covers participation in rebellion or insurrection, and which provides that those found guilty "shall be incapable of holding any office under the United States." This mode of enforcement has been enacted by the entity entrusted with responsibility to enforce the Fourteenth Amendment; it proceeds through the ordinary course of prosecution by the executive, trial by a court, decision by a jury, and appeal to appellate courts, with due process at every step. It is significant that the Department of Justice has prosecuted hundreds of persons for their involvement in the January 6 incursion at the Capitol, but has not charged anyone, including Trump, with insurrection under this or any other statute. It is not obvious that partisan officials in state governments, without specific authorization or checks and balances, should apply broad and uncertain definitions to decide who can run for office in a republic, when responsible officials with clear statutory and constitutional authority have not done so.

Note that the "friends" here isn't just the lawyer conceit of referring to opposing counsel as "my friends"; I think McConnell and Calabresi, Baude, and Paulsen are indeed friends, and McConnell, Baude, and Paulsen are actually coauthors (together with our own Sam Bray) of a [casebook on the Constitution](#). Baude also clerked for McConnell when McConnell was a Tenth Circuit judge (as did Bray). As you might gather, I'm always delighted to see—and, when possible, host—such substantive debates among friends and colleagues.

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