Balkinization: Not Too Hot, Not Too Cold, and Not At All

Not Too Hot, Not Too Cold, and Not At All

Gerard N. Magliocca

One objection to applying Section Three of the Fourteenth Amendment to Donald Trump is that democracy requires that he be permitted to run. I have a draft paper responding to this argument, though I will be revising that in light of Trump's quadruple indictment and the Baude and Paulsen paper. But let me tackle one aspects of that now.

There is no limiting principle to the democracy argument against Section Three. Suppose that Trump was doing poorly in the polls. Then people would say: "Oh, he shouldn't be disqualified. There's no harm in letting him run. Democracy will resolve the issue." Now suppose that he was doing well in the polls. Then people would say: "Oh, he shouldn't be disqualified. There's a harm in not letting him run. *Vox populi, Vox Dei*." Where, then, is the sweet spot in between where he should be disqualified? The answer is that there is none and there cannot be one under the strong form of the democracy principle.

Some people are candid about this. Alan Dershowitz, for example, has an essay arguing that we should ignore Section Three. There are constitutional precedents for this. They are just bad ones that are almost all about the Reconstruction Amendments. I'm quite

unimpressed with the claim that we should not apply the text as written because too many people will be upset. We've seen that tragedy before.

UPDATE: Here is my latest essay on Section Three, in which I explain why an appropriate state Secretary of State would be acting in a non-partisan way by declaring Trump ineligible now.

Posted 11:30 AM by Gerard N. Magliocca [link]

Balkinization: Procrastination Isn't Always Wisdom

Procrastination Isn't Always Wisdom

Gerard N. Magliocca

I want to respond to an argument, exemplified by Ross Douthat's recent column in *The New York Times*, against using Section Three to disqualify Trump. (Andrew Coan offered some thoughtful comments on that argument in a post the other day). The argument is a practical one that says exclusion is dangerous in a democracy. It's wiser to just let the voters decide. David French has a column responding that this would be "appeasing" Trump's supporters. I don't like that loaded term. I have a different take.

The "let the voters decide" argument is basically just a sophisticated version of kicking the can. Kicking the can is sometimes a wise solution. Maybe things will just work themselves out. Let's take a wait-and-see posture when the action being contemplated is broad. Thus, I understand the skepticism that some people have about disqualification, especially if they have only just started thinking about that option.

The problem is that we've tried kicking the can on Trump's misconduct more than once. And things have gotten worse, not better. Let's go back to February 2020. An argument for a Senate acquittal in the first impeachment trial was "Let the voters decide." And that made sense. It was an election year. The case that Trump

committed a high crime and misdemeanor was not so clear. (Indeed, I said in a post here that I was not convinced that he should be convicted.) The voters did decide, but then Trump refused to accept that verdict and (allegedly) committed crimes and (in my view) engaged in insurrection to stay in power.

Now let's revisit February 2021. An argument for acquittal in the second Trump impeachment was "Let the voters decide." He was out of office, so the only point of an impeachment was to disqualify him from serving again. But the next election was three years away. Was it really necessary to bar him from office? Maybe he wouldn't run again. Maybe the voters wouldn't support him. Let's kick the can again. This did not work either. Instead, we face the dilemma of a strong presidential candidate under multiple criminal indictments, which creates an unprecedented and volatile situation heading into next year.

Now many of the same people want to kick the can again. Don't apply Section Three to Trump. Let the voters decide. What could go wrong? At this point, this is just magical thinking. The third time is not the charm.

UPDATE: I've added links to the Douthat and French columns. They are excellent presentations of the opposing views on this issue.

Posted 9:27 AM by Gerard N. Magliocca [link]

Balkinization: Damn the Torpedoes: Disqualifying Donald Trump

The qualifications for officeholding are among the undemocratic, or at least antimajoritarian features of the Constitution of the United States. Electoral College majorities are barred from selecting as president a person who is less than thirty-five years old, not born in the United States, not a citizen of the United States, not a resident of the United States for at least fourteen years, or, while or after holding various federal or state offices, participated in an insurrection or rebellion against the United States. Good reason exists for thinking such qualifications a bad idea. John Seary has an interesting book arguing that younger Americans ought to be constitutionally permitted to hold various offices. Sandy Levinson and others think the constitutional bar on persons born abroad creates second-class citizens. Perhaps electoral college majorities ought to decide whether former insurrectionists should hold office. Section 3 of the Fourteenth Amendment may be a bad idea whose time has passed if that time ever came. If popular majorities want to keep in office a police chief who urged the assassination of police officers or elect a president who as president fomented an insurrection in order to maintain office, the meaning of majoritarianism may be that they should have their way. Holmes famously said his job was to lead his fellows to Hell if that was their chosen direction.The zeitgeist among some authors seems to be that disqualifying Donald Trump under Section 3 is the bad idea, not that barring insurrectionists from office is a bad idea or

that qualifications for the presidency are a bad idea. This claim comes in two flavors. The first is that disqualification decisions should be made by Congress and certainly not by local election judges or state secretaries of state. Local decision-making risks minoritarian extremism and checkerboard solutions, where Trump is on the ballot in some states and not others. The second is that MAGA forces must be defeated electorally. Disqualification will increase the possibility of a civil war or at least civil disruption in the United States initiated by violent members of the far right who perceive that their hero has been treated unfairly.

Balkinization: Section Three "Of" and "Under" Nonsense: The Sequel

Section Three "Of" and "Under" Nonsense: The Sequel

Mark Graber

The persons responsible for Section Three of the Fourteenth Amendment would have laughed at the suggestion that past or future presidents who never held any other office could not be disqualified from present and future office. That whether former president John Tyler, who became a secessionist in 1861, would have been disqualified from office had he survived the Civil War depended on whether Tyler held other state or federal offices is nonsensical. No serious constitutionalist would interpret Section Three as exempting presidents who held no other public office absent a very clear constitutional mandate. Section Three of the Fourteenth Amendment disqualifies any person from holding "any office, civil or military, under the United States, ... who, having previously taken an oath ... as an officer of the United States, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." The common sense reading is that the set of offices that make persons subject to Section Three are the same as the set of offices from which persons may be disqualified. That a traitorous former president is exempt from Section Three, but not traitorous Representatives, Senators, Judges, and Generals boggles the imagination.

Last winter in an essay for Lawfare, I demonstrated that the Fourteenth Amendment hardly compels such foolishness. My survey of every congressional use during the first session of the Thirty-Ninth Congress of "office(s) of," "office(s) under," "officer(s) of," and "officer(s) under" would not surprise anyone with common sense. The members of the 39th Congress who drafted Section Three spoke of the president as "an officer of the United States/Constitution" and as an "officer under the United States/Constitution." They spoke of the presidency as "an office of the United States/Constitution" and as an "office under the United States/Constitution." Some linguistic differences explain the use of "of" and "under" but there is no (not hardly any) evidence in the pages of the Congressional Globe that any member of Congress thought the president might be an officer under the United States/Constitution or an officer of the United States/Constitution, but not both. The essay paid particular attention to a House Report issued a month after the Fourteenth Amendment was sent to the state. That report insisted that no constitutional difference existed in the constitutional usage of "officers under the United States/Constitution" and "Officers of the United States/Constitution." The blog post summaries my conclusions. I may elaborate in the future.

Josh Blackman and Seth Barrett Tillman are nevertheless determined to repeat their comedic performance of December 2021 when they posted on SSRN an essay claiming, contrary to the evidence and common sense, "that the President is not a Section 3 'officer of the United States.'" As was the case with their original piece, the new piece they have recently posted on SSRN claims to be an understanding of the original meaning of Section Three. Their lack of

cotemporaneous historical evidence for a claimed work of originalism is stunning. The number of persons they cite in support of their conclusions who might have influenced the drafting and framing of Section Three is zero. Blackman and Tillman fail to provide any evidence that any member of the 39th Congress maintained that the president is not an officer of the United States or distinguished between an "officer of the United States" and an "officer under the United States." Blackman and Tillman do not point to any member of a state ratification convention or editorialist who, when the Fourteenth Amendment was debated, maintained that the president is not an officer of the United States or distinguished between an "officer of the United States" and an "officer under the United States." They do not point to any governing official, political actor, or small child who during the 1860s made a claim that remotely supports their assertions about the original meaning of an "officer of the United States."

Blackman and Tillman do make the odd claim that William Baude and Michael Paulsen in their influential article claiming that an originalist reading would disqualify Donald Trump under Section Three and my somewhat less famous (i.e., obscure) blog post "disregard the fact that the debates they cite from the 1860s in support of their position look back to debates from the early Republic." But Reconstruction Republicans insisted those debates supported their position that no constitutional difference existed between "officers of the United States" and "officers under the United States." Whether members of Congress in 1866 were right or wrong about their interpretation of debates in 1790s has no bearing on what members of Congress thought in 1866.

The crucial passage occurs in a Congressional Report issued barely a month after Congress sent the 14th Amendment to the states. That passage declares,

"But a little consideration of this matter will show that 'officers of' and 'officers under' the United States are (as said by Mr. Dallas in this Blount case, p. 277) 'indiscriminately used in the Constitution.'" (Congressional Globe, at 3939).

My blog post intentionally omitted "(as said by Mr. Dallas in this Blount case, p. 277)" which I interpreted as a footnote in the original House Report being reproduced in a Congressional Globe that did not include footnotes (I was also madly cutting to stay within word limits). Blackman and Tillman correctly point out that some members of Congress in 1797 disagreed with Dallas when Dallas claimed that no difference exists between "officers of" and "officers under." So what. The issue is what people in 1866 believed, not whether there was a disagreement in 1797. If members of the Thirty-Ninth Congress uniformly thought Dallas was right about the Constitution, pointing out that some members of Congress in 1797 disagreed has no bearing on the original meaning of constitutional language drafted in 1866. The evidence from the Thirty-Ninth Congress and House Report is unambiguous. Reconstruction Republicans uniformly spoke of the president as an "officer of the United States." They never distinguished between "officers of" and "officers under" the Constitution/United States. The committee report insisted, "It is

irresistibly evident that no argument can be based on the different sense of the words 'of' and 'under.'" No difference existed between "an officer 'of' the United States, or one 'under' the government of the United States," the House Report concluded. "In either case he has been brought within the constitutional meaning of these words . . . because they are made by the Constitution equivalent and interchangeable."

Pundits who know nothing about history risk confusing the public by citing Blackman/Tillman in efforts to engage in "balanced" journalism. We may see posts on social media contending:

Some scholars maintain the president is both an officer of and an officer under the Constitution. Others maintain the president is not an officer of the Constitution. Given the division of opinion, we ought not disqualify Donald Trump from holding any state or federal office.

This is reporting of the worst sort. Powerful evidence exists that the persons responsible for Section Three of the Fourteenth Amendment believed the president was an "officer of" and an "officer under" the Constitution. If Donald Trump participated in an insurrection, he is not exempted from disqualification under Section Three because the only office he ever held was the presidency. No evidence exists that any member of Congress, member of a state legislature, political activist, journalist, or hopeless crank during the 1860s thought a president was not an officer of the United States or that a constitutional

difference existed between an officer of the United States and an officer under the United States. History did not give Donald Trump a free "get out of disqualification card" unobtainable by any other president. That two members of the academy make that claim is evidence of a great many things, but not evidence about what persons were thinking when they drafted Section Three of the Fourteenth Amendment.

Posted 8:44 PM by Mark Graber [link]

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Tuesday, October 03, 2023

Ten Theses on Section Three and Donald Trump

Mark Graber

Just posted my thoughts on what history has to say about the most pressing contemporary issues concerning disqualification under Section Three of the Fourteenth Amendment. Still a draft and an extremely rough draft in places. Really rough. But the historical evidence supports the following conclusions.

1. The constitutional disqualification of government officials who violated their oath of office was central to the Fourteenth Amendment's goal of ensuring government by persons who could be trusted to be faithful to the Constitution.

2. With one notable exception, Americans during the 1860s regarded Section Three as self-executing.

3. Section Three when framed was thought to be an additional qualification for officeholding and not a punishment for crime.

4. Section Three of the Fourteenth Amendment was intended to bar from office any past or present state or federal officeholder who engaged in an insurrection, not just persons who participated in what members of the Thirty-Ninth Congress referred to as "the late rebellion."

5. The persons who framed Section Three thought presidents of the United States are officers of the United States who are disqualified from holding future federal or state offices if they engage in an insurrection after or while holding office.

6. The persons who framed Section Three thought that presidency of the United States was among the offices under the United States that past and present officeholders who participation in insurrections were disqualified from holding.

7. An insurrection at the time Section Three was framed consisted of two or more persons resisting the implementation of any law by force, violence and intimidation for a public purpose and was not limited to rebellious attempts to overthrow the government.

8. The events of January 6, 2021 are consistent with the legal understanding of insurrection in 1866.

9. Constitutional authorities before, during and immediately after the Civil War maintained that any person who knowingly contributed to an insurrection as having engaged in the insurrection, even if that person did not personally commit an act of violence or were far from the scene of the violence, force, and intimidation.

10. If the allegations made by the Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol are true, Donald Trump participated in the insurrection that took place on January 6, 2021.

The details are here:

Posted 2:58 PM by Mark Graber [link]

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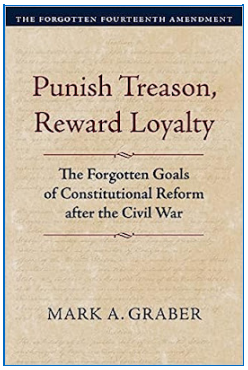

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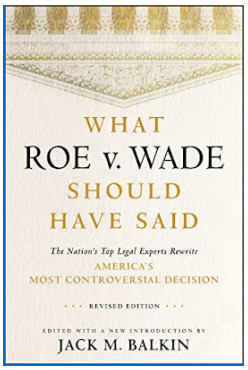

Jack M. Balkin, What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision - Revised Edition (NYU Press, 2023)

Balkinization: The Presidential Oath of Office and Section Three

The Presidential Oath of Office and Section Three

Gerard N. Magliocca

One question about Section Three concerns the President's oath of office. He takes an oath "to preserve, protect, and defend" the Constitution. But Section Three refers to an oath "to support" the Constitution. Is that a meaningful difference? Does the President not take an oath "to support" the Constitution?

Here is what John Norton Pomeroy's well-respected constitutional law treatise said about this in 1868:

"The senators and representatives, the members of state legislatures, and all executive and judicial officers of the states and of the nation, are also required to take an oath to support the Constitution. The President's oath is but an amplification of this; it enters into more detail, but does not add another compulsive clause. The solemn promise in particulars 'to preserve, protect and defend the Constitution,' does not imply more than the equally solemn promise in generals 'to support' it."

Posted 6:55 PM by Gerard N. Magliocca [link]

Balkinization: Is Anyone Disqualified? Mindless and Mindful Textualism in the Second Confiscation Act and Section Three of the Fourteenth Amendment

Is Anyone Disqualified? Mindless and Mindful Textualism in the Second Confiscation Act and Section Three of the Fourteenth Amendment

Mark Graber

Donald Trump, Trump's lawyers, and Trump's legal supporters are cornering the market on mindless textualisms when claiming Second Three of the Fourteenth Amendment does not disqualify Trump from holding office. They claim, common usage and explicit declaration in 1866 to the contrary, that the President of the United States is technically not an "officer of the United States" whose violation of the oath of office triggers Section Three disqualification. They claim, common usage and explicit declaration in 1866 to the contrary, that the President technically does not take the oath to support the Constitution that triggers Section Three disqualification. They suggest, common use and explicit declaration in 1866 to the contrary,

that the presidency may not technically be an office under the United States that is the subject of Section Three disqualification. Now Trump, Trump's lawyers, and Trump's legal supporters are claiming, common use and explicit declaration to the contrary, that persons who incite insurrections may not trigger Section Three disqualification by "engag[ing] in insurrections." This ahistorical reading of Section Three, if taken seriously, demonstrates that the persons responsible for the Fourteenth Amendment failed to disqualify a single confederate from holding any office.

This latest exercise in mindless textualism is based on the somewhat different wording of the Second Confiscation Act (1862) and Section Three of the Fourteenth Amendment. The second section of the Second Confiscation Act frees the slaves of every person who "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." Section Three of the Fourteenth Amendment speaks only of persons "engaged in insurrection." These drafting choices, Trump, Trump's lawyers, and Trump's legal supporters intone, demonstrate that the persons responsible for the Fourteenth Amendment thought that inciting an insurrection was different from engaging in an insurrection. If inciting an insurrection is not engaging in an insurrection, then persons who incite insurrections remain eligible for public office. Otherwise, Trump and his supporters maintain, the contemporaneous use of "shall hereafter incite" in the Second Confiscation Act would have been without legal significance. As anyone who reads the records of congressional debates or the U.S. Statutes at Large knows,

members of Congress then and now do not waste words.

This argument from the Second Confiscation Act not only exempts Donald Trump from Section Three's strictures, but Jefferson Davis, Robert E. Lee, and every confederate supporter, none of whom "engaged in insurrection" under the interpretive canons Trump is advancing. Jefferson Davis and many other confederates who held state or federal office before Civil War were too old to fight in the Confederate Army. They merely instigated and assisted secession efforts. If, however, the Second Confiscation Act demonstrates that persons who "incite" insurrections do not "engage" in insurrections, then presumably persons who "set on foot, assist, . . . and give aid or comfort" to insurrections also do not "engage" in insurrections. Otherwise, again, the use of those words in the Second Confiscation Act would be without legal significance. So much for disqualifying Jefferson Davis and most persons who held office in the Confederacy. But wait, to quote my friend Sandy Levinson, "there's more." Section One of the Second Confiscation Act speaks of "every person who shall hereafter commit the crime of treason against the United States." If we take seriously the principle that all words in the Second Confiscation Act have legal significance, then no person who committed the crime of treason against the United States engaged in insurrection under the Second Confiscation Act and Section Three. Robert E. Lee, his fellow generals, and all members of the confederate army were as eligible for public office immediately after Appomattox as they were immediately before Fort Sumter.

Taken "seriously" Trumpista textualism leads to the conclusion that only persons who did not incite the insurrection, set the insurrection

on foot, assist the insurrection, give aid or comfort to the insurrection, or commit treason during the insurrection by levying war against the United States engage in insurrection for Section Three purposes. Maybe a good lawyer can come up with a hypothetical Confederate who was disqualified from office on this reading of the Fourteenth Amendment. Whether any person living in 1866 was covered by this mindless textual understanding of Section Three is doubtful. Section Three, on the Trump textualist reading, fails to disqualify a single traitor.

Trumpista mindless textualism warps the Second Confiscation Act in other ways. Consider Section Six, which discusses confiscation of property. That section speaks of all persons "engaged in armed rebellion . . . or aiding or abetting such rebellion." If we assume every word of the Second Confiscation Act has legal significance, then those who incited the insurrection, set the insurrection on foot, or in any way gave aid or comfort to the insurrection were not subject to confiscation. We also have to figure out the relationship between "engaged in armed rebellion" as understood in Section Six, "engage in rebellion" in Section Two and "the crime of treason" in Section One. Presumably each phrase has a different meaning. "Engaged in armed rebellion" probably cannot fully encompassed both, otherwise on the textualism logic, that phrase should have appeared in Sections One or Two, Wasted words. The shame. Section Nine's discussion of fugitive slaves speaks of "persons . . . engaged in rebellion . . . or who shall in any way give aid or comfort." On the Trump reading, this section does not cover persons who committed treason, incited the insurrection, set the insurrection on foot, or assisted the rebellion. Who knew?

History explains why Republicans used various phrases to describe behavior they believed to be treasonous and merited disqualification from holding past and present office. The Second Confiscation Act was directed at all persons Republicans believed had committed treason during the Civil War. While that act was being debated, a judicial decision was handed down that many members of Congress interpreted as defining treason far more narrowly than the Republican majority. The different locutions in the Second Confiscation Act are the consequence of the Republican attempt to make sure that all behavior the congressional majority thought was treason was covered, even if some members of the judiciary did not think that behavior treasonous.

Senator Lyman Trumbull of Illinois, the prime mover of the Second Confiscation Act, maintained the bill was directed at "all rebels, and those who give them aid and comfort." Trumbull's bill was aimed at traitors. He informed Congress that the Second Confiscation Act "prescribe[s] a punishment for those persons who, though aiding and abetting the rebellion, cannot be reached and prosecuted for treason; and this bill applies to that class of persons." Republicans when considering the Second Confiscation Act repeatedly declared the measure is "directed by its supporters against individuals who have committed treason." They understood "aid and comfort" or "aiding and abetting" broadly. Representative William P. Sheffield of Rhode Island, quoting Joseph Story, declared,

If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable

purpose, all those who perform any part, *however* minute, or *however remote from the scene of the action*, and who are actually leagued in the general conspiracy, are to be considered as traitors.

Incitement to treason had long been considered treasonous behavior. Grand juries were charged, "successfully to instigate treason is to commit it." Trumbull would punish as treason "the instigators of [secession], the conspirators who set it on foot."

Justice Noah Swayne complicated matters in early 1862. His decision on circuit in *United States v. Chenoweth* quashed indictments for treason that charged persons with providing "aid and comfort to the enemies of the United States." This prong of the treason clause, Swayne reasoned, applied only to persons who assisted "a foreign enemy." Swayne stated in his opinion and afterwards that the same indictment would have been good had the government charged the defendants with providing "aid and comfort" to persons levying war against the United States. Nevertheless, many members of Congress feared that courts might declare unconstitutional any statute that declared assistance to treasonous endeavors to be a form of treason.

The final version of the Second Confiscation Act solved the potential problem with narrow judicial constructions of the treason clause. The first section punished treason per se. Good Republican judges would apply that clause to all behaviors Republicans recognized as treasonous. The second section punished various behaviors that Republicans thought treasonous, but feared courts might hold not covered by the treason clause of the Constitution. This language

would enable conservative Republicans and Democrats in the judiciary who might not support confiscation under Section One to support confiscation under Section Two. Contrary to Trump, Trump's lawyers, and Trump's legal supporters, the verbiage in Sections One and Two of the Second Confiscation Act do not reflect Republican understandings that engaging in treason was something different than inciting treason or committing treason. Republicans described different forms of treason and used overlapping phrases to ensure that judges who might have a narrower understanding of treason would sustain the sanctions for the behaviors that Republicans thought treasonous.

The Second Confiscation Act makes sense once one recognizes the Republican effort to prevent a narrow judicial understanding of treason from interfering with congressional efforts to free slaves and confiscate rebel property. Outside of the different punishments, which reflected Republican understandings that there were graduations of treason, the behaviors covered by Sections One and Two of the measure are afterwards treated identically and never distinguished. The president was authorized to confiscate the property of all persons whose behavior Republican members of Congress thought was treasonous. The army was forbidden to return escaped enslaved persons from all masters whose behavior Republican members of Congress thought was treasonous. No member of Congress who favored the Second Confiscation Act make the distinctions that Trump is seeking to import into Section Three of the Fourteenth Amendment. They described the bill as providing sanctions for all and only behavior they thought treasonous. Most significantly, these sanctions for behavior Republican members

thought treasonous included disqualification from holding public office. The third section of that measure declares that "every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States."

Mindful textualism and history demonstrate that the Second Confiscation Act (1862) supports claims that persons who incite and assist insurrections are "engaged in insurrection" as that phrase is used in Section Three of the Fourteenth Amendment. When read together, the use of "engaged" in Sections Two, Six, and Nine of the Second Confiscation Act clearly refer to all behaviors members of Congress thought treasonous. These behaviors, members of Congress declared during the debates over the Second Confiscation Act, included inciting and assisting insurrections. The Thirty-Seventh Congress explicitly declared inciting and assisting insurrections to be behaviors that warranted disqualification from public office. The Ironclad Oath of 1862 disqualifies persons whose behavior merited disqualification under the Second Confiscation Act. No evidence exists that the Thirty-Ninth Congress by using the phrase "engaged in insurrection" intended to narrow this longstanding policy on who was eligible to hold federal or state office in the United States.

Posted 7:59 AM by Mark Graber [link]

Balkinization: My Amicus Brief in the Minnesota Section Three Case

My Amicus Brief in the Minnesota Section Three Case

Gerard N. Magliocca

Here is my brief. Here is the Introduction:

Section 3 of the Fourteenth Amendment is the constitutional expression of President Lincoln's pledge in his Second Inaugural Address: "With malice toward none, with charity for all." Instead of imposing criminal punishments or other harsh penalties on former officials who served the Confederacy, the Framers of the Fourteenth Amendment chose only to exclude them from office. Moreover, they gave Congress the exclusive power to forgive these officials if the public interest warranted their return to office. This Court must now apply these principles to the January 6, 2021 attack on the Capitol and to Donald Trump's role in that attack.

This *amicus* brief relies on history to answer five legal questions. First, is the public use of violence by a group of people to prevent or hinder the execution of the Constitution an insurrection within the meaning of Section 3? Second, should the phrase "engaged in insurrection" in Section 3 be read broadly to include words as well as deeds? Third, does Section 3 apply to the Presidency? Fourth, does Section 3 apply to a former President who took an oath to support the Constitution only as President? Fifth, may Section 3 be enforced by state courts without an Act of Congress? The answer to all five questions is "Yes."

Posted 7:46 PM by Gerard N. Magliocca [link]

Balkinization: John Bingham Explaining That Jefferson Davis Was Ineligible to be President

John Bingham Explaining That Jefferson Davis Was Ineligible to be President

Gerard N. Magliocca

One issue in the current Section Three debate is whether the presidency is an "office . . . under the United States" subject to disqualification. A point that I made in my original Section Three article was that the presidency must be covered, because to say otherwise would mean that Jefferson Davis was ineligible for every office except the highest one. More research has followed from John Vlahoplus confirming that Americans in that era thought that Jefferson Davis was ineligible for the presidency.

I've found a speech by John Bingham in 1872 that provides additional evidence. By way of background, the Democratic Platform in that year argued for "universal amnesty" for all ex-Confederates and was a cause championed by Horace Greeley, the Democratic presidential candidate. Bingham gave a campaign speech in July1872 and pointed out that Congress recently gave to amnesty to most ex-Confederates:

"Why, then, do these gentlemen talk about general amnesty? Is the Republican Party to be stricken down unless Jefferson Davis is made eligible to be the *Democratic candidate for President of the United*

States next after Horace Greeley? [Laughter] That is all there is left to this amnesty question."

Later in that paragraph, Bingham said:

"All disabilities, I repeat, are removed, except from such persons as Jefferson Davis and a few others like him. I don't know that the country will suffer if they are never relieved from their disabilities. I don't know that it is essential to the safety of the Republic, or to the equal rights of any of the citizens of this Union, that Jefferson Davis, or Beauregard, or any man of that character who bore the commissions of the United States, and were bound by oaths to support the Constitution of the United States, and committed treason against the United States, should ever hereafter be permitted to be either *President* or Governor, Senator or Representative."

I added the italics for clarity's sake and will find a way to make entire speech available if I can.

UPDATE: The speech was made in Ohio can be found in *The Tiffin Tribune* on July 18, 1872.

Posted 9:37 PM by Gerard N. Magliocca [link]

Balkinization: John Bingham on the President as an "officer of the United States"

John Bingham on the President as an "officer of the United States"

Gerard N. Magliocca

Another issue in the Section Three debate is whether the President is an "officer of the United States." There are several angles to that discussion, but let me focus on one. How did John Bingham talk about that question at two high-profile moments during Reconstruction?

First, in 1865 Bingham gave the closing argument in the military trial of the conspirators to President Lincoln's assassination. Here is how he described the charges to the court:

"[C]onspiracy, in aid of a rebellion, with intent to kill and murder the Executive officer of the United States, and commander of its armies, and of the murder of the President in pursuance of that conspiracy."

Thus, Bingham equated "the Executive officer of the United States" with the President. He did the same thing in an 1868 speech in the House, where he said: "It is vain that gentlemen stand here and intimate that the President, because he is the executive officer of the United States . . . is above any statute."

Later in 1868, Bingham gave the closing argument in President

Johnson's impeachment trial. Bingham argued that Johnson committed a "high crime and misdemeanor" by violating the Tenure of Office Act based on his view that the Act was unconstitutional. (Set aside what you think of that claim for purposes of this post.) Bingham explained that it was clear that a judge would not be "charged with usurpation" if he set aside a law as unconstitutional:

"And is it not equally clear that a mere executive official of the United States, clothed with no judicial authority, and bound by his authority to take care that the laws be faithfully executed, who should thus decide or attempt to set aside as null and void a law of the United States, would be guilty of usurpation?"

Again, Bingham said that the President was an "official of the United States." He was not alone in this usage, of course, as President Johnson and many others at the time made the same point.

Posted 9:35 AM by Gerard N. Magliocca [link]

Balkinization

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an unanticipated
consequence of
Jack M. Balkin

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Monday, October 16, 2023

Newspaper Commentary on Griffin's Case

Gerard N. Magliocca

Another issue in the Section Three debate is the relevance of Chief Justice Chase's circuit opinion in *Griffin's Case*. I've been going through the newspaper commentary from 1869 on that decision, which stated, in part, that an Act of Congress was required to enforce Section Three. Here is how the *New York Sun* described Chase's opinion:

> "We consider that decision of Chief Justice Chase not only entirely erroneous in point of law, but the most immoral in its character and the most atrocious in its consequences ever pronounced by an American Judge. It is of far greater consequence and if possible is more odious, than the opinion of Chief Justice Taney in the *Dred Scott* case. If the decision of the Chief Justice is law, slavery may be re-established under the Constitution of the United States any day . . . The argument of inconvenience to which the Chief Justice resorts applies with much greater force against the abolishment of slavery than it does against the liberation of a few prisoners."

Posted 8:53 AM by Gerard N. Magliocca [link]

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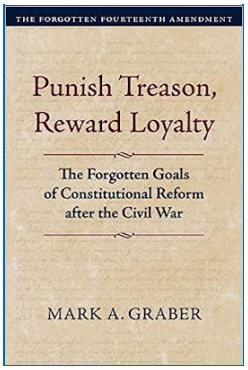

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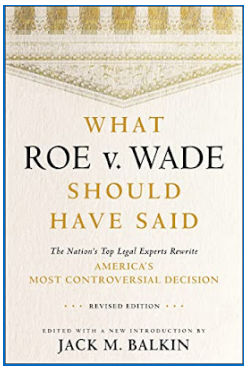

Jack M. Balkin, What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision - Revised Edition (NYU Press, 2023)

Balkinization: Two Unreported Section Three Cases From Reconstruction

Two Unreported Section Three Cases From Reconstruction

Gerard N. Magliocca

I have found two previously unknown Section Three cases from 1870 that were reprinted in newspapers at the time. The first was *United States v. Thompson*, a federal circuit decision from Kentucky that ordered the removal of a state court official pursuant to Section Three. The other was a grand jury charge by a federal circuit judge from Tennessee. I will try to make these publicly available as soon as possible. The grand jury charge is especially interesting.

UPDATE: *United States v. Thompson* (the Kentucky case) is in *The Times-Picayune* of October 16, 1870 at page 6. The most complete version of the federal grand jury charge can be found in *The Tennessean* of December 4, 1870 at page 3. The issues themselves are in a subscription database, so I'm not sure how to link to them yet.

Posted 12:18 PM by Gerard N. Magliocca [link]

Balkinization: 1870 Grand Jury Charge on Section Three and Constitutional Oaths

1870 Grand Jury Charge on Section Three and Constitutional Oaths

Gerard N. Magliocca

Another argument in the Section Three debate is whether the President is excluded because he takes an oath to "preserve, protect, and defend" the Constitution and not to "support" the Constitution as Section 3 says. Here is what a federal circuit judge told a Tennessee grand jury about that sort of argument in 1870:

> The oath which shall have been taken need not be in the precise words of the [Fourteenth] amendment: "To support the Constitution of the United States." That instrument, article six, section 3, provides that all officers, executive and judicial, both of the States and of the United States, shall be sworn in support of the Constitution of the United States. Under this provision there has been slight differences in the forms of these oaths, but all are conceded to comply with it when substantially, though not literally, they include an obligation to the Federal power. You will make no criticism, therefore, of this kind, but assume that all oaths are sufficient where the officer has been sworn into office in the usual form adopted in this state.

Posted 11:47 AM by Gerard N. Magliocca [link]

Balkinization: Dueling Disqualifications

Dueling Disqualifications

Gerard N. Magliocca

Let's go off the beaten track for a minute. Section Three of the Fourteenth Amendment is often described as unique. Other constitutional qualifications for office, the story goes, were straightforward rules that did not involve adjudicating misconduct. This is true with respect to the Federal Constitution. But not for state constitutions. Many state constitutions in 1868 prohibited duelers from holding office.

Here is the Mississippi Constitution of 1868:

"[A]ny person who shall hereafter fight a duel, or assist in the same, as second, or send, accept, or knowingly carry a challenge therefor, or go out of the State to fight a duel, shall be disqualified from holding any office under this Constitution, and shall forever be disfranchised in this State."

The South Carolina Constitution of 1868:

"[A]ny person who shall fight a duel, or send or a challenge for that purpose, or be an aider and abetter in fighting a duel, shall be deprived of holding any office of honor or trust under this State . . ."

The Arkansas Constitution of 1868:

"Any person who shall, after the adoption of this Constitution, fight a duel or send or accept a challenge for that purpose, or be aider or abettor in fighting a duel, either within this State or elsewhere, shall thereby be deprived of the right of holding any office of honor or profit in this state . . ."

The North Carolina Constitution of 1868:

"No person who shall hereafter fight a duel, or assist in the same as a second, or send, accept, or knowingly carry a challenge therefor, or agree to go out of this State to fight a duel, shall hold any office in this State."

There is an interesting analogy between the dueling and insurrection disqualifications. They both involve the use or attempted use of violence in lieu of lawful and peaceful methods to settle disputes. (Duels, of course, involve private disagreements rather than public ones.) And they both were defined broadly. Even being a second in a duel or fighting one out of state could get you banned from state office for life.

Were there any cases interpreting these provisions? I don't know, but I'll look.

Posted 8:14 AM by Gerard N. Magliocca [link]

Balkinization: The President is an Officer of the United States

The President is an Officer of the United States

Mark Graber

Researching whether the persons responsible for Section Three of the Fourteenth Amendment thought the president was an officer of the United States is a bit like researching whether George Washington had five fingers on his right hand. No one ever says so directly because the point is obvious. But when you do the research, you discover quotation after quotation in the last half of the 1860s that the president is an officer of the United States, quotation after quotation that Republicans thought Section Three of the Fourteenth Amendment covered all federal officers, and quotation after quotation that they did not distinction between the various oaths covered by the Constitution. The below covers my research on the subject. Gerard Magliocca has also done excellent research and provided me with some of the sources below. John Vladolus,'s "Insurrection, Disqualification, and the Presidency," 13 *British Journal of American Legal Studies* ___ (2023) is an excellent source.

The President of the United States was among the officials who took the oath of allegiance to the Constitution that under Section Three triggered disqualification for participating in an insurrection. The persons responsible for the Fourteenth Amendment sought to bar from present and future office all persons who betrayed their constitutional oath. "All of us understanding the meaning of the third

section," Senator John Sherman of Ohio stated, "those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office."

Proponents of free labor and racial equality in the Thirty-Ninth Congress repeatedly declared that persons who violated their oaths of office were not, in the words of Representative J.L. Thomas of Maryland, "safe to be trusted with the destinies of a great nation and of an injured and magnanimous people." Sometimes, they spoke of "an oath to support the Constitution." Sometimes, as in the case of Senator Luke Poland, they spoke only of "governmental oaths." No one pointed to the relevance of any distinction in the oaths members of the federal government were constitutionally required to take.

Republican members of the Thirty-Ninth Congress repeatedly emphasized that Section Three disqualification was triggered by violations of the constitutional oath of office. Senator Daniel Clark of New Hampshire when proposing what eventually became Section Three of the Fourteenth Amendment insisted that the constitutional qualifications for officeholding should "exclude all those who had taken an oath to support the Constitution of the United States, thereby acknowledging their allegiance to that Government and had proven false to that oath." Senators endorsed Clark's understanding the betraying the oath of office was the lynchpin of Section Three disqualification. Senator Jacob Howard of Michigan asserted, "where a person has taken a solemn oath to support the Constitution of the United States there is a fair moral implication that he cannot afterward

commit an act which in its effect would destroy the Constitution of the United States without incurring the guilt of at least moral perjury." Senator James W. Grimes of Iowa maintained that the ban on officeholding "is intended as a prevention against the future commission of offences, the presumption being fair and legitimate that the man who has once violated his oath will be more liable to violate his fealty to the Government in the future."

No member of the Congress that drafted the Fourteenth Amendment distinguished between the presidential oath mandated by Article II and the oath of office for other federal and state officers mandated by Article VI. Both were oaths to support the Constitution. Senator Garrett Davis saw no legal difference between the constitutional requirement that "all officers, both Federal and State, should take an oath to support" the Constitution and the constitutional requirement that the president "take an oath, to the best of his ability to preserve, protect, and defend the Constitution." Senator Jame Doolittle of Wisconsin declared that Congress need not pass laws requiring presidents to swear to support the Constitution because that "oath is specified in the constitution." Courts after the Civil War agreed that the precise wording of constitutional oaths made no constitution difference for Section Three purposes. Judge Emmons charged the grand jury that "[t]he oath which shall have been taken need not be in the precise words of the amendment" "To support the Constitution of the United States."

Republicans intended a comprehensive constitutional disqualification of all federal and state officers who violated the oath they took when entering office by participating in an insurrection. Members of the

majority party in the Thirty-Ninth Congress repeatedly pushed aside Democratic efforts to limit the scope of the proposed constitutional restriction on officeholding. Republican majorities defeated proposals to limit the ban on officeholding to persons who were in office when they joined the Confederacy, state officers, persons pardoned by the president and persons who had last taken an oath of office ten years before January 1, 1861.

Republicans when describing Section Three often stated that the persons subject to disqualification were those who held offices, which included past and presidents of the United States. They made no distinction between an officer, which included the president, an officer of the United States, and an officer under the United States. Speaking neither of "offices under" nor "officers of," Senator John Henderson of Missouri stated that Section Three "strikes at those who have heretofore held high office position." Senator Richard Yates similarly stated, "By the proposed amendment to the Constitution certain men are excluded from holding office, those who, having taken an oath to support the Constitution heretofore, have violated their oath. No member of the Thirty-Ninth Congress suggested any prominent government official was excluded by a legal technicality from the strictures of Section Three.

The persons responsible for drafting Section Three regularly described the president as "an officer of the United States." Representative Rufus Spalding of Ohio spoke of the presidency as "this high office of the Government." Many members of Congress, sometimes quoting President Andrew Johnson or Attorney General James Speed, declared that the president was "the chief executive

officer of the United States." John Bingham during the trial of the persons who conspired to murder Abraham Lincoln and during the impeachment trial of Andrew Johnson referred to the president as an "executive officer of the United States." Several members of the Thirty-Ninth Congress spoke of all elected members of the national government as "officers of the government." Representative Andrew Rogers of New Jersey included the presidency when he stated, "Without the States an officer of the Government cannot be elected." Davis referred to "the portion of the people who choose the officers of the government." No member of the Thirty-Ninth Congress betrayed even a hint that they understood the president not to be an officer of the United States.

One month after sending the Fourteenth Amendment to the states, the House of Representatives firmly rejected any constitutional distinction between the phrases "office under" and an "office of" as they were used in various constitutional provisions, including Section Three of the Fourteenth Amendment, which declares persons holding "offices of the United States" are subject to disqualification from "offices under the United States." Federal law prohibited a person who held "any office under the Government of the United States" that paid them more than $2,500 a year from receiving "compensation for discharging the duty of any other office." Representative Roscoe Conkling of New York claimed he did not violate this statute when taking a paid position as a federal prosecutor after being elected to Congress. Conkling insisted that the president and members of Congress could hold dual offices because they were officers "of the United States," not officers "under the United States." The select committee investigating Conkling disagreed unanimously. Members

rejected claims that the Constitution divided government officials into "officers of the United States" and "officers under the United States." The committee report declared, "It is irresistibly evident that no argument can be based on the different sense of the words 'of' and 'under.'" No difference existed between "an officer 'of' the United States, or one 'under' the government of the United States," the report concluded. "In either case he has been brought within the constitutional meaning of these words ... because they are made by the Constitution equivalent and interchangeable." The Report several times made reference to the president as holding an office that could sometimes be described as an "office of" and at other times an "office under" the Constitution.

The Andrew Johnson administration understood the phrase "officers of the United States" in Section Three to include to include all federal officers. The First Reconstruction Act disenfranchised persons in states under military rule who were "excluded from the privilege of holding office by [the] proposed [Fourteenth] amendment." Congress on March 23, 1867, implemented this disqualification by requiring all voters in former confederate states still under military rule to swear that they "had never taken an oath . . . as an officer of the United States . . . and afterwards engaged in insurrection or rebellion against the United States." Three months later, Attorney General Henry Stanbury issued an opinion declared that "office of the United States" in the bill implementing Section Three of the Fourteenth Amendment meant all federal officers. Stanbery insisted "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 has taken an official oath to support the Constitution of the United States, is

subject to disqualification." Disqualification hinged on the oath and holding an office, and an oath and holding office only. Stanbery's opinion maintained, "Two elements must concur in order to disqualify a person under these clauses: *first*, the office and official oath to support the Constitution of the United States; *second*, engaging afterwards in rebellion." He announced no presidential exception to this rule. Grant's Attorney General agreed. A.T. Akerman declared that "persons who held any National or State office prior to the late troubles, and afterwards adhered to the rebellion, are disabled by the XIVth Amendment, unless relieved by Congress."

Governing officials during the 1860s regarded the chief executive officer in any government as an officer of that government. Just as presidents were officers of the United States so, a broad consensus acknowledged, governors were officers of the state in which they held office. Senator Timothy Howe of Wisconsin spoke of "the Governor and every other officer in the State." Representative John Bingham of Ohio insisted that "all legislative, all executive, all judicial officers of every state be bound by an oath." Judicial officials treated the reference to "officers of a state" in the Fourteenth Amendment as encompassing all state officers. Judge Bond in *United States v. Powell* declared that Section Three was "broad enough to embrace every officer in the state." Again, no member of the Thirty-Ninth Congress hinted at any legal technicality that excluded any chief executive officer of any government from the list of officers of that government.

The Thirty-Ninth Congress did not insist "officer of" and "officer under" the Constitution are always "equivalent and interchangeable." The select committee noted occasional statements distinguishing the

persons who were “officers of the United States” and “officers under the United States” as well as instances where constitutional references to “officers under the United States” plainly excluded some federal officials. Several contemporary scholars have pointed to these and other quotations, and these and other examples when claiming that the President is not an officer of the United States for any constitutional purpose. They observe, for example, that the Constitution requires the president to commission “the officers of the United States,” but presidents do not commission themselves.

Nevertheless, no commentator who claims that the president is not an “officer of the United States” points to any statement made during the process of framing and ratifying the Fourteenth Amendment or, for that matter, any statement made during the 1860s that supports their position on the office of the presidency. The select committee report acknowledged that the Constitution is not perfectly consistent in usage and that any effort to impose perfect consistency would result in absurdities. The presumption in the Thirty-Ninth Congress was that constitutional phrases should be understood according to common understandings. The select committee report insisted that the “enlarged and general sense” determined the meaning of constitutional words rather than “some technical sense” unless the context made clear that the technical sense was the correct meaning.

Courts in the wake of the Civil War rejected carving out a presidential exception to the persons and offices subject to Section Three. Federal Circuit Judge Halmor Hull Emmons, a Grant appointee, when charging a federal grand jury in Tennessee on Section Three declared, “Without perplexing you with the difficult classifications or nice

distinctions between political, judicial, or executive officers, I charge you that it includes *all* officers" (emphasis in original).

Democrats and other opponents of the Fourteenth Amendment acknowledged that Section Three disqualified presidents who participated in insurrections. Garrett Davis proposed a revised version of Section Three that he declared would be limited to "all federal officers." He did not suggest that his amendment was adding presidents to the list of persons subject to disqualification. Senator Peter Van Winkle of West Virginia proposed a constitutional amendment granting amnesty after a period of time to all persons not covered by Section Three. He described his proposal, which spoke of insurrections past and future, as encompassing "the mass of the people South, including a great many who were misled by those upon whom they usually depended for information as to the proper conduct they should pursue, and who were forced into the service under other circumstances, wherein they cannot be said to have been morally blamable." A president of the United States clearly does not fit the description of the people Van Winkle thought not covered by Section Three.

Prominent scholars who insist the President is not an "officer of the United States" acknowledge that the phrase "colloquially . . . appl[ies] to the president and that "[t]he Senate in debating Section 3 of the 14th Amendment was of the view that the president is an officer of the United States" (the House of Representatives as well). Professor Stephen Calabresi and others nevertheless insist that "the phrase is a legal term of art, and the drafters of Section 3 had the burden of specifying clearly that they meant for the President to be disqualified

from office as well as appointed 'Officers of the United States.'' This is not a claim about any opinion uttered during the 1860s about Section Three of the nature of the presidential office or any contemporaneous understanding of the property interpretation of constitutional phrases. Historical analysis demonstrates, as Calabresi acknowledges, that the persons responsible for Section Three thought the president was subject to disqualification. The records of the Thirty-Ninth Congress provide no evidence that any Representative or Senator was self-consciously aware that the language of Section Three contained a specialized "legal term of art" or thought the drafters of any provision of the Fourteenth Amendment had an obligation to be clear when making colloquial usage of words that were sometimes used as a legal term of art. The Select Committee adopted the contrary rule of interpretation, insisting on the general meaning of constitutional words unless the context made clear that the more technical meaning was correct. None of the many lawyers who sat in the Thirty-Ninth Congress or who wrote commentaries on the Fourteenth Amendment after the drafting pointing out that because of a legal technicality Section Three did not disqualify a past or present president who engaged in an insurrection or rebellion but never held any previous state or federal office. No one has ever advanced a commonsense reason why such an exemption should exist. Whether Section Three should nevertheless be interpreted as containing that exemption as a matter of "original meaning" or some other constitutional modality is a question that can be resolved only by constitutional theory in the twenty-first century, not by anything said or done in the nineteenth century.

Two articles insist that the framers of the Fourteenth Amendment

intended to exclude the president or at least were not clear on that point. The first article making this "originalist" claim, by Josh Blackman and Seth Tillman, makes not a single reference to the persons who framed the Fourteenth Amendment, the persons who ratified the Fourteenth Amendment, commentary at the time the Fourteenth Amendment was ratified, or any quotation supporting the opinion that the framers thought the president was not covered by Section Three made within a decade of the framing and ratification of Section Three. Kurt Lash promises to produce "drafts" of Section Three that explicitly refer to the President, but only one of the drafts he produces makes explicit reference to the President of the United States. The author of that draft, Representative Samuel McKee of Kentucky, abandoned that explicit reference to the President during the debates over the Fourteenth Amendment, but never in any lengthy speech did he indicate any difference in the scope of his two proposals. Rather, his remarks make clear McKee took for granted presidents and the presidency were covered by both his proposed versions of Section Four. He declared, "I desire that the loyal alone shall rule the country which they alone have saved," and that proposal "cuts off the traitor from all political power in the nation." McKee treated "office," "office of trust or profit under the Government of the United States," and "office under this Government" as synonyms. The goal of constitutional reform was to "seize them forever from office."

The Republican decision to neuter politically the ex-confederate leadership rather than disenfranchise the ex-confederate masses prevented in practice the Electoral College from being a barrier against Jefferson Davis, Robert E. Lee or similar figures from becoming President or Vice-President. Lash wrongly claims that

"Section Three . . . ensures[s] that only loyal electors voted for the President of the United States." Robert E. Lee was disqualified from participating in the Electoral College, but every former member of the Confederate Army who had not held state or federal office before the Civil War remained constitutionally qualified to serve on that body. All persons who committed treason during the Civil War could vote for their beloved Robert E. Lee or Jefferson Davis (who was less beloved in the South) at the ballot box and traitors who had not taken an oath to support the United States as state and federal officers could so vote as members of the Electoral College. Gerard Magliocca points out that at least three former confederate soldiers, including General John B. Gordon, one of Lee's "most trusted" officers, were presidential electors from Georgia in 1868. Unsurprisingly, given the likely composition of Electoral College members from former confederate states, no proponent of the Fourteenth Amendment ever expressed Lash's confidence that the Electoral College was a bulwark against a disloyal president or that the existence of the Electoral College explained the otherwise bizarre Republican decision to permit former confederate leaders to become president, but not occupy lesser offices.

The past and present concur that the exceptional president who never held any other federal office is covered by Section Three of the Fourteenth Amendment. Any effort to scour the historical record from 1866 to 1868 finds numerous assertions that everyone thought presidents were covered and not a single statement that suggests presidents were not covered. If the point of Section Three is to prevent people from again taking office who violated their oaths to the Constitution by engaging in violent insurrection, no reason exists for

carving out a presidential exception. If, as the Colorado court found, President Trump engaged in an insurrection, he is not constitutionally qualified to be president of the United States or assistant dogcatcher of River City, Iowa, if that position is an office established by the state constitution.

Posted 7:28 AM by Mark Graber [link]

Balkinization: The President's Oath to Support the Constitution

Saturday, November 18, 2023

The President's Oath to Support the Constitution

Gerard N. Magliocca

"My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands."

President Grover Cleveland, Special Message to Congress (Mar 1, 1886). The "demands" involved a congressional request for certain documents.

UPDATE: There is also Andrew Jackson's Veto of the Second Bank of the United States:

"Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision."

UPDATE 2: In 1863, the Indiana Supreme Court explained: "The President does not derive his war power from his oath to support, protect, and defend the Constitution." Griffin v. Wilcox, 21 Ind. 370 (1863).

Posted 12:53 PM by Gerard N. Magliocca [link]

Balkinization: A Section 3 Interpretive Exercise

A Section 3 Interpretive Exercise

Gerard N. Magliocca

Here's a question that came up almost immediately after Section Three was ratified: "Are insurrectionists barred from serving as state legislators?" To answer this question, let start with the language:

> 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.

Here are two reasons why some people said that the answer was no. First, Section Three does not list state legislative positions as a covered office. It just says "office . . . under any state." Second, federal legislative positions are specifically listed. They are not considered federal offices. Thus, a parallel reading would say that state legislative positions are not state offices.

This interpretation was rejected. In 1869, President Grant announced in his Annual Message that many members of the Georgia legislature were ineligible to serve due to Section Three. The Union Army then removed these legislators. Later, state legislators in Virginia were indicted for serving in office illegally under Section 3, though they received amnesty prior to trial.

What's the takeaway here? One is that Section Three was applied in a purposive and all-inclusive way subject to congressional amnesty. The other is that a finer textual reading was considered and rejected almost immediately.

Posted 8:54 AM by Gerard N. Magliocca [link]

Balkinization: Presidents as Officers of and under the United States: The View from the Thirty-Ninth Congress, Second Session

Presidents as Officers of and under the United States: The View from the Thirty-Ninth Congress, Second Session

Mark Graber

The historical evidence demonstrates that the persons responsible for Section Three of the Fourteenth Amendment thought they had included former presidents as persons subject to disqualification, even when such persons had never held previous office, and included the presidency as an office to which insurrectionists were disqualified. No one in 1866 who supported the constitutional ban on present and future officer holding by those past and present office holders who engaged in insurrection would have thought that Donald Trump was not disqualified from seeking the presidency in 2024 because former President Trump had never been an officer of the United States or because the presidency he hungers after is not an office under the United States. I presented the evidence for this historical claim in a draft up on SSRN and in several blog posts found here and here. John Vladolus,'s "Insurrection, Disqualification, and the Presidency," 13 *British Journal of American Legal Studies* ___ (2023) is another excellent source (as are the collected writings of Gerard Magliocca).

My past work included a survey of all uses of "office(r) of" and "office(r) under" during the first session of the Thirty-Ninth Congress, the session in which the Fourteenth Amendment was drafted. This survey found multiple uses of these phrases to describe the President of the United States, a committee report that self-consciously declared all elected officials of the national government to be officers, "officers of the United States," and "officers under the United States" unless the Constitution clearly specified otherwise, and no claim denying that presidents were "officers of the United States" or denying that presidents were "officers under the United States." As important, the survey found that members of Congress repeatedly described Section Three as directed at all officials and all rebels, implicitly treating the phrases "office(r) of" and "office(r) under" as having no independent constitutional significance. The Republicans who supported Section Three maintained that they were disqualifying from public office all rebels who had previously held public office.

This blog post details the results of my survey of all uses of "office(r) of" and "office(r) under" during the second session of the Thirty-Ninth Congress, the session in which Congress began implementing the proposed (not yet ratified) constitutional ban on officeholding by past and present office holders who engaged in insurrections. To no surprise, members of Congress from December 3, 1866 to March 3, 1867 used the phrases "office(r) of" and "office(r) under" exactly as they had used these phrases from December 4, 1865 to July 28, 1866. The summary is almost the same, with an interaction between two leading Republicans replacing the committee report as a particularly self-conscious episode in which presidents were acknowledged as officers of the United States. This survey found

multiple uses of these phrases to describe the President of the United States, an interaction between Representatives James Ashley of Ohio and John Bingham of Ohio in which both self-consciously declared the president to be an "officer of the United States," and no claim denying that presidents were "officers of the United States" or denying that presidents were "officers under the United States." As important, the survey found that members of Congress repeatedly described Section Three as directed at all officials and all rebels, implicitly treating the phrases "office(r) of" and "office(r) under" as having no independent constitutional significance. Representative Robert C. Schenck was among the many Republicans who equated holding "office under the General Government" with "holding office."

Members of the Thirty-Ninth Congress repeatedly spoke of the president as an officer of the United States. Senator Benjamin Wade of Ohio maintained that the president was "the chief executive officer of the United States." Representative Robert S. Hale of New York referred to the president as "the chief executive officer of the Government." With specific reference to presidential impeachments, Hale stated, "before such charges can be made here against any officer of the Government he must be put on trial on the constitutional form."

Republicans without contradiction declared the president to be an officer of the Government during the most important political debates held during the second session of the Thirty-Ninth Congress. Representative James Garfield of Ohio when talking about presidential removals stated, "I hope that all officers of the Government will have by this bill a ground to stand upon, and that none of them, whether

civil or military, may be removed at the will and pleasure of any officer of the United States." Senator Jacob Howard of Michigan implicitly referred to the president when he indicated "some branch or officer of" the Government was responsible for Jefferson Davis's confinement. Representative Thaddeus Stevens of Pennsylvania in a speech defending the constitutional authority of the Congress was speaking of the president of the United States, among others, when he asserted, "No other officer of the Government, possesses one single particle of the sovereignty of the nation."

Bingham, generally regarded as a particularly important framer of the Fourteenth Amendment, if not the framer of the Fourteenth Amendment, self-consciously maintained the president to be an officer of the government in two central political debates. The first was over a provision in what became the Tenure of Office Act, the measure under which President Andrew Johnson would eventually be impeached. A draft of that bill declared that any officer of the Government of the United States who shall appoint or commission any person to an office in violation of the provisions of this act shall be deemed guilty of a misdemeanor in office, and on conviction thereof shall be dismissed from office." Bingham objected, pointed out that that language "clothes the civic courts with the power to remove any officer from office, the President not accepted." The phrase "shall be dismissed from office" was then removed from the final bill. Less than a week later, Bingham made the same point when Ashley called for an investigation to determine whether "any officer of the Government of the United States." Bingham immediately objected claiming that Ashley's resolution covered "every civil officer in the United States." During the colloquy that followed, both made clear that their reference

to “officer of the United States” included the President of the United States.

This consensus that the president was an officer of the United States was bipartisan. Such opponents of the Fourteenth Amendment as Representative Benjamin Boyer of Pennsylvania, Representative Michael Kerr of Indiana, Senator Edgar Cowan of Pennsylvania, Senator James Dixon of Connecticut, Senator Williard Saulsbury of Delaware, and President Andrew Johnson referred to the president as “the “first officer of the Republic,” “the chief executive officer of the United States,” the highest officer of the Government,” and "the chief executive officer of the country.” Dixon declared that he knew “that not a single officer of the General Government from the President down can receive his salary without an appropriation from Congress.” Democrats were as prone as Republicans to include the president when talking about officers of the United States. Representative John Chanler of New York, after asserting with respect to the Ashley resolution discussed above, “Whether the President of the United States be innocent of guilty of the crimes and high misdemeanors charged to him in the resolution is a question for determination in the future,” declared, “I stand here ready to initiate an examination into the conduct of any office of the Government who may be charged in good faith with impeachable offenses.” Senator Charles Buckalew of Pennsylvania with reference to the president stated, “no Senator will contend that Congress cannot prohibit by law the abuse of his authority by any officer of the United States

Federal law reflected this consensus that presidents were not above the law of Section Three. The First Reconstruction Act declared that

persons disqualified under Section Three could not vote for or be a member of a "convention to frame a constitution for any of said rebel states" or be eligible for voting or holding office "under such provisional governments. Presumably, no one thought past and present presidents who engaged in insurrections were an exception to this policy.

Such members of Congress as Senator George Williams of Oregon and Senator Lyman Trumbull of Illinois assumed governors were officers of a State, an assumption inconsistent with the view that presidents are not officers of the United States. The Committee on Public Lands recommended that "no person shall ever be employed as a professor or teacher in the said agricultural college in the State of Tennessee who had ever held military of civil office under the so-called confederate government, or under the rebel State government of Tennessee." Presumably this covered governors.

When members of the Thirty-Ninth Congress spoke of Section Three, they maintained that the provision covered all leading participants in insurrections and all governmental officers. No member of Congress treated ""office(r) of" and "office(r) under" as encompassing a more limited number of officers or offices than "office(r)." Trumbull stated that Section Three "excluded from office . . . every person who had held an office of any considerable importance," or any "office of significance or importance." Representative Benjamin Loan of Missouri insisted that Americans would "by a ratification of the proposed constitutional amendment disqualify all of their rebel leaders from holding any office under the Government of the United States." No Republican hinted at a presidential exception to Section

Three. Representative William Dodge of New York asserted, "the men who have ever held office under the confederate government are to be entirely disfranchised."

Republicans made clear that after ratification of the Fourteenth Amendment, rebels need not apply to any governmental position. Senator Charles Sumner of Massachusetts claimed, "If rebels cannot be officers under the Government they ought not to be voters." Ward declared, "The leaders of the rebellion should never again return to power in this country. . . . They should never be clothed with trust in this Government. . . . None of these restless, dangerous men should ever again cast a vote or hold an office under this Government. . . .. . . [L]et them go, disfranchised, shorn of all political power." Such comments are hardly consistent with an understanding that presidents were not disqualified or that former rebels were eligible for the presidency. Representative George Miller of Pennsylvania expressed the Republican consensus when he stated that "leading rebels . . . seem extremely anxious to be in a position to make and administer laws for the loyal people of the country. . . . But in the mean time these persons must understand that in Government affairs they must take a back seat."

The penchant of some originalist to insist that, despite this evidence, the original meaning of the Fourteenth Amendment is that presidents are not officers of the Government is Exhibit A in the demonstration that originalism has nothing to do with history. The persons responsible for the Fourteenth Amendment thought the presidency was an office of the United States and the president was an officer under the United States. No good reason exists for carving out a

presidential exception to the offices and persons subjected to Section Three disqualification. Any method of constitutional interpretation that makes the ahistorical conclusion that, against all common sense, Donald Trump is constitutionally qualified to serve as president of the United States, ought to be disqualified as a theory of constitutional interpretation on that ground only.

Posted 11:03 AM by Mark Graber [link]

Balkinization: Some Additional Section 3 Resources

Some Additional Section 3 Resources

Gerard N. Magliocca

The Colorado Supreme Court will hear argument next week in the Trump eligibility challenge. Here are some new materials that I've found in my research that might be of interest to our readers:

1. State v. Lewis, 22 La. 33 (1870) (upholding the removal of a state judge pursuant to Section Three). The judge was a state legislator in Georgia before the Civil War and served in the Confederate Army. He moved to Louisiana after the war and became a parish judge, but he did not receive amnesty. Neither I nor anyone else noticed this decision until recently, in part because it is brief.

2. *The Daily Journal* (Montpelier, VT), Oct. 19, 1868 (explaining the Fourteenth Amendment to its readers). "The third article of the fourteenth amendment excludes leading rebels from holding offices in the Nation and the State, from the Presidency downward, until Congress, by a two-thirds vote of each branch, shall have removed the disability."

There are many newspaper articles from this era the say the same thing. At some point I'll list them all.

3. At least one member of the Supreme Court (Lucius Q.C. Lamar of

Mississippi) needed amnesty to hold his seat. John Bingham himself introduced Lamar's amnesty petition in the House in 1872. (Lamar joined the Court in the 1880s). Justice Howell Jackson of Georgia, who served for a few years in the 1890s, was given amnesty by the general statute in 1872.

4. I highly recommend Sherillyn Ifill's op-ed in *The Washington Post* from the other day.

Posted 8:26 AM by Gerard N. Magliocca [link]