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"Seven Questions on Section 3: A Response to Professor Kurt Lash"

A reply to Prof. Kurt Lash's response to the brief by Profs. Akhil Amar & Vikram Amar.

EUGENE VOLOKH | 2.8.2024 12:36 PM

I asked Prof. Akhil Amar whether he was inclined to respond to Prof. Lash's response to the Amar brothers' amicus brief in *Trump v. Anderson*, and Prof. Amar suggested that I might publish a reply by Prof. Amar's research assistants at Yale Law School (Arshan Barzani, Samarth Desai, Jacob Hutt, and Jordan Kei-Rahn), which I am glad to do; all that follows below is their work:

[* * *]

We are research assistants to Professor Akhil Reed Amar at Yale Law School. We write to address some spirited but misguided critiques Professor Kurt Lash has made in response to the amicus brief of Professor Amar and Professor Vikram Amar in *Trump v. Anderson*.

Respectfully, we also write to raise serious concerns about the reliability of Professor Lash's writings on Section 3 and to make clear what the historical record does—and does not—say.[1]

By answering seven questions, we will show that (1) there was a First Insurrection, (2) John B. Floyd, in addition to other Buchanan Administration officials, participated, (3) Section 3 is self-executing, and (4) Section 3 covers the presidency.

[1.] Was there really a First Insurrection?

Yes. In the months before Abraham Lincoln's inauguration in 1861, anti-Lincoln men in Washington plotted to undermine the Union and derail the peaceful transfer of power. Secretary of War John B. Floyd sent arms southward so that they would be "on hand when treason wanted them."[2] Lincoln arrived in Washington under the cover of night. "There is little doubt that he would have been assassinated if he had attempted to travel openly throughout his journey," President Grant reckoned in his famous memoirs.[3]

In a nutshell: Unionists feared that secessionists would storm the Capitol on February 13, 1861.[4] On that day—the equivalent of January 6, 2021—Congress would count the president-elect's electoral votes. But unlike in 2021, the Capitol's guardians, led by Brevet Lieutenant General Winfield Scott, were ready. Anyone who tried to obstruct the count, Scott promised, "should be lashed to the muzzle of a twelve-pounder and fired out of a window of the Capitol."[5] Though a "howling, angry mob" had triggered "much street-fighting," the count in the Capitol went off seamlessly.[6] That was thanks to General Scott.[7]

As Lincoln's inauguration approached, legislators again feared a "treasonable conspiracy, to resist the inauguration by force of arms [and] to seize the Federal capital."[8] Again, "a mob of soldiery organized from the States of Maryland and Virginia, and States south of Virginia, would have defeated the inauguration of the Chief Magistrate" if not for Scott's preparations.[9]

The insurrectionists of 2021 succeeded where their predecessors had failed. Spurred on by the outgoing president, they breached the Capitol, where the Confederate flag flew for the first time.[10]

[2.] Did Americans in the 1860s view the First Insurrection as an insurrection?

Absolutely, clearly, and contemporaneously. On February 7, 1861, six days before the certification of Lincoln's electoral vote, Representative Henry Winter Davis proclaimed on the House floor that "cabinet ministers have violated their oaths by organizing *insurrection*."[11] When one Vermont politician asked General Scott to ensure the peaceful counting of votes, Old Fuss and Feathers reassured him: if any man attempted "to obstruct or interfere with the lawful count of the electoral vote for President," it would be "my duty to suppress *insurrection—my duty!*"[12] Meanwhile, a New Hampshire newspaper blamed "[t]raitors in the old lady's Cabinet" for "supply[ing] the conspirators with the means of *insurrection* from the public arsenals," such that "General Scott [was] hampered in his measures to defend the capital."[13] All this before the Civil War began.

By 1868, the First Insurrection was deeply seared into America's historical memory. On the Senate floor in February 1868, as the Fourteenth Amendment was being drafted, Senator Jacob Howard called the conspiracy to prevent Lincoln's inauguration a "*perfectly notorious fact*"—so notorious that it was known even to "the humblest citizen of the Republic on the remotest boundary of the Republic."[14]

Professor Lash claims that there could not have been a First Insurrection because, in Howard's words, "there was flagrant war" by December 29, 1860, the day Floyd resigned.[15] Lash thus suggests that all insurrections at the time were part of the Civil War. The problem with this claim is that it contradicts a scholar who wrote in a 2021 book that "the Civil War began" only in April 1861, when "South Carolina fired on Fort Sumter."[16] That scholar is Kurt Lash. As it happens, the scholarly consensus on the start date of the Civil War agrees with (the 2021) Lash.[17]

[3.] Did John B. Floyd take part in the First Insurrection?

Yes, both in perception and reality. Floyd was a meme, an archetype, the Benedict Arnold of his time, the most infamous actor in a broad conspiracy to derail Lincoln from assuming the presidency.[18] This conspiracy scattered union forces, weakened the capital's defenses, sought to disrupt the electoral-vote count, and plotted Lincoln's assassination.

Before resigning in December 1860, Floyd used his office as secretary of war to scatter union forces and divert munitions away from key Northern forts, thus fortifying the South. Floyd's efforts heightened the threat to the Capitol in the weeks leading up to Lincoln's inauguration. Though General Scott was able to hold the Capitol, he had fewer soldiers and arms *because of* Floyd.

In the early 1860s, Americans understood that Floyd laid the groundwork for his coconspirators to derail Lincoln's presidency. On December 29, 1860, Justice Robert Grier wrote that Floyd was "a traitor & one who has conducted

his office in a manner to disgrace this administration & plunder the country, & who is now plotting its destruction."[19] On February 7, 1861, Representative Davis declared that Floyd had "supplied arms to be forthwith used in making war against their rightful owners."[20] As Representative Isaac Arnold recalled in 1862, "There is no doubt now but that the chief conspirators—Davis, *Floyd* … and others— … intended to assassinate President Lincoln!"[21]

Floyd's actions cannot be—and were not—seen in isolation. The First Insurrection was much farther-reaching than one man's treachery. Not all actors in this vast conspiracy knew the names, much less the specific plots, of all the backstage actors. What they did have in common was a goal: to keep President-elect Lincoln from the White House. Americans who lived through the First Insurrection knew, to be sure, that Floyd would not be the one to pull the trigger on Lincoln. But they knew, too, that he would be to blame for giving aid and comfort to the assassin who would.

Professor Lash notes that the House found no centrally organized group planning a plot to foil the Inauguration. But the House merely found no *unified* organization directing such a plot.[22] Basic conspiracy law holds that conspiracies need not have central coordination. If A conspires with B who conspires with C, all are linked in one conspiracy—even if A does not even know that C exists (and vice versa) and even if their specific plans diverge in many details.[23] (This is why the Amar brief repeatedly speaks of, for example, "Floyd *and other top officials*" and "Floyd *and his allies*."[24])

The key point is that, in the minds of the framing Congress and ratifying public, Floyd was guilty for the plot during and after the war. The story of Floyd and his cabinet co-conspirators was the paradigm case that shaped Section 3.

In 1862, numerous senators who opposed seating alleged Confederate sympathizer Benjamin Stark invoked the specter of Floyd. If Stark could become a senator, they argued, Floyd could, too.[25] This debate helped motivate Congress to pass the Ironclad Oath—the statutory precursor to Section 3—months later.

In 1868, the Senate refused to seat Philip Francis Thomas of Maryland, who served as treasury secretary under President Buchanan.[26] Championing the refusal, Senator Jacob Howard argued that when "principal public functionaries" including Thomas and Floyd had resigned from Buchanan's cabinet, they had been perfectly aware of the cabal "endeavoring to … beleaguer the city of Washington with the design of seizing it … and, at all events, preventing the inauguration of President Lincoln."[27] Howard then singled Floyd out. "No man could be so ignorant and be in the Cabinet of Mr. Buchanan, as not to understand the tergiversations, the twistings, and the windings of *John B. Floyd*."[28]

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Notably, Floyd and Thomas were infamous not for taking part in the Confederacy, but for their duplicity as members of President Buchanan's Cabinet.[29] Indeed, Thomas was never even accused of formally joining the Confederacy. His alleged treason occurred *entirely* during the First Insurrection before Sumter and included simply resigning from Buchanan's Cabinet—abandoning his critical post at a critical hour. As Senator Jacob Howard explained in 1868, "[N]o greater encouragement could have been given to the rebels than the resignation of the leading Cabinet officers … Does anybody doubt that *John B. Floyd* was a traitor? … Was Mr. *Thomas* any better?"[30]

[4.] According to Professor Lash, no one at the time said Section 3 was self-executing. Is that true?

No. Actually, many framers said the precise opposite.

Professor Lash writes that he has "not discovered a single person who thought the text was self-executing and capable of disqualifying a candidate prior to some kind of adjudication."[31] But the historical record has such persons aplenty.

In June 1868, Senator Oliver Morton declared that oath-breaking insurrectionists "will become disqualified the *moment* the fourteenth article becomes a part of the Constitution"—no prior adjudication or enabling legislation required.[32] Senator George Williams said much the same thing.[33] So did Senator Thomas Hendricks, even though he opposed the Fourteenth Amendment.[34] So, even, did Jefferson Davis's own legal team. (And Chief Justice Salmon P. Chase, before he flip-flopped in *Griffin's Case*.)[35]

Then there is Grant, who also understood Section 3 to be self-executing and instructed his military commanders to act accordingly. When Brevet Major General Edward Canby accordingly disqualified candidates-elect in Virginia, his conduct received the personal approval of Representative John Bingham, a chief architect of the Fourteenth Amendment.[36]

And the list goes on.[37] Professor Lash's portrayal of the legislative and post-enactment history collapses under scrutiny.

[5.] According to Professor Lash, Thaddeus Stevens said Section 3 "will not execute itself." Is that true?

Not at all. Stevens was referring to Section 2, not Section 3. In repeatedly citing Representative Thaddeus Stevens for the proposition that Section 3 "will not execute itself," Professor Lash gets the historical record seriously and unfortunately wrong.[38]

When Stevens made this remark, the draft third section was an utterly different provision from what would become ratified as Section 3. This draft provision envisioned the *disenfranchisement* of millions of people, while the final, radically reshaped amendment mandated the *disqualification* from holding office of a *few thousand oath-breaking* insurrectionists. (The draft read: "Until [July 4, 1870], all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.")[39]

More importantly, when Stevens said, "it will not execute itself," he was referring not to the third section, but to what would eventually become *Section 2* of the Fourteenth Amendment.[40]

Here is the proof: Stevens was responding to Bingham, who worried that this never-ratified draft third section would have required the federal government to send federal election officers into every state to prevent rebels from voting.[41] Stevens said that Bingham's concern applied with equal force to Section 2:

> I say if this *amendment* prevails you must legislate to carry out *many parts* of it. You must legislate *for the purpose of ascertaining the basis of representation*. You must legislate for registry such as they have in Maryland. It will not execute itself, but as soon as it becomes law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do. *So that objection falls to the ground*.[42]

Stevens was saying that other "parts" of the "amendment" as a whole—specifically, the provision related to "ascertaining the basis of representation"—would not execute themselves.[43] That provision on apportionment evolved into Section 2 of the Fourteenth Amendment, which reduces congressional representation for states that disenfranchise citizens. Lash is thus doubly wrong to invoke a statement not even about Section 3, in a debate not even about the final version of Section 3. [44]

[6.] Have defenders of the "president is not an officer" theory produced even a single prominent framer or ratifier who clearly stated their position?

Not one, to the best of our knowledge. Despite repeated public challenges by Professors Amar, Mark Graber, and Gerard Magliocca, Professor Lash has not cited even a single participant of the framing or ratifying debates who clearly expressed his view that the president is not an officer for the purposes of Section 3 (that is, without immediately retracting their opinion).

By contrast, scholars on the other side have found *dozens* of examples of Americans referring to the president as an officer throughout the 1860s.[45] Countless others did, too, in antebellum America, including Alexander Hamilton in *Federalist* No. 69.[46]

Lash has pointed to Senator Reverdy Johnson.[47] But when Johnson expressed his view that Section 3 omitted the presidency, he was interrupted —mid sentence—by Senator Lot Morrill, who clarified that the presidency was included in the phrase "any office, civil or military, under the United States." Johnson then recanted. "Perhaps I am wrong as to the exclusion from the Presidency; *no doubt I am*; but I was misled by noticing the specific exclusion in the case of Senators and Representatives."[48]

[7.] The Ironclad Oath of 1862 expressly applied to all offices *except* the presidency. Doesn't that mean the presidency is an office?

Exactly. The Ironclad Oath, the forerunner to Section 3, applied to "every person elected or appointed to any office of honor or profit under the government of the United States … *excepting the President of the United States*."[49] By the rule against surplusage, the text of the Ironclad Oath demonstrates that Civil War Congresses viewed the president as holding an "office under the government of the United States."

Professor Lash has claimed, absurdly, that the Ironclad Oath "blows a hole through the already weak originalist case for disqualification" (even though he did not cite it in his brief to the Supreme Court).[50] How does a statute that expressly exempted the presidency from its coverage of all "office[s] … under the government of the United States" *cut against* the idea that the presidency is an office under the United States?

Lash points to Senator Lyman Trumbull, the sole member of Congress during the statute's drafting to argue that that presidency was not an "office" under the draft statutory language. But by the time the bill landed on President Lincoln's desk, Trumbull had yielded. In fact, he was the one who had offered the *original proposal* of language for an express presidential exception.[51] He did so because his colleagues were emphatic that the president was indeed an officer.[52] This statutory language was subsequently quoted dozens of times in Congress and reprinted in newspapers across the nation throughout the 1860s, making clear to all members of Congress and ratifiers that the president was indeed an officer.[53]

A single senator raised the idea that the presidency was not an office. In response, Congress spoke with one voice to resoundingly reject that view.

[* * *]

In sum: Yes, there was a First Insurrection. Yes, John B. Floyd took part in it. Yes, Section 3 is self-executing. And yes, it covers the President as an officer of the United States. With respect to Professor Lash, he has gotten all of these questions wrong, seriously so. In addition to consulting the Amar brief and other briefs filed by distinguished scholars and historians, fair-minded readers with any lingering doubts about our analysis should follow the footnotes, scrutinize the historical record, and see for themselves.

[1] We are not the first to do so. *See* Will Baude & Michael Paulsen, *The Use and Misuse of Section's Three's "Legislative History:" Part I*, Reason: Volokh Conspiracy (Feb. 6, 2024), https://reason.com/volokh/2024/02/06/the-use-and-misuse-of-section-threes-legislative-history-part-i; Will Baude & Michael Paulsen, *The Use and Misuse of Section's Three's "Legislative History:" Part II*, Reason: Volokh Conspiracy (Feb. 6, 2024), https://reason.com/volokh/2024/02/06/the-use-and-misuse-of-section-threes-legislative-history-part-ii [https://perma.cc/93H2-7MAX].

[2] 1 Ulysses S. Grant, Personal Memoirs of U.S. Grant 226 (New York, Charles L. Webster & Co. 1885).

[3] *Id.* at 228.

[4] Ted Widmer, Opinion, *The Capitol Takeover That Wasn't*, N.Y. Times (Jan. 8, 2021), https://www.nytimes.com/2021/01/08/opinion/capitol-protest-1861-lincoln.html [https://perma.cc/P9F6-ZXA3]; Ted Widmer, Lincoln on the Verge: Thirteen Days to Washington 190-94 (2020). On the latest episode of Professor Amar's weekly podcast, Professor Widmer unequivocally supported and endorsed all the relevant First Insurrection claims made in the Amar brief. *Amarica's Constitution, 20 Questions on Section 3 and Insurrection #1—Special Guest Ted Widmer*, at 20:50 (Feb. 7, 2024) [hereinafter Amar/Widmer Podcast], https://podcasts.apple.com/us/podcast/20-questions-on-section-3-and-insurrection-1-special/id1549624070?i = 1000644444574.

[5] L. E. Chittenden, Recollections of President Lincoln and His Administration 38 (New York, Harper & Bros. 1891).

[6] *Id.* at 46.

[7] *Id.*

[8] Cong. Globe, 36th Cong., 2d Sess. 909 (Feb. 14, 1861) (statement of Rep. Campbell).

[9] Cong. Globe, 37th Cong., 2d Sess. 432 (Jan. 22, 1862) (statement of Sen. Davis).

[10] Rhae Lynn Barnes & Keri Leigh Merritt, Opinion, *A Confederate Flag at the Capitol Summons America's Demons*, CNN (Jan. 7, 2021), https://www.cnn.com/2021/01/07/opinions/capitol-riot-confederacy-reconstruction-birth-of-a-nation-merritt-barnes [https://perma.cc/2RGP-AVL2].

[11] Springfield Weekly Republican, February 9, 1861, at 5 (emphasis added).

[12] Chittenden, *supra* note 5, at 38 (emphasis added).

[13] Exeter Newsl. & Rockingham Advertiser, Feb. 18, 1861, at 2 (emphasis added).

[14] Cong. Globe, 40th Cong., 2d Sess. 1169-70 (Feb. 14, 1868) (emphasis added).

[15] Kurt Lash, *Section Three and the "First Insurrection" … That Wasn't*, Reason: Volokh Conspiracy (Jan. 29, 2024), https://reason.com/volokh/2024/01/29/section-three-and-the-first-insurrection-that-wasnt [https://perma.cc/WVL2-DN5U].

[16] *Introduction to Part 1D*, *in* 1 The Reconstruction Amendments: The Essential Documents 312 (Kurt Lash ed., 2021).

[17] *See, e.g.*, James M. McPherson, Battle Cry of Freedom: The Civil War Era 276 (1988) (referring to "[t]he outbreak of war at Fort Sumter"); Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery (2010) 161 (with "the bombardment of Sumter[,] Civil War had begun"); David W. Blight, Frederick Douglass: Prophet of Freedom 339 (2018) ("Confederate insurgents fired on Fort Sumter … Civil War commenced."). In fact, the same day Floyd resigned as secretary of war, Justice Robert Grier wrote that unless the people rebuke it, secession will "be certainly followed by civil war." Letter from Justice Robert Grier to Aubrey Smith (Dec. 29, 1860) (on file with Dickinson Coll. Archives & Special Collections) [hereinafter Justice Grier Letter]. The justice evidently did not think the Civil War had begun yet, a natural point of view given that no shots had yet been fired. Grier is most famous as the author of the *Prize Cases*, in which the Supreme Court held that beginning in April 1861 the United States was engaged in a de facto war. 67 U.S. 670 (1862). The Court noted that Queen Victoria recognized hostilities once she learned "the news of the attack on Fort Sumter, and the organization of a government by the seceding States." *Id.* at 669.

[18] Brief for Akhil Reed Amar and Vikram David Amar as Amici Curiae Supporting Neither Party at 6-7, 12, Trump v. Anderson, No. 23-719 (U.S. Jan. 18, 2024) [hereinafter Amar Brief].

[19] Justice Grier Letter, *supra* note 17.

[20] Springfield Weekly Republican, Feb. 9, 1861, at 5.

[21] Cong. Globe, 37th Cong., 2d Sess. 858 (Feb. 17, 1862) (statement of Rep. Arnold) (emphasis added).

[22] Cong. Globe, 36th Cong., 2d Sess. at 913 (submitting the Report of the Select Committee). Indeed, in its report, the committee expressly confirmed that after Lincoln's election, "disaffected persons of high and low position … consult[ed] together on the question of submitting to that result, and also upon various modes of resistance. Among other modes, [they contemplated] resistance to counting the ballots, to the inauguration of Mr. Lincoln [and] the seizure of the Capitol."

[23] *See, e.g.*, Pinkerton v. United States, 328 U.S. 640 (1946); Blumenthal v. United States, 332 U.S. 539 (1947).

[24] Amar Brief, *supra* note 18, at 9.

[25] Cong. Globe, 37th Cong., 2d Sess. 864 (Feb. 18, 1862) (statement of Sen. Trumbull); *id.* at 872 (Feb. 18, 1862) (statement of Rep. Henderson) ("[I]f we shall do justice to ourselves here, John B. Floyd … will never present [himself] upon the floor of any Senate."); *id.* at 927 (Feb. 24, 1862) (statement of Sen. Howe); *id.* at 970 (Feb. 26, 1862) (statement of Sen. Sherman).

[26] Professor Amar discusses Thomas in his recent guest essay for *The New York Times*. Akhil Reed Amar, Opinion, *The Supreme Court Should Get Out of the Insurrection Business*, N.Y. Times (Feb. 7, 2024), https://www.nytimes.com/2024/02/07/opinion/supreme-court-trump-section-3.html [https://perma.cc/C6FZ-VLY7]. For the participation in the First Insurrection of Howell Cobb, another Buchanan Cabinet official, *see* Amar/Widmer Podcast, *supra* note 4, at 12:01.

[27] Cong. Globe, 40th Cong., 2d Sess. 1170 (Feb. 14, 1868).

[28] *Id.*

[29] Floyd was widely compared to Benedict Arnold before he was commissioned as a Confederate general, indeed before blood was even shed at Fort Sumter. Amar Brief, *supra* note 18, at 7 n.6 (citing newspapers referring to Floyd as "Benedict Arnold"). In fact, Floyd received little acclaim from Confederates for his actions *during* the Civil War. He suffered a series of military defeats that the *New York Times* quipped "restore[d] to the Government nearly as many arms as he robbed it of." He also abandoned his soldiers at a pivotal battle and was discredited with Confederate leadership. Floyd died half-way through the Civil War having "virtually been deprived of

a command." *Gen. J. B. Floyd*, N.Y. Times, Sep. 6, 1863. To the extent he served as a hero for secessionists, it was for his conduct in the First Insurrection, not the Second.

[30] Cong. Globe, 40th Cong., 2d Sess. 653 (Jan. 21, 1868) (emphasis added); *see also* Cong. Globe, 40th Cong., 2d Sess. 1209 (Feb. 17, 1868) (statement of Sen. Morton) ("The President had to come here by stealth and in secrecy … . All this had been brought about by just such men as Philip F. Thomas—men who had given the rebellion the most powerful aid and encouragement by leaving the Cabinet publicly for reasons that were treasonable in themselves.").

[31] Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* 61 (Dec. 29, 2023) (unpublished manuscript), https://ssrn.com/abstract=4591838 [https://perma.cc/Y564-D3LT].

[32] Cong. Globe, 40th Cong., 2nd Sess. 3009 (June 10, 1868) (emphasis added).

[33] *Id.* at 3008 ("[Offices held by] persons who will be ineligible under the constitutional amendment when it takes effect … will become vacated by the adoption of that constitutional amendment.").

[34] *Id.* at 3010 ("Suppose that on Monday … the Governor is eligible under the fourteenth article of the Constitution … . On Tuesday evening that Governor is inaugurated … . Then you may go on a few days more, and the constitutional amendment being ratified by enough States that man goes out.").

[35] Brief of Amici Curiae American Historians in Support of Respondents at 29, Trump v. Anderson, No. 23-719 (2024); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 105-06 (2021).

[36] Amar Brief, *supra* note 18, at 13-14. In a recent piece, Professors Josh Blackman and Seth Barrett Tillman ask why Canby disqualified oath-breaking insurrectionists from the Virginia state legislature if, as Professors Vikram Amar and Akhil Reed Amar wrote in 1995, the Constitution makes a "global officer/legislator" distinction. Josh Blackman & Seth Barrett Tillman, *Professor Akhil Reed Amar and Professor Vikram Amar Retreat from Their "Global" Rule for the "Offices" and "Officers" of the Constitution*, Reason: Volokh Conspiracy (Jan. 27, 2024, 10:27 PM), https://reason.com/volokh/2024/01/27/professor-akhil-reed-amar-and-professor-vikram-amar-retreat-from-their-global-rule-for-the-offices-and-officers-of-the-constitution [https://perma.cc/2W58-FAEQ]; Vikram D. Amar & Akhil Reed Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995). The answer is because the federal

constitutional global rule applies to the federal government, not to state governments. Thus, Virginia could properly view its legislators as officers under its own state constitution, even though members of Congress are not officers for the purpose of the federal Constitution. Indeed, under the Virginia Constitution of 1868, Section IV, state legislators took the same "Oath of Office … before entering upon the discharge of any function as Officers" that the governor and judges did. *See* also Brief of Amici Curiae Professors Akhil Reed Amar, Vikram David Amar, & Steven Gow Calabresi in Support of Respondents, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271) ("Under a proper originalist understanding of 'legislature,' each state's people, acting though its state constitution, retained broad power to redefine the legislative system for all subsequent elections.").

[37] *See* Brief for Professor Kermit Roosevelt at 10-12, Trump v. Anderson, No. 23-719 (2024).

[38] *See* Lash, *supra* note 31, at 7, 9, 27-28, 39, 50-51; Brief for Professor Kurt Lash as Amicus Curiae Supporting Respondent-Appellee at 19, 21, Anderson v. Griswold, No. 23SA300, 2023 WL 8770111 (Colo. 2023); *see also* Kurt Lash (@kurtlash1), X (formerly Twitter) (Feb. 1, 2024, 9:23 AM), https://twitter.com/kurtlash1/status/1753061572384034954 [https://perma.cc/B2VY-52KP] (doubling down by accusing Professor Amar of making a "big 'oops'").

[39] Cong. Globe, 39th Cong., 1st Sess. 2542 (May 10, 1866).

[40] Baude and Paulsen, *supra* note 1.

[41] *Id.* at 2543 (statement of Rep. Bingham).

[42] *Id.* at 2544 (statement of Rep. Stevens) (emphasis added).

[43] Congressional apportionment, unlike disqualification, requires congressional action. How do we know? The Constitution tells us in plain English. "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they *shall by Law direct*." U.S. Const., art. I, sec. II (emphasis added); *see Amarica's Constitution*, *A Self-Educating Gaffe* at 51:05 (Jan. 31, 2024), https://podcasts.apple.com/us/podcast/amaricas-constitution/id1549624070?i=1000643616184.

[44] According to Lash, Stevens later said that Section 3 required "proper enabling acts" for its execution. Lash, *supra* note 31, at 38, 50. But this, too, was about Section 2, not Section 3, as demonstrated by … the rest of the sentence. Stevens envisioned "proper enabling acts, *which shall do justice to*

the freedmen and enjoin enfranchisement as a condition-precedent"—in other words, legislation that would grant Black men the right to vote. Cong. Globe, 39th Cong., 1st Sess. 3148 (June 13, 1866) (emphasis added).

[45] Mark A. Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, 17-24. Shortly before Congress debated the Fourteenth Amendment, Attorney General James Speed, a Lincoln appointee, and then-General Benjamin F. Butler referred to the president as the "chief executive officer" on multiple occasions. *Ex parte* Milligan, 70 U.S. (4 Wall.) 2, 18, 91 (1866). About a month later, both parties in *Mississippi v. Johnson* referred to the president as an executive officer, including Speed's successor, Attorney General Henry Stanbery. 71 U.S. (4 Wall.) 475, 479, 480, 484 (1866). These arguments before the Court, *immediately before* Section Three was debated and ratified, reaffirmed the public understanding that the president was an officer. Later, numerous others, including President Johnson himself, referred to presidents as "chief executive officers" and related terms. 8 A Compilation of the Messages And Papers of the Presidents 3510, 3512–13, 3516-17, 3519, 3521, 3524-25, 3527 (New York, Bureau of Nat'l Literature, James D. Richardson, ed., 1897) (publishing President Johnson's proclamations where he referred to himself as "the chief civil executive officer of the United States").

[46] *E.g.*, Alexander Hamilton, *Federalist* No. 69 ("The President of the United States would be an officer elected by the people for four years … ."); *see also* Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843) (referring to the president as "the one chief executive officer"); United States *ex rel.* Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 310 (1854) ("The President, like all the other officers of the government, is subject to the law, and cannot violate it with impunity.").

[47] Lash, *supra* note 31, at 4-6, 9, 12, 33, 35-37, 39, 48; Brief for Professor Kurt T. Lash as Amicus Curiae in Support of Petitioner at 4-5, 11, 16-17, Trump v. Anderson, No. 23-719 (U.S. Jan. 16, 2024) [hereinafter Lash Brief].

[48] Cong. Globe, 39th Cong., 1st Sess. 2899 (May 30, 1866). Lash also relies on *Blount's Case* and Joseph Story's *Commentaries*, Lash Brief, *supra* note 47, at 9-11, both of which preceded the framing and ratification of the Fourteenth Amendment by decades. Worse, a House select committee rejected both sources on the very question of who is an officer mere weeks after Congress submitted the Fourteenth Amendment to the states. The committee called Story's view "incautious" and "not fully authorized" by *Blount's Case*. Cong. Globe, 39th Cong., 1st Sess. 3940 (July 19, 1866) (submission of the Report of the Select Committee). Lash also cites to an April 1868 editorial series in the *Louisville Daily Journal*. Lash Brief, *supra* note 47, at 12-13. For the many problems with relying on a single outlier source from an anti–Fourteenth

Amendment newspaper that virtually nobody has ever heard of, see Mark Graber, *Eureka Not: The President is an Officer of the United States Redux, Redux*, Balkinization (Jan. 10, 2024), https://balkin.blogspot.com/2024/01/eureka-not-president-is-officer-of.html [https://perma.cc/EVA2-XURQ].

[49] Act of July 2, 1862, ch. 128, 12 Stat. 502 (emphasis added).

[50] Lash, *supra* note 15.

[51] Cong. Globe, 37th Cong., 2d Sess. 2861 (June 21, 1862) (statement of Sen. Trumbull) ("Now I move to amend the bill by inserting … 'and for whom the form of the oath of office is not prescribed by the Constitution,' so that if the amendment is made the bill will only require this oath of office from those persons for whom the form of the oath is not prescribed by the Constitution of the United States. As the form of oath is prescribed for the President of the United States, of course it will not embrace him."). This language was later changed to the "excepting the President of the United States." *Id.* at 3050 (July 1, 1862).

[52] Senator Willard Saulsbury, Sr., questioned the "competen[ce]" of Congress to "say[] that an officer who takes the oath prescribed by the Constitution shall not exercise the functions of the office unless he takes [an] additional oath." Cong. Globe, 37th Cong., 2d Sess. 2693 (June 13, 1862). As multiple senators during this debate reminded one another, the Constitution prescribes a particular oath only for the president. See, e.g., *id.* at 2861 (June 21, 1862) (statements of Sen. Trumbull and Sen. Saulsbury). And Senator John Carlile maintained that "the language of this bill includes every officer from the President down." *Id.* at 2871 (June 23, 1862).

[53] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 1125 (Mar. 1, 1866); *id.* at 4168 (Jul. 26, 1866) (statement of Sen. Davis); *The Proceedings of Congress: Senate*, N.Y. Times, July 1, 1862; *Oath of Office*, Methodist, July 5, 1862, at 7; *Constitutional Construction*, Camden Democrat, Dec. 26, 1863, at 2; *A Test Oath*, Albany Evening J., June 27, 1865, at 2; *An Oath for Office Holders*, Phila. Inquirer, June 28, 1865, at 4; *A Dead Lock—The Test Oath*, New Era, July 4, 1865, at 1; Weekly State Gazette, Aug. 1, 1865, at 2; *Should Traitors Be Admitted to Congress?*, Chi. Republican, Nov. 17, 1865, at 4; *Kentucky Contested Seats in the House*, Cincinnati Daily Gazette, Jan. 24, 1868, at 1.

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