DISLOYALTY & DISQUALIFICATION: RECONSTRUCTING SECTION 3 OF THE FOURTEENTH AMENDMENT

Myles S. Lynch*

ABSTRACT

To become President of the United States, you must be constitutionally qualified. You must be thirty-five years old, a natural born citizen, and fourteen years a resident within the United States. Neither Congress nor any state can set this threshold higher; the same is true for congresspeople. But since it was last successfully invoked in 1917, most have forgotten the other qualifier—for officers at both the state and federal levels—from Section 3 of the Fourteenth Amendment. Those who have violated their oath to uphold our Constitution can be disqualified from holding any public office under the United States or any state. This Article reconstructs this lost qualification and develops a framework for its twenty-first-century application by the states, the federal courts, and Congress.

Part I uses sources from and contemporary to the drafting of the Fourteenth Amendment alongside recent secondary sources to determine what Section 3 means. Part II then develops a test that can be applied in judging a Section 3 case. Part III briefly explores mechanisms through which the qualification can be enforced. Part IV reviews and summarizes some surviving use-cases so that decision makers can easily compare modern transgressions to precedent. And finally, Part V adopts the analysis from Parts I and II and scrutinizes a hypothetical person who may be barred by Section 3. The Article then concludes.

* University of Pennsylvania Law School, JD. I would like to thank my friends and family, who tolerated me as I droned on about this topic and provided immeasurable support along the way. I would also like to thank Mitchell Berman, Daniel Hemel, Gerard Magliocca, and Seth Barrett Tillman for helpful substantive, strategic, and structural comments on previous drafts. And I am especially grateful for the mentorship of Jean Galbraith, who laid the seeds of this project. Finally, I would like to thank Madeline Blackburn and the Editors of the *William & Mary Bill of Rights Journal* for their faith in this Article and their incredibly helpful editing and feedback.

INTRODUCTION

> The country has a right to expect that all who enter [office] shall have a sure and well-founded loyalty, above all question or "suspicion." And such I insist is the rule of the Constitution and of Congress.
>
> —Sen. Charles Sumner[1]

[1] CONG. GLOBE, 40th Cong., 2d Sess. 1145 (1868).

After the Civil War ended, Congress recognized that its losers would continue to fight—if not on the battlefield, then in the political arena.[2] So one condition for readmission into the Union was that confederate states needed to ratify the Fourteenth Amendment.[3] While the first and fifth sections of this amendment are well known today, "no one teaches anything about Sections 2, 3, and 4."[4] Ironically, one of the least discussed today, Section 3, was one of the most heavily debated by the Thirty-Ninth Congress.[5] And through that debate, what began as temporary disenfranchisement of every disloyal Southerner eventually became permanent disqualification from holding public office for those who betray their oath to uphold the Constitution of the United States.[6] Succinctly put in 1869, by Justice Reade of North Carolina's Supreme Court, "the idea [was] that one who had taken an oath to support the Constitution, and violated it, ought to be excluded from taking it again until relieved by Congress."[7]

Throughout Reconstruction, numerous people were challenged, and disqualified, by Section 3.[8] Since then, however, only one person's qualifications have been challenged: a Congressman at the outbreak of the First World War.[9] According to

---

[2] *See, e.g.*, *id.* at 1145–46.

[3] *E.g.*, Act of June 25, 1868, ch. 70, 15 Stat. 73, 74.

[4] Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS U. L.J. 639, 639–40 (2018). Section 3 holds that:

> 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.

U.S. CONST. amend. XIV, § 3.

[5] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2459–61 (1866). *See generally 14th Amendment to the U.S. Constitution*, LIBR. OF CONG., https://guides.loc.gov/14th-amendment/digital-collections (last visited Oct. 27, 2021) (compiling congressional debates on the Fourteenth Amendment); Mark Graber, *Rewarding Loyalty (?) and Punishing Treason Through Disenfranchisement and Bans on Officeholding: Section 3*, *in* THE FORGOTTEN FOURTEENTH AMENDMENT (forthcoming 2021) (manuscript at 2) (on file with author) ("Inverting contemporary priorities, Republicans spent more energy debating Section 3 than any other provision of the omnibus Fourteenth Amendment.").

[6] *Compare, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866), *with* U.S. CONST. amend. XIV, § 3.

[7] *See* Worthy v. Barrett, 63 N.C. 199, 204 (1869), *appeal dismissed sub nom.* Worthy v. Comm'rs 76 U.S. 611 (1869).

[8] *See infra* Part IV.

[9] *See infra* Section IV.G.

current conceptions of Section 3, which treat it as "generally limited to the context of the immediate aftermath of the Civil War," this dormancy makes sense.[10] But the plain text, history, and use of Section 3 show that current conceptions are too narrow.

This Article shows that violating one's oath disqualifies them from holding public office. This disqualification can attach at either the federal or state level, whether in the legislature, the executive, or the judiciary. These violations consist of, and only of, obstructing enforcement of the laws of the United States or any state beyond recourse of the justice system[11] and acting in ways that tend to strengthen the enemies of the United States or weaken the ability of the United States to repel an invasion.[12] But this is still very broad and means that seemingly innocuous things—like lobbying on behalf of a hostile foreign power, making statements that delegitimize U.S. Government actors on the world stage, or simply organizing a mass of people against the American war effort—may prevent people from being a Member of Congress, an executive official, a governor, or even a state police officer.

There are, however, certain preconditions for disqualification to attach. First, the person must have taken a legally required oath[13] to uphold the Constitution prior to their disloyal act.[14] Second, except in cases of insurrection and rebellion, there must be an actual enemy of the United States that was aided or comforted.[15] And third, the relevant decision maker must find that the actions taken were disqualifying. Disqualification can, however, be removed by getting two thirds of each congressional chamber to grant amnesty.[16]

---

[10] Am. Citizens v. United States, No. 05-1259, 2006 WL 8444223, at *1 (D.N.M. May 31, 2006) (holding Section 3 was "inapposite here because [its] meaning is generally limited to the context of the immediate aftermath of the Civil War, when officials of the Union were concerned about the potential mischief that could result if former agents of the Confederacy and their sympathizers were to take control of Congress.").

[11] *See infra* Section I.C.

[12] *See infra* Section I.D.

[13] This includes all oaths required by Article VI, including: 5 U.S.C. § 3331; 4 U.S.C. § 101; and potentially U.S. CONST. art. II, § 1, cl. 8.

[14] U.S. CONST. amend. XIV, § 3 ("who, having previously taken an oath").

[15] *But see* Erin Creegan, *National Security Crime*, 3 HARV. NAT'L SEC. J. 373, 376 (2012) ("First, one may commit treason by supporting an enemy of the United States, or, alternatively, by undermining the United States without actually supporting [ ] a specific enemy."). Though this is discussing treason, it is still relevant because, as discussed in Section I.D, the Section 3 test was in part derived from the treason test. Creegan's assertion, however, is not supported by citation, and appears to be contradicted by her discussion of *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), later in her article. *Cf.* Creegan, *supra* note 15, at 379 n.18.

[16] U.S. CONST. amend. XIV, § 3.

Because it has been largely ignored in practice,[17] this Article unearths Section 3's scant history and draws parallels with similar constitutional and common-law concepts to reconstruct the provision. Accordingly, this Article proceeds in five Parts. Part I gives a constitutive account of Section 3. Part II develops a Section 3 test. Part III discusses the mechanisms and procedures for bringing a Section 3 challenge at different levels of governance and at different stages in the election or appointment process. Part IV analyzes how Section 3 (and its extraconstitutional predecessor) has been used by Congress and the courts and discusses their precedential and persuasive values. And Part V works through a hypothetical example of an official who could have their qualifications challenged under Section 3. Finally, the Article concludes.

I. THE MEANING OF SECTION 3

In uncovering the proper function of Section 3 and its legal applications, perhaps nothing is more important than showing what the text means. It is increasingly important to understand what the text originally meant, given the Supreme Court's ongoing trend towards originalism.[18] This Part uncovers the original public meaning of Section 3[19] and imports doctrinal definitions that could affect how courts interpret its text. It will proceed by separating the text into five pieces: (1) who is considered an officer of, or under, the United States or any state;[20] (2) what it means to have "previously taken an oath . . . to support the Constitution of the United States"; (3) who has "engaged in insurrection or rebellion against the same"; (4) who has "given aid or

---

[17] The last time the judiciary, either federal or state, truly took up the task of interpreting Section 3 was in 1871. *See* United States v. Powell, 27 F. Cas. 605, 606 (C.C.D.N.C. 1871) (No. 16,709). Before then, it was only interpreted by one other federal court. *See generally In re* Griffin, 11 F. Cas. 7 (Chase, Circuit Justice, C.C.D. Va. 1869) (No. 5,815). Outside of the courts, the last time this issue was "litigated" was in 1919, through the House of Representatives. *See* H.R. REP. NO. 66-413, at 11–12 (1919), *reprinted in Victor L. Berger: Hearings Before the Special Committee Appointed under the Authority of House Resolution No. 6 Concerning the Right of Victor L. Berger to be Sworn in as a Member of the Sixty-Sixth Congress* (1919) [hereinafter *Berger Hearings*]; H.R. REP. NO. 66-414, at 2 (1919), *reprinted in Berger Hearings*. These precedents will be discussed further throughout this Article.

[18] *See, e.g.*, David McDonald, Commentary, *We Are All Originalists Now, Sort Of*, REALCLEAR POL. (Aug. 7, 2019), https://www.realclearpolitics.com/articles/2019/08/07/we_are_all_originalists_now_sort_of_140957.html [https://perma.cc/27ZB-TSRW]; *see also AP Explains: Originalism, Barrett's Judicial Philosophy*, A.P. (Oct. 13, 2020), https://apnews.com/article/donald-trump-amy-coney-barrett-us-supreme-court-courts-antonin-scalia-038ec1d4de30d1bd97a0ce3823903f0c [https://perma.cc/T2J9-BGP7].

[19] *See generally, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

[20] This piece will include two clauses: "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," and "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." *See* U.S. CONST. amend. XIV, § 3.

comfort to the enemies thereof"; and (5) when "Congress may by a vote of two-thirds of each House, remove such a disability."[21] Determining how the legal community would have originally interpreted these pieces and providing constitutive accounts of them will primarily be done through inspection of congressional use-cases and accepted legal understandings of terms as of 1868, with some utilization of ratification debates and enforcing statutes, as necessary, and secondary sources, where they exist.

A. To Whom Does Section 3 Apply?

Section 3 can disqualify oath-bound people seeking to be: (1) Senators or Representatives in Congress; (2) electors of the President and Vice President; or (3) a holder of any other office, "civil or military, under the United States, or under any State."[22] The first two groupings are obvious enough: you cannot be a Member of Congress or a member of the electoral college if Section 3 disqualifies you. And the third is a catch-all.

On the other hand, Section 3 uses different language in describing the preconditional offices: "a member of Congress, or [] an officer of the United States, [] a member of any State legislature, or an executive or judicial officer of any State."[23] This language strongly resembles that of Article VI, which provides the requirement that officers of the United States and the several states take an oath to uphold the Constitution.[24] So, the legal community likely would have understood holding any office that falls within Article VI—in addition to officers of the uniformed services[25]—to trigger Section 3's precondition for disqualification.

Why not simply use the same language for the precondition as was used in describing offices subject to the qualification? The likely answer is that the disqualifiable-office language was included as an adaptation of the impeachment-disqualification clause while the preconditional-office language was imported with slight modification from Article VI.[26] One less obvious difference in language is the shift from "no person shall . . . hold any office *under*" to ". . . taken an oath as an officer *of* . . . ." Though under-explored, it facially appears that people who hold "offices *under*" are "officers *of*."[27] This would mean there is no functional difference.[28] But there does

---

[21] *Id.*

[22] *Id.*

[23] U.S. CONST. amend. XIV, § 3.

[24] *Compare* U.S. CONST. amend. XIV, § 3, *with* U.S. CONST. art. VI.

[25] Article VI does not include within its plain terms military offices, but those were clearly anticipated to be within Section 3 and appears to be the driving force for not importing its exact language. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2537, 2898–99, 2917, 3030 (1866); The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 182, 203 (1867). Section 3 likely also covers the Article II oath, for reasons discussed below. *See* U.S. CONST. amend. XIV, § 3.

[26] *Compare* U.S. CONST. art. I, § 3; *id.* art. VI, cl. 3, *with id.* amend. XIV, § 3.

[27] This is most clear looking at Article VI:

> The Senators and Representatives before mentioned, and the Members of

appear to be some confusion on this point.[29] Regardless, these provisions were introduced at separate times, by separate Senators, and without any relevant discussion.[30]

> the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI. But every constitutional provision that uses under and of follows this pattern. *Compare* U.S. CONST. art. I, § 3 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . . ."); *id.* art. I, § 6 ("No Senator or Representative shall . . . be appointed any civil Office under the Authority of the United States . . . and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); *id.* art. I, § 9 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without, the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); *id.* art. II, § 1 ("[N]o Senator or Representative, or Person holding an Office of Trust of Profit under the United States, shall be appointed an Elector."); *with id.* art. I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."); *id.* art. II, § 2 ("[The President] shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for . . . ."); *id.* art. II, § 3 ("[The President] shall commission all the Officers of the United States."); *id.* art. II, § 4 ("[A]ll civil Officers of the United States, shall be removed from Office on Impeachment . . . .").

[28] *See* United States v. Germaine, 99 U.S. 508, 509–10 (1878) (equating "hold[ing] an office under the government" to "becoming its officer[]").

[29] *Compare* 39 CONG. GLOBE 3568 (June 29, 1868) (using of and under interchangeably); John. R. Tucker, *General Amnesty*, 126 N. AM. REV. 53, 55 (1878) ("[T]he Senate of the United States decided that a Senator was not a civil officer of, and *a fortiori*, *under* the United States."); *Reports of Committees of the House of Representatives*, 39th Cong. 19–20 (1866) ("But a little consideration of this matter will show that 'officers of' and 'officers under' the United States are . . . 'indiscriminately used in the Constitution.' . . . It is irresistibly evident that no argument can be based on the different sense of the words 'of' and ['']under,' as used in these clauses of the Constitution, and we must approach this question as to whether a member of Congress is an officer 'under' the United States, with the knowledge that if we find him to be *either* an officer 'of' the United States, or one 'under' the government of the United States, in either case he has been brought within the *constitutional* meaning of these words, as used in the act of 1852, because they are made by the Constitution equivalent and interchangeable."), *with* 2 Cong. Rec. 3987 (May 18, 1874) ("I think there is a distinction between an officer of the Government and an officer under the Government."), https://www.google.com/books/edition/Reports_of_Committees/cqIFAAAAQAAJ?hl=en&gbpv=1 [https://perma.cc/YB3F-L3DZ]; Francis Wharton, State Trials of the United States During the Administrations of Washington and Adams 269 (1849), https://www.google.com/books/edition/State_Trials_of_the_United_States_During/m3oDAAAAQAAJ?hl=en&gbpv=0 [https://perma.cc/3ZT2-FU2Y].

[30] *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (Statement of Sen. Clark), *with*

Instead, Section 3 deliberation simply focused on the word "officer" and ignored the of/under distinction entirely. So, "under" and "of" are likely "equivalent and interchangeable."[31] The only apparent result of this change between the two clauses is to *exclude* elector of the President and Vice President as a preconditional office but *include* elector as a disqualifiable office.[32]

With over two million people receiving paychecks from the Federal Government alone,[33] and another seven-and-a-half from the states and local governments,[34] there are obviously positions that do not qualify as offices and are therefore immune from Section 3 scrutiny. *Buckley v. Valeo*[35] is the currently governing case as to who is and is not a federal officer.[36] *Buckley* established that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.'"[37] However, determinations as to the meaning of an officer of the United States, like in *Buckley* itself, have largely been Appointments Clause challenges, which utilize a two-step analysis of asking (1) whether the position is an office of the United States and then (2) whether the de facto officer is a de jure officer; if the answers are yes and no, respectively, then the Appointments Clause has been violated.[38]

---

id. at 2869 (Statement of Sen. Howard). *See id.* at 2460 (using officers "under" interchangeably with officers "of").

[31] *Reports of Committees of the House of Representatives*, 39th Cong. 19–20 (1866), https://www.google.com/books/edition/Reports_of_Committees/cqIFAAAAQAAJ?hl=en&gbpv=1 [https://perma.cc/3PZG-766P].

[32] Though Congresspeople are not included as officers of the United States, and the unparallel phrasing of Section 3 suggests the inverse is true for state legislators, it appears state legislators should fall within both categories. *See* Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021, 1:43 PM), https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide [https://perma.cc/VP7B-YD6G]; ch. 114, § 14, 16 Stat. 113 (1870) ("whenever any person shall hold office, except as a member of Congress or of some State legislature, contrary to the provisions of [Section 3]"); The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 182, 203–04 (1867). *Contra* Colautti v. Franklin, 439 U.S. 379, 392–93 (1979) (discussing the canon against surplusage).

[33] CONG. RSCH. SERV., FEDERAL WORKFORCE STATISTICS SOURCES: OPM & OMB (last updated Oct. 23, 2020), https://fas.org/sgp/crs/misc/R43590.pdf [https://perma.cc/J2HY-RUZX].

[34] *States with Most Government Employees: Totals and Per Capita Rates*, GOVERNING, https://www.governing.com/gov-data/public-workforce-salaries/states-most-government-workers-public-employees-by-job-type.html [https://perma.cc/7WLX-AH6G] (last visited Oct. 27, 2021).

[35] 424 U.S. 1 (1976), *superseded in part by statute*, The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81.

[36] Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 459–60 (2018).

[37] *Buckley*, 424 U.S. at 126; *see also* Freytag v. Comm'r, 501 U.S. 868, 880–82 (1991) (noting as relevant whether the tasks performed are "ministerial" and whether there is a grant of discretion). *See generally* Lucia v. SEC, 138 S. Ct. 2044 (2018).

[38] *See Buckley*, 424 U.S. at 124–28.

The Office of Legal Counsel (OLC)—an executive branch office tasked with interpreting the Constitution[39]—has interpreted the *Buckley* standard as both expanding and restricting the original understanding of the term.[40] OLC's determination of what constitutes a federal office requires: the position is delegated a portion of the sovereign powers of the Federal Government, which "primarily involve[s] binding the Government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws" and "represent[ing] the United States to foreign nations or [] command[ing] military force on behalf of the Government" but does not involve "purely advisory position[s]" or "typical contractor[s]";[41] and the appointment must be "continuing" and "not personal, 'transient,' or 'incidental,'" which precludes "special diplomatic agents, short-term contractors, *qui tam* relators, and many others in positions that have authority on an ad hoc or temporary basis."[42] In working through this test, OLC has deemed it proper to explore the statutory basis for the position.[43]

According to Professor Jennifer Mascott, the post-*Buckley* Supreme Court and OLC have expanded the original understanding to include deputies and other agents as officers that meet the *Buckley* test, though Founding-Era Congresses did not consider them officers, and restricted the original understanding by requiring that the duties that qualify a position as an office render it "significant" enough, though ministerial and administrative positions were considered offices around the time of the Founding.[44]

While courts today would likely defer to the long line of Appointments Clause precedents in defining "officer,"[45] Section 3 is wholly separate, and it is possible that a court would take the opportunity to dig into the original meaning instead. Professor Mascott argues that the original public meaning, at least for the 1787 Constitution, included any person who was legally delegated a portion of the sovereign powers of either the United States or a state for continuous exercise.[46] This standard, unlike the modern standard,[47] does not require that the power delegated allow the

---

[39] *See About the Office*, DEP'T OF JUST. OFF. OF L. COUNS., https://www.justice.gov/olc [https://perma.cc/2KH5-H8ZM] (last visited Oct. 27, 2021). *See generally* Sonia Mittal, *OLC's Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL'Y REV. 211 (2015).

[40] Mascott, *supra* note 36, at 462 (quoting Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 86–87 (2007)).

[41] Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 77 (2007).

[42] *Id.*

[43] *Id.* at 78.

[44] Mascott, *supra* note 36, at 462–70.

[45] *Id.* at 458–60, 462–65, 536–37.

[46] *Id.* at 462–66. Mascott's analysis is done in the context of the Appointments Clause, U.S. CONST. art. II, § 2, but there does not appear to be any reason to treat the definition in Article VI as different from the definition in Article II, or anywhere else in the original Constitution.

[47] *Id.* at 462 (quoting Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 86–87 (2007)).

actor to bind third parties, but also does not include deputies or other agents of officers.[48] Indeed, this understanding is in line with an 1867 Supreme Court decision, *United States v. Hartwell*,[49] that utilized the nature of the position—"embrac[ing] the ideas of tenure, duration, emolument, and duties"—in determining whether a government position constituted an office.[50] These *functional* ideas were recognized a decade later in *United States v. Germaine*,[51] where the Court briefly looked at whether the supposed officer's duties were "continuing and permanent" and whether there was a regular appropriation made to pay them.[52] *Germaine*, however, primarily relied on a simple *formal* test: did the supposed officer obtain their position in accordance with the Appointments Clause?[53]

Using these functionalist and formalist definitions, we can now determine that the Nation's most prominent offices—the presidency and vice presidency—are offices under the United States (and that the President and Vice President are officers of the United States), even though they are not explicitly enumerated.[54] First, the President quite clearly is legally delegated a portion of the sovereign powers of the United States for continuous exercise,[55] so it passes the functionalist test. And second, the President obtains their office in accordance with the constitutional process for selecting a person to that office,[56] so it passes the formalist test as well.

But some scholars disagree and argue that the President and Vice President are not officers "of" the United States.[57] Professors Josh Blackman and Seth Barrett

---

[48] *Id.*

[49] 73 U.S. (6 Wall.) 385 (1867).

[50] *See id.* at 393.

[51] 99 U.S. 508 (1878).

[52] *See id.* at 510–12.

[53] *See id.*

[54] The explicitly enumerated positions, on the other hand, are not offices under the United States. *See, e.g.*, ASHER C. HINDS, 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 669–79 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf [https://perma.cc/FYS6-6EBH] (rejecting a resolution that a Member of Congress is "a civil officer of the United States within the meaning [of the impeachment clause] of the Constitution"); *In re* Green, 134 U.S. 377, 379 (1890) ("Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in Congress.").

[55] Mascott, *supra* note 36, at 462–66; U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

[56] U.S. CONST. amend. XII. Though the focus in the discussion of the formalist test above was on the Appointments Clause, that clause is limited to offices whose selection process is not otherwise provided for in the Constitution. *Id.* art. II, § 2. The formalist test simply asks if the person holds an office that they obtained through the constitutionally mandated procedures.

[57] *See, e.g.*, Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section Three of the Fourteenth Amendment?*, VOLOKH CONSPIRACY (Jan. 20, 2021, 12:00 PM), https://reason.com/volokh/2021/01/20/is-the-president-an-officer-of-the-united-states-for-purposes-of-section-3-of-the-fourteenth-amendment/

Tillman note that the "officers of" language appears in the 1787 Constitution four times—and at least one of which, the Impeachment Clause, admittedly does use language that facially implies that they are correct. Relying on "the default presumption . . . of linguistic stability, rather than [] linguistic drift," though acknowledging the possibility of drift across the near-century separating the original ratification of the Constitution and ratification of the Fourteenth Amendment, Professors Blackman and Tillman primarily focus on a number of Appointments Clause precedents to seemingly derive and export an ultra-formalist test: is the position one that is filled through appointment by the President, heads of departments, or courts of law?[58] This, of course, is a rejection of the broader formalist justification offered above. Professors Blackman and Tillman also cite for support Senator Booth's statements during the William Belknap impeachment and an 1878 treatise, but these appear to be—at least—matched by evidence that supports the contention that people in 1868 viewed the President as an officer of the United States.[59] And Professors Blackman and Tillman dismiss the "purposivist argument" that the Fourteenth Amendment's drafters would not have intended to exclude the presidency in favor of a democracy canon.[60] But that argument does not consider the original *public meaning*: instead of questioning whether the drafters intended to include the President, it is proper to question whether the public would have thought the President was immune from this provision. Even if the drafters "had no pressing reason to draft Section 3's jurisdictional

---

[https://perma.cc/CUL3-HQ3J]. *See also generally* Seth Barrett Tillman, *Originalism & the Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59 (2014).

[58] Blackman & Tillman, *supra* note 57 (discussing *United States v. Mouat*, 124 U.S. 303 (1888), and *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and then noting executive branch reliance on *Mouat*).

[59] Act to Prescribe an Oath of Office, ch. 128, 12 Stat. 502 (1863) (repealed 1868) ("[H]ereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military or naval departments of the public service, excepting the President of the United States . . . ."); United States *ex rel*. Stokes v. Kendall, 26 F. Cas. 702, 752 (C.C.D.C. 1837) (No. 15,517) ("The president himself . . . is but an officer of the United States . . . ."), *aff'd* 37 U.S. 524 (1838); Gerard Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 93–94 (2021) (citing CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866)); S. Journal, 24th Cong., 1st Sess. 190 (1824), http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(sj01361)) [https://perma.cc/Q5AP-799M] (stating that the states' militias "could not be commanded by a regular officer of the United States, or other officer than of the militia, except by the President"); *President Andrew Johnson Appoints William W. Holden Provisional Governor of North Carolina*, LOWCOUNTRY DIGIT. HIST. INITIATIVE, https://ldhi.library.cofc.edu/exhibits/show/after_slavery_educator/unit_one_documents/andrew-appoints-holden [https://perma.cc/B488-7TVY] (last visited Oct. 27, 2021) ("[T]he President of the United States is, by the constitution, . . . the chief civil officer.").

Further, knowing that military officers are included, it should be noted that the President is the Commander in Chief of the Army and Navy of the United States and may be found to be within Section 3 on this alternate ground. *See* U.S. CONST. art. II, § 2.

[60] Blackman & Tillman, *supra* note 57.

element to cover former or future U.S. Presidents," would the legal community or the public writ large—were the issue to have come up in the 1872 presidential election—have welcomed a rebel President? It seems unlikely. While this may be a closer call than many think, this Article concludes that the President fits within both historical tests and other contemporary evidence tips in favor of inclusion.

While the *Hartwell* and *Germaine* tests may be sufficient to understand who was classified as an officer of the United States around the time of Section 3's drafting, they cannot inform us of the equivalent tests under the several states. For these analyses, the Attorney General of the United States, in 1867, said that the distinction between officers and employees of a state was "well established."[61] The Attorney General cited Chief Justice Tilghman of the Pennsylvania Supreme Court in identifying state offices as all those offices created pursuant to the State's constitution that were not focused on purely temporary or local concerns.[62] Justice Reade of the Supreme Court of North Carolina, in an actual Section 3 case from 1869, provided what may be the simplest state variant of the formalist test: "I do not know how better to draw the distinction between an officer and a mere placeman, than by

---

[61] The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 155–56 (1867). Some have suggested that Congress overruled the Attorney General's opinion. David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 425 (2008) (discussing Act Supplementary to an Act Entitled "An Act to Provide for the More Efficient Government of the Rebel States," ch. 30, § 10, 15 Stat. 14 (1867)). While it undoubtedly was broadly a rebuke to the Attorney General's Reconstruction Act opinion, it does not appear to contradict the "well established" original meaning of Section 3's state officers. *See* ch. 30, § 10, 15 Stat. 14, 16 (1867) ("no district commander . . . shall be bound in his action by any opinion of any civil officer of the United States."). *Compare id.* § 6 (directing the words "executive or judicial office in any State" in a Reconstruction Oath, *see* ch. 6, § 1, 15 Stat. 2 (1867), to "be construed to include all civil officers created by law for the administration of any general law of a State, or for the administration of justice."), *with* Commonwealth v. Sutherland, 3 Serg. & Rawle 145, 149 (Pa. 1817) ("Every thing concerning the administration of justice, or the *general interests of society*, may be supposed to be within the meaning of the constitution . . . .").

[62] The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 155–56 (1867) (citing *Sutherland*, 3 Serg. & Rawle at 149). Contrary to Professor Currie's conclusion, it appears that municipal officers were never "embrac[ed]" by Congress. Currie, *supra* note 61, at 425. Beyond the similar language used in Chief Justice Tilghman's *Sutherland* opinion and the discussed act—and the former's exclusion of municipal offices—the act elsewhere clearly states when municipal offices are relevant. *See* Colautti v. Franklin, 439 U.S. 379, 392 (1979) (discussing the canon against surplusage); ch. 30, § 2, 15 Stat. 14 (1867); *id.* § 9; *see also* The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 155–56 (1867); The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 182, 203 (1867). Further suggesting the exclusion of municipal officers, in the Fourteenth Amendment debates, "Executive and Judicial officers of a state"—in Section 2—was chosen, in part, to remove any ambiguity that suggested municipal offices may be included. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2991, 3010, 3037–39 (1866). *But see* VA. CONST. art. III, § 4 (1868) (including mayors, city councilmembers, and others in the state constitutional adaptation of Section 3), https://www.google.com/books/edition/The_Constitution_of_Virginia/BiAtAQAAMAAJ?hl=en&gbpv=1&bsq=officer [https://perma.cc/WJ6X-F96A].

making his oath the test."[63] Other states will have different officers within the constitutional definition thereof, but these serve as a baseline for how one could expect "an officer of any state" to be interpreted by contemporary actors.

B. Oaths, and Affirmations?

Section 3 explicitly conditions disqualification from public office on "having previously taken an oath . . . to support the Constitution of the United States."[64] The Oath as we know it today, however, is not what was used throughout the drafting and ratification of the Fourteenth Amendment.[65] From 1862 until 1884, the "Ironclad Oath"[66] was used. This required federal civil servants to state, under penalty of perjury:

> I, ____, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.[67]

---

[63] Worthy v. Barrett, 63 N.C. 199, 202 (1869), *appeal dismissed sub nom.* Worthy v. Comm'rs 76 U.S. 611 (1869).

[64] U.S. CONST. amend. XIV, § 3.

[65] Since 1884, the oath of office that federal officers must take—except for the President, whose oath is prescribed by Article II, Section 1—requires the prospective official to state:

> I, ____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C. § 3331; Act of May 13, 1884, ch. 46, 23 Stat. 21.

[66] *Lawmakers, Loyalty and the "Ironclad Oath," 1864*, U.S. CAPITOL VISITOR CTR., https://www.visitthecapitol.gov/exhibitions/timeline/lawmakers-loyalty-and-ironclad-oath-1864 [https://perma.cc/2PNV-5N5F] (last visited Oct. 27, 2021).

[67] Act of July 2, 1862, ch. 128, 12 Stat. 502. In addition to federal civil servants, the Ironclad

Significantly more robust than what was in place prior to the Civil War,[68] the Ironclad Oath was used to punish and deter confederate sympathizers from electing to hold office because, by doing so, they would be exposed to criminal perjury charges. More importantly, this oath was used to unconstitutionally exclude people from office before Section 3 took legal effect.[69]

Beyond the federal oath, which only applies to federal officials, Section 3 expressly contemplates disqualifying people who had only held state offices and thus would not have been subject to the federal oath.[70] Article VI requires[71] that "the Members of the several State legislatures, and all executive and judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support [the United States] Constitution."[72] Thus, many oaths and affirmations relevant for Section 3 would have been administered by the several states.[73]

Looking back at the text of Section 3, it seems strange that it references only those "having taken an *oath*" whereas, in every other constitutional provision on the matter, the words "Oath or Affirmation" are used.[74] Does this mean that those who solemnly *affirm*, on their personal honor, are not within Section 3 where those who solemnly *swear* to some higher power are? Probably not. When the Fourteenth Amendment was ratified in 1868, every official "oath," at least federally, had included both oaths and affirmations;[75] indeed, from the very first Act of Congress, the oaths and affirmations required by Article VI have been referred to simply as oaths.[76]

Oath was also to be administered to all lawyers, a practice that was rendered unconstitutional by the Supreme Court in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

[68] Before the Ironclad Oath, the federal oath of office consisted only of: "I do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." An Act to Regulate the Time and Manner of Administering Certain Oaths, ch. 1, § 1, 1 Stat. 23 (1789).

[69] *See* Powell v. McCormack, 395 U.S. 486, 521–22 (1969) (disallowing the use of exclusion proceedings for extraconstitutional conduct-policing).

[70] U.S. CONST. amend. XIV, § 3.

[71] Some have claimed that certain states did not fully adhere to this requirement. *See, e.g.*, *In re* Griffin, 11 F. Cas. 7, 22, 27 (C.C.D. Va. 1869) (No. 5,815).

[72] U.S. CONST. art. VI.

[73] *See* 4 U.S.C. § 101.

[74] *Compare* U.S. CONST. amend. XIV, § 3 ("having previously taken an oath . . . to support the Constitution of the United States"), *with* U.S. CONST. art I, § 3 ("[Senators] shall be on Oath or Affirmation" for impeachments); U.S. CONST. art. II, § 1 ("[The President] shall take the following Oath or Affirmation"); U.S. CONST. art. VI ("the Members of the several State legislatures, and all executive and judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support [the United States] Constitution").

[75] *See supra* notes 65–69 and accompanying text.

[76] *See, e.g.*, Act of June 1, 1789, ch. 1, § 1, 1 Stat. 23 (affirmation not part of Act title); Act to Prescribe an Oath of Office, ch. 128, 12 Stat. 502 (1862) (same); An Act Amending the Revised Statutes of the United States in Respect of Official Oaths, ch. 46, 23 Stat. 21 (1884) (referring simply to "oaths" rather than "oath or affirmation" throughout).

So, "taking an oath" to the legal community in the mid- to late-Nineteenth Century presumably meant having gone through the process of solemnly swearing *or* affirming to support the United States Constitution as required by Article VI. Consequently, Section 3 cannot be avoided simply by an officeholder's choice to affirm rather than swear to uphold the Constitution.

C. Engaging in Insurrection or Rebellion

Plainly put, active participation in the Confederacy was the impetus[77] of including "engaging in insurrection or rebellion" as one of Section 3's two proscribed crimes.[78] This fact, however, is inapposite to modern Originalist interpretation, which is primarily concerned with the original public meaning.[79] The legal definition of "engaging in insurrection or rebellion" did not require taking up arms and levying war against the United States, but came from the militia act of 1795—a predecessor of the Insurrection Act of 1807—which gave the President certain powers in case of insurrection or rebellion.[80] Per that act—and the Insurrection Act that followed, which remains as amended on the books today—insurrections and rebellions consisted of either uprising and threatening the government of a state, leading the state's legislature to petition for federal intervention,[81] or opposing or obstructing the

---

[77] Beyond the Confederacy, the House also briefly discussed the Whiskey Rebellion and the Burr Trial as the only two other comparable instances in American history. CONG. GLOBE, 39th Cong., 1st Sess. 2534, 2534 (1866).

[78] Whether Section 3 constitutes a punishment was discussed at length in the debates, *see, e.g.*, *id.* at 2915, and in Jefferson Davis's case, see *In re* Davis, 7 F. Cas. 63 (C.C.D. Va. 1871) (No. 3,621A). With hindsight, it seems clear that this is a punishment, so it will be discussed as such.

[79] *See generally* Lawrence B. Solum, What Is Originalism? The Evolution of Contemporary Originalist Theory 1 (2011) (unpublished manuscript), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub [https://perma.cc/TTB8-KZME].

[80] Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424); *In re* Davis, 7 F. Cas. 63, 96 (C.C.D. Va. 1871) (No. 3,621A) (referring, as an attorney for the United States in the treason trial of Jefferson Davis, to the militia act of 1795 as establishing the test for insurrection or rebellion). *But see* The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 160 (1867) ("The first part of the sentence covers the case of domestic war existing in form of rebellion or insurrection . . . .").

The contemporarily authoritative legal dictionary distinguished between different types of government opposition, stating "insurrection, sedition, rebellion, revolt, and mutiny express action directed against government or authority, while riot has this implication only incidentally, if at all," before noting rebellion, insurrection, revolt, and mutiny must be expressions of "actual and open resistance to authority." *Rebellion*, 2 BOUVIER'S LAW DICTIONARY & CONCISE ENCYCL. (Rawles Rev., 1867), https://www.google.com/books/edition/Law_Dictionary/CYZOAAAAYAAJ?hl=en&gbpv=1&bsq=rebellion [https://perma.cc/UYH7-TUSB]. It went on to define insurrection as "an actual arising against the government," but clarified that "[r]ebellion goes beyond insurrection in aim." *Id.* Rebellions, according to this dictionary, were attempts to actually overthrow the government, while insurrections sought only minor changes. *Id.*

[81] Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424 ("in case of an insurrection in any state").

execution of the laws of the United States "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals."[82] In either case, the President must make a proclamation ordering a cessation of the uprising and "it is only after disobedience to that proclamation" that it can duly be considered insurrection or rebellion.[83]

Early drafts of what would become Section 3 *were* actually limited to the Civil War itself,[84] but by the time of ratification, the language was broadened to insurrection and rebellion generally.[85] Another change in the language from early drafts to the finished product was the removal of the word "voluntarily."[86] This omission notwithstanding, Section 3 was understood to contain an implicit voluntariness requirement.[87] Therefore, the Reconstruction Era legal community appears to have understood engaging in insurrection or rebellion, for the purposes of Section 3, as voluntarily being part of a combination that is opposing or obstructing the laws of the United States or any State in a manner too powerful to be suppressed by the justice system, a definition by which taking up arms or holding office for the confederacy were obviously included.[88]

---

[82] *Id.* § 2; Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281 ("rebellion against the authority of the Government of the United States"); Presidential Proclamation (April 15, 1861); *see also* Luther v. Borden, 48 U.S. (7 How.) 1, 2 (1842) ("Although no State could establish a permanent military government, yet it may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority.").

[83] Act of Feb. 28, 1795, ch. 36, § 3, 1 Stat. 424; *Davis*, 7 F. Cas. at 96; Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29–32 (1827).

[84] CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866) ("all persons who voluntarily adhered to *the late insurrection*, giving it aid and comfort, shall be excluded from the right to vote . . . .") (emphasis added).

[85] U.S. CONST. amend. XIV, § 3.

[86] *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866) ("all persons who *voluntarily* adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote . . . .") (emphasis added), *with* U.S. CONST. amend. XIV, § 3. The Senate debated whether to include a voluntariness requirement at length and decided against it. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2918–21 (1866).

[87] United States v. Powell, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (No. 16,709) ("[engaging in insurrection or rebellion] implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellon [sic] . . . and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment."); The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 161 (1867); Privett v. Stevens, 25 Kan. 275, 277–78 (Kan. 1881). *But see* CONG. GLOBE, 39th Cong., 1st Sess. 2918–21 (1866) (debating the grounds for objecting to adding "voluntary").

[88] Section 3 could be read as only providing punishment for engaging in insurrection or rebellion against the United States, and not caring about actions against any particular state. But the sounder plain-text interpretation seems to be punishing insurrection or rebellion against the Constitution of the United States, which guarantees to each state a republican form of government. U.S. CONST. art. IV, § 4. Through this interpretation, rebellions or insurrections recognized by the federal government fall within Section 3, but rebellions or insurrections recognized only by state governments would not. *Cf.* Luther v. Borden, 48 U.S. (7 How.) 1,

The modern test of whether an insurrection or rebellion exists is largely the same, as set by the amended Insurrection Act,[89] which is codified in Title 10 of the U.S. Code, and adds the following:

> The President . . . shall take such measures as he considers necessary to suppress, in a State, any insurrection . . . if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.[90]

Before the President can so act, they still must issue a Proclamation, "immediately order[ing] the insurgents to disperse and retire peaceably to their abodes within a limited time."[91] This modern test facially appears to be a simple extension of the original that allows the President, in declaring an insurrection, to consider the guarantees of the Fourteenth Amendment.[92] To utilize this extension, however, some

---

2 (1849) (state governments, following Presidential inaction, must themselves determine the appropriate degree of force).

[89] Insurrection Act of 1807, ch. 39, 2 Stat. 443; Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281; Act of April 20, 1871, ch. 22, § 3, 17 Stat. 13.

[90] 10 U.S.C. § 253; *see also id.* §§ 251–52. The criminalization of engaging in such an insurrection is found in 18 U.S.C. § 2383.

[91] 10 U.S.C. § 254. This has been done primarily in the civil rights context to enforce *Brown v. Board* and to squash race riots. *See, e.g.*, Proclamation No. 3204, 22 Fed. Reg. 7628 (Sept. 23, 1957); Proclamation No. 3795, 32 Fed. Reg. 10905 (July 24, 1967).

[92] For examples of when the President has had such authority, regardless of whether it was invoked, see, e.g., Suppression of Unlawful Organizations in Arizona, 17 U.S. Op. Atty. Gen. 242 (1881) (discussing the use of force to suppress outlaw activity along the Arizona territory and Mexico border); Suppression of Lawlessness in Arizona, 17 U.S. Op. Atty. Gen. 333 (1882); President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 U.S. Op. Atty. Gen. 313, 326 (1958) (in response to riots in response to the integration of public schools in Arkansas); Use of Potatoes to Block the Maine-Canada Border, 5 U.S. Op. Off. Legal Counsel 422, 426 (1981); Authority for Use of Military Force to Combat Terrorist Activities Within the United States, 2001 WL 36190674 (O.L.C. Oct. 23, 2001).

For a more thorough discussion of the Insurrection Act and its history, see generally Scott R. Anderson & Michel Paradis, *Can Trump Use the Insurrection Act to Deploy Troops to American Streets?* (June 03, 2020, 8:47 AM), https://www.lawfareblog.com/can-trump-use-insurrection-act-deploy-troops-american-streets [https://perma.cc/XHU6-EDLH]; JENNIFER K. ELSEA, CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW (last updated Nov. 6, 2018).

have suggested it is necessary for the unrest to violate federal law and that mass unrest that violates only state law could only amount to insurrection if the state's legislature requests assistance.[93] This possible condition is not explicit in the text of the Insurrection Act, but comes from the context that its relevant amendments were enacted in.[94] Because this has not been litigated, this Article will not treat it as a condition and will treat the President's Proclamation pursuant to the Insurrection Act as the threshold indicator of whether insurrection or rebellion exists;[95] potential Section 3 respondents may, however, try to invoke this argument as an affirmative defense that the President's invocation was invalid.[96]

D. Giving Aid or Comfort to the Enemy

The second type of conduct proscribed by Section 3 requires "giving aid or comfort" to "the enemies of the United States." This prong, with one very important exception—the omission of any adherence requirement[97]—is taken from Article III's definition of treason,[98] which was taken in turn from the English Treason Statute of 1351.[99] The English Treason Statute has been understood such that "giving aid and comfort" consists of "an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, or which weakens or tends to weaken the power of the King and of the country to resist or attack" those

---

[93] *See* Anderson & Paradis, *supra* note 92.

[94] *See id.*

[95] *See* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29–32 (1827) (noting that the President "is necessarily constituted the judge of the existence of the exigency in the first instance" when deciding whether to invoke the Militia Act of 1795).

[96] *But see id.*

[97] *See, e.g.*, Cramer v. United States, 325 U.S. 1, 30 (1945) (stating that, for treason, "the indispensable overt act must sustain [] the two elements of the offense as defined: viz., adherence and giving aid and comfort.").

[98] U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist . . . in adhering to their Enemies, *giving them Aid and Comfort*.") (emphasis added); CONG. GLOBE, 39th Cong., 1st Sess. 2498, 2500 (1866) (providing, in an early draft of Section 3, that "all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote"); The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 160 (1867). It appears that the difference between "*and*" and "*or*" is inconsequential. *See id.*

[99] 25 Edw. 3, st. 5, ch. 2 (1351) ("[I]f a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving them aid and comfort in the realm, or elsewhere, . . . [they] ought to be judged [of] Treason[.]"); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 869–73 (2006) ("No provision of the Constitution is as rooted in English legal history as the Treason Clause."); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 226 (1944) ("Taking the colonial period as a whole, in most of the colonies the definition of the offense was clearly thought of in terms of the English legislation. . . ."); *see generally* Charles Warren, *What is Giving Aid and Comfort to the Enemy?*, 27 YALE L.J. 331 (1918) (discussing the historical origins and understandings of treason by adherence and aid or comfort).

enemies.[100] In the context of American treason law, the Supreme Court has stated that there is "no evidence whatever that . . . aid and comfort was designed to encompass a narrower field than that indicated by its accepted and settled meaning" from the English Treason Statute.[101] This "accepted and settled meaning" meant that "aid and comfort is given when the enemy is encouraged and his morale bolstered as well as when materials are furnished."[102]

1. Aid or Comfort

Having established that "aid or comfort" was intended to import the tests of the Treason Clause and old English law—other than the adherence requirement[103]—is *not* itself sufficient to establish what the original public meaning of the clause was, though the well-established historical background definitely informed such meaning. Luckily, we have contemporary interpretations from courts and Congress that can fill any gaps in the historical record. The Fortieth Congress, which directly succeeded the Congress that drafted Section 3, and the Forty-First Congress together considered at least ten election challenges because of disloyalty.[104] Of these, six were admitted to sit in Congress and four were excluded.[105] Taking the most extreme example, *Smith v. Brown* showed that an inflammatory letter to a newspaper was all that was needed as evidence to bar a Representative-Elect from sitting in the Fortieth

---

[100] King v. Casement, 1 K.B. 98 (1917).

[101] Cramer v. United States, 325 U.S. 1, 76 (1945).

[102] *Id.* at 73, 76.

[103] *Compare* U.S. CONST. amend. XIV, § 3, *with* U.S. CONST. art. III, § 3; *see also* ASHER C. HINDS, 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 443 (1907) [hereinafter 1 HINDS' PRECEDENTS] ("such acts or speech need not be such as to constitute treason technically, but must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."). *But see In re* Charge to Grand Jury, 30 F. Cas. 1036, 1037 (C.C.S.D. Ohio 1861) (No. 18,272) ("The words 'adhering to their enemies,'" seem to have no special significance, as the substance is found in the words which follow—"'giving them aid and comfort.' . . . In general, when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs, gives them aid and comfort.").

[104] *Known House Cases Involving Qualifications for Membership*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Qualifications/Qualifications-for-Membership-Cases/ [https://perma.cc/WP23-C34K] (last visited Oct. 27, 2021); U.S. SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793–1990 (1994); *see infra* Sections IV.A.3–B. Of these ten, only five were adjudicated *after* the Fourteenth Amendment's ratification. For the earlier five, exclusions were made on the grounds of inability to take the Ironclad Oath; regardless, this Congress included many of the same actors and frequently used language in hearings that mirrored Section 3 more so than the Ironclad Oath. So, for reasons further discussed *infra* Part IV, this Article treats these cases as contemporary evidence of public meaning.

[105] *Known House Cases Involving Qualifications for Membership*, *supra* note 104; U.S. SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793–1990, *supra* note 104.

Congress.[106] In the case of *McKee v. Young*, also before the Fortieth Congress, it was said that "aid and comfort may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position."[107]

But what does it mean to occupy an influential position? Victor Berger's publication, the *Milwaukee Leader*, had roughly 14,000 subscribers when the Espionage Act revoked its mailing privileges.[108] Social media platforms, such as Facebook, Instagram, and Twitter, are flush with individuals and communities with far more subscribers than that,[109] and a growing number of people utilize these platforms for news consumption.[110] The United Kingdom has recently concluded that having 30,000 followers on a single platform "indicated that [the account owner] had the attention of a significant number of people" and regulated the account's posts as if they were a "celebrity."[111] Digital marketing metrics treat everybody with between 1,000 and 100,000 followers as "micro-influencers."[112] Given that the United States has roughly three times more people living within its borders than it did when Victor Berger's case presented itself, scaling the size of the *Milwaukee Leader* provides a workable proxy for being "one occupying an influential position,"[113] though this could be too high of a bar. Consequently, natural cut-offs for Section 3 "influencers"

---

[106] 1 HINDS' PRECEDENTS, *supra* note 103, at 445.

[107] H.R. REP. NO. 40-29, at 2 (1868) (internal quotation marks omitted).

[108] John M. Work, *The Leader Among Labor Dailies*, 12 LABOR AGE 9 (Oct. 1923), https://www.marxists.org/history/usa/pubs/laborage/v12n08-oct-1923-LA.pdf [https://perma.cc/7TJV-9WD4]. Outside of network-based tests of influence, it could be argued that the relevant influence stems from being an officeholder or from some other reputational basis.

[109] Prior to suspension of his account, President Trump alone had more than 88.5 million followers on Twitter—more than the *entire* United States' population in 1900. *Twitter 'Permanently Suspends' Donald Trump's Account*, CNA (Jan. 9, 2021, 7:35 AM), https://www.channelnewsasia.com/news/world/donald-trump-twitter-account-suspended-realdonaldtrump-13924784 [https://perma.cc/5C6F-24PS]; *National Intercensal Tables: 1900–1990*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/pre-1980-national.html [https://perma.cc/U7CE-FE4A] (last visited Oct. 27, 2021); *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock (last visited Oct. 27, 2021).

[110] *See* Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/ [https://perma.cc/5UVZ-Z5ZR].

[111] *ASA Ruling on Sanofi UK in Association with This Mama Life*, ADVERT. STANDARDS AUTH. (July 3, 2019), https://www.asa.org.uk/rulings/sanofi-uk-A19-557609.html [https://perma.cc/JG2H-MVTQ].

[112] *See, e.g.*, Kaya Ismail, *Social Media Influencers, Mega, Macro, Micro, or Nano*, CMS WIRE (Dec. 10, 2018), https://www.cmswire.com/digital-marketing/social-media-influencers-mega-macro-micro-or-nano/ [https://perma.cc/MM8F-2X5G].

[113] *Compare* NUMBER AND DISTRIBUTION OF INHABITANTS, U.S. CENSUS BUREAU (1920), https://www2.census.gov/library/publications/decennial/1920/volume-1/41084484v1ch1.pdf [https://perma.cc/5M4L-B32B], *with U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/JQY2-NE62] (last visited Oct. 27, 2021).

could be set at the United Kingdom's 30,000, the *Leader*'s 42,000 unique followers across social media platforms, or even as high as 100,000.[114] Or perhaps being a person of influence is context specific and simply holding office is enough. Unfortunately, contemporaneous litigation leaves the exact delineation unclear.

In other, non-Section-3, Reconstruction-Era contexts: giving aid and comfort frequently took the form of selling goods or services to the confederacy, even without doing so for the purpose of aiding the rebel cause.[115] People doing as such "cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the [enemy cause], he does not sell them for that purpose. . . . [They] must be taken to intend the consequences of [their] own voluntary act."[116] This is easier to conceptualize as providing aid and comfort than the general speech-type acts of Young or Brown because, by the action of providing goods or services to the enemy, the enemy is directly and tangibly benefitting unlike the abstract and intangible benefit gained from speech acts.

Modern-day inclinations regarding freedom of speech or enterprise notwithstanding, these examples—writing a letter as an influential person, selling goods, or providing services—of contemporary applications of the "aid or comfort" language reinforce the idea that the legal community understood it as they understood the treason-context parallel. After all, in the treason context, "aid and comfort is given when the enemy is encouraged and his morale bolstered as well as when materials are furnished,"[117] and the above examples neatly fit within that test.

2. Enemies of the United States

Aid and comfort can be provided without penalty, so long as the beneficiary is not among the enemies of the United States.[118] Outside of Section 3, the only constitutional mention of enemies is in the Treason Clause.[119] Outside of the Constitution, prize cases rely on their own definition of enemies and multiple statutes define who the United States' enemies are,[120] but the earliest of those statutes was

---

[114] Using followers as a metric for influence based on a comparison to the world as it existed from Reconstruction through the First World War is flawed insofar as modern-day platforms allow for instantaneous sharing and resharing, and thus increased influence from any given speech act, but without a better proxy this test will have to work.

[115] *See, e.g.*, Carlisle v. United States, 83 U.S. 147 (1872) (holding that British subjects residing in the United States were not entitled to compensation for property seized by Union soldiers under the Captured and Abandoned Property Act because they sold goods to the confederacy, and thus gave them aid and comfort). Like the Captured and Abandoned Property Act, ch. 120, § 3, 12 Stat. 820 (1863), the Court of Claims Act of 1868 also had provisions regarding the giving of aid or comfort. ch. 71, § 3, 15 Stat. 75 (1868).

[116] *Carlisle*, 83 U.S. at 151.

[117] Cramer v. United States, 325 U.S. 1, 73 (1945).

[118] *See* U.S. CONST. amend. XIV, § 3.

[119] *See* U.S. CONST. art. III, § 3.

[120] *See* 50 U.S.C. § 4302 (1918) ("(a) Any individual, . . . of any nationality, resident

enacted in the context of the First World War[121]—a full fifty years after Section 3's ratification.[122] Consequently, the only indicators of the contemporary understanding of who comprises the enemies of the United States come from treason prosecutions and maritime disputes.

Justice Field, serving as a circuit justice in 1863, interpreted enemies in the treason context "according to its settled meaning at the time the constitution was adopted, appl[ying] only to the subjects of a foreign power in a state of open hostility with us."[123] Relying on the English common law, he went on to state "[a]n enemy is always the subject of a foreign power who owes no allegiance to our government or country."[124] Indeed, this view was dominant in the legal community for interpreting enemies *in the treason context* prior to the Fourteenth Amendment.[125] In the prize context, however, the Supreme Court noted that "[u]nder the very peculiar Constitution" of the United States, "States claiming to be sovereign over all persons and property within their respective limits" were "asserting a right to absolve their citizens from their allegiance to the Federal Government" by organizing their rebellion.[126] Because of this peculiarity, "all persons residing within [the confederacy] . . . [were] liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors."[127]

Because, as noted above, Section 3 is an adaptation of the Treason Clause, one may assume that the *treason* definition of enemies was adopted by the Thirty-Ninth Congress, to the exclusion of the *prize* definition.[128] There is reason, however, to

---

within the territory . . . of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory . . . or incorporated within any country other than the United States and doing business within such territory. (b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer . . . thereof. (c) Such other individuals . . . as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, . . . as the President . . . may . . . include within the term 'enemy.'"); 50 U.S.C. § 2204 (1996) ("[A]ny country, government, group, or person that has been engaged in hostilities, whether or not lawfully authorized, with the United States.").

[121] *See* 50 U.S.C. § 4302 (1917).

[122] *See* U.S. CONST. amend. XIV.

[123] United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254).

[124] *Id.*

[125] *See, e.g.*, The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 160–61 (1867); Larson, *supra* note 99, at 869–73.

[126] The Prize Cases, 67 U.S. (2 Black) 635, 673 (1862) (emphasis omitted).

[127] *Id.* at 674. The *Prize Cases*, however, were not resolved on these grounds. The Supreme Court noted that the term "enemies' property" was a technical phrase "peculiar to prize courts" and declared that "[t]he owner, *pro hac vice*, is an enemy." *Id.*

[128] *See* Larson, *supra* note 99, at 919–20 (arguing that the *Prize Cases* did not represent a departure from historic understandings of enemies in the treason context but instead was being interpreted in an international law of prizes context).

doubt this assumption. First, Congress frequently referred to the confederates as enemies and directly, although briefly, cited to the *Prize Cases* to justify treating the Confederacy as conquered enemies.[129]

Second, the Attorney General in 1867 said "although [he] strongly incline[d] to think that the *aid and comfort* here mentioned should strictly be confined to its acknowledged legal interpretation, [he was] not quite prepared to say that Congress may not have used it as applicable to the rebellion," because "for certain purposes and in a certain sense, every citizen in the rebel States, during the late rebellion, [wa]s to be considered a public enemy."[130] Further, in an apparent confirmation of the Attorney General's suspicions, all but one of the congressionally adjudicated Section 3 disputes and the few judicial applications of Section 3 were centered around the Civil War.[131] If Congress was utilizing the pure Treason Clause definition of enemies, the confederacy—as a domestic entity—could not have been an enemy and aiding or comforting it could not trigger Section 3.

Assuming Congress adopted the Supreme Court's stance on enemies from the then-recently decided landmark *Prize Cases*, on the other hand, would explain this departure in practice. At the very least, Congress's actions in adjudicating Section 3 challenges show that the legal community began to understand that domestic actors could also be enemies, at least if operating under the sovereignty of a rebelling state government.[132] This shift implies that prize case definitions of enemies *do* inform understandings of Section 3, even if they do not inform understandings of the Treason Clause.[133]

It is clear then that there were two contemporary understandings of who was an enemy of the United States: first, subjects of a foreign power "in a state of open hostility" with the United States;[134] and second, subjects of a rebelling domestic state that has taken arms against the United States.[135] But what is "a state of open hostility"? While it may be obvious that such a state is "characterized by armed conflict,"[136] the

---

[129] CONG. GLOBE, 39th Cong., 1st Sess. 2536 (1866).

[130] The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 160–61 (1867).

[131] *See infra* Part IV.

[132] *The Prize Cases*, 67 U.S. (2 Black) at 673. *But see* Larson, *supra* note 99, at 919. This does not mean that the typical American insurrectionist or rebel—i.e., not acting under a de facto sovereign government that is at war with the United States—can be labelled an enemy.

[133] It is very possible that the Fourteenth Amendment implicitly amended the definition of enemies in the Treason Clause as it implicitly amended—through "reverse incorporation"—much of the Bill of Rights, but that is beyond the scope of this Article.

Further support for this argument can be found by looking at the modern oath of office, which explicitly requires "support[ing] and defend[ing] the Constitution of the United States against all enemies, foreign *and domestic*." 5 U.S.C. § 3331 (emphasis added).

[134] United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254).

[135] *Prize Cases*, 67 U.S. at 673.

[136] United States v. McCrary, 1 C.M.A. 1, 8 (1951) (Brosman, J., concurring).

actual boundary-lines are more difficult to conjure because treason prosecutions have historically arisen only where it was very clear who our enemies were. During the Quasi-War between the United States and France,[137] the Supreme Court considered the question in the prize case of *Bas v. Tingy*.[138] Recognizing the exchanges of force upon the high seas, Justice Moore asked "by what other word the . . . situation of America and France could be communicated, than by that of hostility, or war? And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of enemies?"[139] Justice Washington distinguished between "perfect" and "imperfect" wars on the basis of whether there were limitations as to the hostilities authorized in the dispute, labelling the Quasi-War as the latter.[140] To Justice Washington, stopping trade with France and commissioning American ships to attack and take as prize French ships could lead to only one conclusion: "They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of two governments. If they were not our enemies, I know not what constitutes an enemy."[141] Justice Chase, largely agreeing with the above sentiments, said "Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases. . . . So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates."[142] This reinforces the idea that a formal declaration of war is not required but also shows that there must be some public authority for the uses of force.[143]

As noted above, the original understanding of who constituted enemies of the United States centered around authorized uses of force with additional consideration being given to the state of diplomatic relations between the United States and the hostile party.[144] Our "enemies" were never defined formulaically and "I shall not today attempt further to define the kinds of [actors] I understand to be embraced

---

[137] *See generally, e.g.*, *The XYZ Affair and the Quasi-War with France, 1798–1800*, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1784-1800/xyz [https://perma.cc/F429-3VSK] (last visited Oct. 27, 2021).

[138] 4 U.S. (4 Dall.) 37 (1800).

[139] *Id.* at 39 (opinion of Moore, J.) (emphasis omitted).

[140] *Id.* at 40 (opinion of Washington, J.).

[141] *Id.* at 41.

[142] *Id.* at 43 (opinion of Chase, J.).

[143] This public authority need not be a congressional declaration of war nor maybe even an explicit authorization for the use of military force, because "[u]nder the Constitution Congress has the power to declare war, but with the army and navy the President can take action such as to involve the country in war and to leave Congress no option but to . . . recognize its existence." United States v. Anderson, 17 C.M.A. 588, 591 (1968) (Kilday, J., concurring) (quoting President Taft).

[144] *Tingy*, 4 U.S. at 41 (opinion of Washington, J.).

within that shorthand description [because] perhaps I could never succeed in intelligibly doing so."[145] But, much like Justice Stewart and pornography, "[we] know it when [we] see it."[146] Or at least we used to.

With the advent of the United Nations, the increased weaponization of the global economy, the seemingly never-ending state of quasi-war with amorphous groups whose alliances fluctuate, and the change from human- to machine-centric warfare, it is harder than ever to tell who our enemies are. The United States has been in an on-off cold war with Russia for decades, there has been a multi-year "trade war" with China, kinetic and cyber attacks have publicly and privately been exchanged with Iran, and North Korea has been exhaustingly threatening nuclear annihilation for years.[147] Then there are the non-state actors: the Islamic State, the Taliban, Al-Qaeda, and the like.[148] In the past, the United States has openly intervened to overthrow despotic or communist regimes in South America and Asia despite, in some instances, never sending a single soldier.[149] Not all of these state and non-state actors, however, are—or were—our enemies because the United States never entered into a "state of open hostilities."[150]

In *Bas v. Tingy*, Justice Washington made clear that, for a state of open hostilities to exist, the actions taken must be "authorised by the legitimate authority of two governments."[151] Justice Washington also made clear that "contention by force" categorically constitutes hostilities.[152] What the *Tingy* Court did not address, however, is what the Center for Strategic and International Studies calls "the Gray Zone," which includes information operations, political coercion, economic coercion, cyber operations, proxy support, and provocation by state-controlled Forces.[153] These provocations, designed to further a state's interests at the cost of a geopolitical rival without triggering escalation, fall "somewhere between routine statecraft and

---

[145] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[146] *Id.*

[147] *See generally* Annual Threat Assessment of the US Intelligence Community, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, 2021.

[148] *Id.*

[149] *See, e.g.*, *Understanding the Iran-Contra Affairs: The Counterrevolutionaries ("The Contras")*, BROWN UNIV., https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/n-contras.php [https://perma.cc/9VNW-88HZ] (last visited Oct. 27, 2021); *U.S. Relations with Iran*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/timeline/us-relations-iran-1953-2021 [https://perma.cc/PML3-6BJ6] (last visited Oct. 27, 2021).

[150] *See Tingy*, 4 U.S. at 41 (opinion of Washington, J.).

[151] *Id.* Presumably, the second "government" in the case of non-state actors is simply whoever is in charge. *See* Larson, *supra* note 99, at 916 (citing 4 BLACKSTONE'S COMMENTARIES at *83) (labelling pirates as enemies). But *Tingy* did not have a chance to address the non-state-actor question.

[152] *Tingy*, 4 U.S. at 41 (opinion of Washington, J.).

[153] *See, e.g.*, *Gray Zone Project*, CTR. FOR STRATEGIC & INT'L STUDIES, https://www.csis.org/grayzone [https://perma.cc/243M-PFBB] (last visited Oct. 27, 2021).

open warfare"[154] and it is still an open question whether the existence of such back-and-forth actions would qualify as open hostilities.

E. Removing the Disability

The simplest of the components of Section 3 is the provision allowing for the removal of the disability it imposes. Section 3 states that "Congress may by a vote of two-thirds of each House, remove such disability."[155] This has been done numerous times, some aimed at individuals and others aimed at large groups of people.[156] This culminated in the General Amnesty Act of 1872, which removed Section 3's disqualification "from all persons whomsoever" with four exceptions that are irrelevant here, and an 1898 universal amnesty act.[157] The original understanding was plainly that Congress could, by two-thirds vote, remove Section 3's disqualification from individuals or classes of people. Notably, the only invocation of Section 3 not contemporary to its drafting resulted in a future Congress completely ignoring this component of Section 3 by allowing somebody previously excluded to sit as a Member.[158]

II. THE TEST AND ITS APPLICATION

With a provision as powerful and as politically wieldable as Section 3—one that can be used to disqualify people from holding office on claims of disloyalty to the United States—it is of paramount importance to make sure that it is neutrally enforced.[159] Though the irony should not be lost in remembering that the initial test was anything but neutral. Should the test be perceived as biased, prudence would require decision makers to exercise Thayerian levels of self-restraint,[160] or else all legitimacy could be lost outside the extraordinary circumstances surrounding its ratification.

It has been established as a threshold issue that Section 3 was not voided by the amnesty acts of 1872 or 1898, nor did it substantively expire the day the last confederate died.[161] Second, no person is disqualified after forgiveness from two thirds of each

---

[154] *See, e.g.*, *id.*

[155] U.S. CONST. amend. XIV, § 3.

[156] James A. Rawley, Note, *The General Amnesty Act of 1872*, 47 MISS. VALLEY HIST. REV. 480, 482 (1960) ("Congress, by individual acts, relieved numerous southerners of disability in the years preceding the Amnesty Act of 1872.").

[157] Act of May 22, 1872, ch. 193, 17 Stat. 142; Act of June 6, 1898, ch. 389, 30 Stat. 432.

[158] *See infra* Section IV.G.

[159] *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[160] *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). This level of restraint, outside of the judicial review of statutes, would likely see decisionmakers not disqualify an official on Section 3 grounds unless their conduct was clearly treasonous. In other words, decisionmakers would be counseled to refrain themselves if there was the slightest ambiguity as to the merits of disqualification.

[161] CLARENCE CANNON, 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES

chamber of Congress.[162] These are non-controversial. The challenges come with determining who is an officer and whether somebody "engaged in insurrection or rebellion" or has "given aid or comfort to the enemies" of the United States.[163]

A. Officers of the United States and the Several States

Regardless of the proper scope of an office under the United States for Appointments Clause purposes, which is fact-laden and difficult to predict ex ante,[164] Section 3 is primarily concerned with the officers themselves.[165] There are two different contemporaneously developed tests to determine who is an officer of the United States: the functionalist *Hartwell* test and the formalist *Germaine* test.

Under the formalist test, a decision maker can usually skip over whether the position is *properly* classified as an office and look to the structural test of whether the supposed officer was appointed as an officer: if somebody was appointed by the President, the head of an executive department, or the courts of law[166] to a continuing position created by law, then they are an officer of the United States.[167] And if somebody took an oath to support the Constitution pursuant to Article VI for their state position, then they are an officer of their state.[168] This especially makes sense for classifying preconditional positions, accepting the general idea behind Section 3 was "that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress."[169]

Defaulting to the formalist test is supported by contemporary interpretation of Section 3. The simple rule of *Worthy v. Barrett* is that:

> [There is no better way] to draw the distinction between an officer and a mere placeman, than by making his oath the test. Every officer is required to take . . . an oath to support the Constitution

---

OF THE UNITED STATES 53, 58 (1935) [hereinafter CANNON ON PRECEDENTS] (internal citations omitted).

[162] U.S. CONST. amend. XIV, § 3.

[163] *Id.*

[164] *See generally* Mascott, *supra* note 36.

[165] *See id.*

[166] Courts of law, post-*Freytag*, 501 U.S. 868 (1991), seem to include Article I tribunals as well as Article III courts.

[167] *See* Buckley v. Valeo, 424 U.S. 1, 5 (1976), *superseded in part by statute*, The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81. As noted in Section I.A, the President, who is selected by a different constitutional procedure is also likely an officer.

[168] Worthy v. Barrett, 63 N.C. 199, 204–05 (1869), *appeal dismissed sub nom.* Worthy v. Comm'rs 76 U.S. 611 (1869).

[169] *Id.*; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866) ("I understood the purpose . . . to be to exclude the men who violated their oath of office . . ., who added moral perjury to the crime of violating their allegiance.").

> of the State and of the United States. Whereas every mere placeman is simply required to take an oath to perform the particular duty required of him . . . and takes no oath to support the Constitution of the State, or of the United States.[170]

Where this formalist test is not satisfied, the challenger would likely invoke the functionalist test to have the courts establish the position is, in fact, an office. And a respondent to a Section 3 challenge may have an affirmative defense if they can show, via the functionalist test, that they were not an officer despite the formalities. But as always, relevant state supreme court decisions as to which offices in a state meet the constitutional definition must be consulted for state challenges.

B. Engaging in Insurrection or Rebellion

As noted above, the original accepted legal definition of "engaging in insurrection or rebellion" did not require taking up arms and levying war against the United States, but simply opposing or obstructing the execution of the laws of the United States or any state "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals."[171] The limiting effect of "too powerful to be suppressed" by the justice system ensures that standard acts of peaceful protest and civil disobedience designed to show opposition to or hinder execution of supposedly unjust laws could not trigger such extreme consequences.[172] Further, the voluntariness requirement guarantees that people will not be unjustly disqualified for participating in an uprising or other conflict against a state or the United States under duress.[173]

Insurrection and rebellion have high bars that, in light of the Proclamation requirement, should be obvious enough and Section 3 should be easy to apply to those engaged in them. Though the President has sent federal troops to quell insurrections without proclamations and without apparent statutory bases,[174] it is hard to believe that a court (or Congress) would allow for a deprivation of somebody's right to hold public office according only to the President's subjective and secretive assertion.[175]

---

[170] *Worthy*, 63 N.C. at 202.

[171] *See supra* note 82 and accompanying text.

[172] *See* Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281.

[173] *See* The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 161 (1867).

[174] *See generally* ELSEA, *supra* note 92.

[175] It should be noted that "[t]he President of the United States is the exclusive judge whether the exigencies have arisen in which he is authorized to call forth the militia of the Union," and "[i]t is not necessary in such a case that it should appear . . . that the exigency actually existed. It is sufficient that the President has determined it, and all other persons are bound by his decision." Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29, 32 (1827). But this exclusive authority is vested by the Insurrection Act and its predecessor, and the proclamation requirement prevents

A basis in law, which requires a Proclamation, should then underlie a Section 3 challenge on the basis of insurrection or rebellion. The test, then, is basically: if somebody voluntarily takes part in a scheme that causes such domestic unrest that the President issues a Proclamation pursuant to the Insurrection Act and calls in the National Guard or other military forces to suppress their scheme, then they have engaged in insurrection or rebellion and could be disqualified by Section 3.[176]

Some may worry that this test could possibly capture people that participate in "mostly peaceful" mass protest movements that become violent and, in effect, suppress civil rights activists. An alternative test could be more formalist: the disqualification only attaching to those who have been adjudged guilty under 18 U.S.C. § 2383.[177] But this alternative is not ideal.[178] It also does not consider federally recognized rebellion or insurrection against states.

C. Giving Aid or Comfort to the Enemies of the United States

1. Aid or Comfort

In more of a gray area than engaging in insurrection or rebellion is speaking or acting in a manner that constitutes aid or comfort. Providing goods and services is giving aid or comfort.[179] That is clear enough. But what about "making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength"[180] as "one occupying an influential position"?[181] This is harder to apply.

When is "making a speech critical of the government or opposing its measures"[182] disqualifying under Section 3, and when is it the simple political speech that fundamental American principles immunize?[183] One answer would be to use the Sixtieth Congress's language and label speech as aid or comfort when "willfully

---

its secretive invocation. *Id.* at 31. And abuse of this power—either by invoking the Insurrection Act without justification or not invoking it when doing so would be justified—is remediable by impeachment. *Id.* at 32.

[176] *But see* Luther v. Borden, 48 U.S. (7 How.) 1, 2 (1842) (contemplating the arrest by law enforcement of people "engaged in [] insurrection" without a presidential proclamation).

[177] Act of July 17, 1862, ch. 195, § 2, 12 Stat. 589.

[178] There does not appear to be a single person ever convicted under this provision, so it is as much a gray area as Section 3.

[179] *See, e.g.*, Carlisle v. United States, 83 U.S. (16 Wall.) 147, 151 (1872).

[180] Cramer v. United States, 325 U.S. 1, 29 (1945).

[181] *See supra* Section I.D.1.

[182] *Cramer*, 325 U.S. at 29.

[183] *See, e.g.*, Cole v. Richardson, 405 U.S. 676, 680 (1972) (prohibiting loyalty oaths requiring "that one has not engaged, or will not engage, in protected speech activities such as []: criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office.").

hinder[ing], obstruct[ing], and embarrass[ing] the Government of the United States."[184] This would impute voluntariness and *mens rea* elements into the test: if the intent of the speech act is to further discussion on the merits of a government policy or it is taken out of context, then it would not be giving aid or comfort, but if it is said with the intent to sow discord, create disunity, or undermine the government, then it would be giving aid or comfort. This *mens rea* test cannot be justified by reliance on the original text of Section 3, which is steeped in a disregard for speech protections,[185] but at least one of the contemporary cases—that of Lawrence Trimble[186]—and part of the discussion from *United States v. Powell*[187] provide a sound basis for it. Further, recognizing Section 3 as a constitutional crime[188] may provide justification for requiring at least *some mens rea*.

2. Enemies of the United States

Part of the reason that the enemies of the United States are so hard to define is that it has historically been a political question.[189] This makes sense, given that declaring a nation or organization as an enemy of the United States has been perceived as "tantamount to a declaration of war."[190] "Such a determination therefore raises thorny questions of foreign relations that the text of the Constitution squarely commits to the political branches . . . . [And is] particularly inappropriate for judicial resolution."[191] This means—at least where Section 3 actions are brought by either the Department of Justice or Congress—the test, at least superficially, appears to be whether the challenge is brought. If the Department of Justice brings a Section 3 challenge to somebody's title for office under the aid or comfort test, that is the executive branch labelling the group in question as an enemy and the courts could abstain from weighing in one way or the other under *Baker v. Carr*.[192] If Congress brings a Section 3 challenge against a congressperson-elect's qualification for office under the aid-or-comfort test, that is the legislative branch labelling the group in question as an enemy and the courts have no ability to hear challenges relating to the qualifications of Members of Congress.[193]

---

[184] CANNON ON PRECEDENTS, *supra* note 161, at 58.

[185] *See generally infra* Part IV.

[186] *See infra* Section IV.A.3.

[187] 27 F. Cas. 605 (C.C.D.N.C. 1871) (No. 16,709).

[188] As noted, the drafting Congress was split as to whether Section 3 was a punishment. And while the question is technically open, it makes more sense to think of disqualification as a sort of punishment for the constitutional crime of "disloyalty." *See supra* note 77.

[189] *See* Larson, *supra* note 99, at 920–21.

[190] *See id.* at 921.

[191] *See id.* (internal citations omitted).

[192] *See generally* 369 U.S. 186, 217 (1962).

[193] U.S. CONST. art. I, § 5. While *Powell v. McCormack* involved a challenge to congressional discretion under Section 5, its conclusion was simply that "Congress is limited to the

However, as established above, Section 3's aid or comfort test was taken from the Treason Clause, which is *squarely within Article III*.[194] Consequently, it would seem absurd to classify any of the elements of that crime as nonjusticiable. To exemplify how absurd this would be: President Trump called media companies "ENEM[IES] OF THE PEOPLE!"[195] Could working for CNN plausibly be treasonous or disqualify somebody from office?

One way to address the political question without delegating the issue entirely is the jury trial. In old English treason law, enemy status was "purely a question of fact, triable by the jury." The Crown would simply aver that they were an enemy and "public notoriety [was] sufficient evidence of it."[196] So, if the Department of Justice brings a Section 3 challenge to somebody's title for office under the aid-or-comfort test, that is the executive branch labelling the group in question as an enemy and a jury may decide—as a matter of fact, not law—whether they are.

For judgments as a matter of law, though, we can adapt Professor Carlton Larson's attempt, in the treason context, to strike a balance between the political question problem and the abuse of power problem: first, "the asserted 'enemy' [must] at least conform[] to the traditional requirement[s]" of an enemy; second, "the assertion [must be] supported by other actions of the political departments"; and third, "[a]s a basic matter of due process, individuals [must] have some sort of notice as to what groups will be considered enemies . . . [and] the declaration of enemy status cannot come in the indictment itself."[197] This test allows the political branches flexibility to consider foreign relations implications and evolving standards of hostilities while protecting Americans from weaponization of the deference that normally comes with political questions.

III. HOW SECTION 3 WORKS

This Part will explore the actual mechanics of a Section 3 challenge. This is uniquely complicated due to Section 3's broad applicability and constitutional barriers maintaining separation of powers and federalism. For example, Section 3 can

---

standing qualifications prescribed in the Constitution," and such a determination as to one of those standing qualifications is final. 395 U.S. 486, 550 (1969).

[194] U.S. CONST. art. III, § 3.

[195] Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Apr. 5, 2019, 1:41 PM), https://www.thetrumparchive.com/?dates=%5B%222019-04-05%22%2C%222019-04-06%22%5D&results=1 [https://perma.cc/PRD6-VH7C].

[196] Treason and Rebellion 38 (Towne & Bacon 1863) (quoting 1 Sir Matthew Hale, Pleas of the Crown 163–64 (1736)), https://www.google.com/books/edition/Treason_and_Rebellion/s8zrYc55m6EC?hl=en&gbpv=1&pg=PA38&printsec=frontcover [https://perma.cc/6FTY-LFCA]; 1 Sir Matthew Hale, Pleas of the Crown 163–64 (1736), http://lawlibrary.wm.edu/wythepedia/library/HaleHistoryOfThePleasOfTheCrown1736Vol1.pdf [https://perma.cc/VHS7-SH72].

[197] Larson, *supra* note 99, at 923.

disqualify somebody from becoming a Member of Congress, but the courts have no jurisdiction to enforce that disqualification, even though they do have the power to enforce a disqualification of a federal officer.[198]

As a reminder, *every* officer under the United States and of the several States, and Member of Congress, whether elected or appointed, is subject to disqualification by Section 3.[199] Disqualification can happen in a multitude of ways: a declared candidate for elected office could be prevented from being placed on the ballot; a candidate-elect could be prevented from taking the oath of office; or an official could be removed from their office. The process of seeking disqualification in these ways, however, will vary according to the type of office at issue. Consequently, this Part will proceed by separating Section 3 challenges into three jurisdictional groups—the states, the federal government, and Congress—and then discuss how somebody could find themselves on the wrong side of Section 3 within that jurisdiction.

A. State Office Challenges

Officers of the states—as discussed in Section I.A—will be classified as such on a state-by-state basis and may not be identical in form to those of the United States. Paths into office vary among states, precluding reliance on a single pathway: i.e., officers that would be appointed in some states will be elected in others. This Section will proceed by breaking down the procedures for challenges to state offices into three different temporal groups: before election/appointment; after election/appointment; and after assumption of office. Further work would be needed to establish a truly comprehensive guide to navigating procedural and jurisdictional issues in challenging the qualifications of candidates in each state, but to establish some basic jurisdictional points, this Section will focus on Indiana.

1. Pre-Election/Appointment

While a fifty-state survey on the exact procedures of running for office is beyond the scope of this Article, a person running for a state office typically files their candidacy with the state government's secretary of state or board of elections.[200] Doing so is an affirmation that you are qualified for the office you seek, and you will be placed on the ballot, assuming the administrative requirements have been satisfied.[201] What if, however, you are not actually qualified?

---

[198] *See* U.S. CONST. art. I, § 5; *id.* amend. XIV, § 3.

[199] *See* U.S. CONST. amend. XIV, § 3.

[200] *See, e.g.*, *2021 Candidate Qualifying Guide*, MISS. SEC'Y OF STATE, https://www.sos.ms.gov/Elections-Voting/Pages/Candidate-Qualifying-Forms.aspx [https://perma.cc/ALV9-8PWA] (last visited Oct. 27, 2021); *Candidate Forms*, VA. DEP'T OF ELECTIONS, https://www.elections.virginia.gov/candidatepac-info/candidate-forms/ [https://perma.cc/7PXW-YWYA] (last visited Oct. 27, 2021).

[201] *See, e.g.*, *2021 Candidate Qualifying Guide*, MISS. SEC'Y OF STATE, https://www.sos

In that case, a challenger can petition the certifying body alleging your disqualification and, if successful, prevent your name from being placed on the ballot come election day.[202] Unsurprisingly, this process also varies by state. Because of that, there is not a uniform way to challenge somebody's qualifications under Section 3. Some states make it very easy: Indiana has a specialized form for challenging people's candidacy.[203] Others are slightly more difficult: New Hampshire requires challengers to submit written objections with sworn affidavits to the Ballot Law Commission under the New Hampshire Secretary of State.[204] Others are more challenging still: Florida requires that these challenges be adjudicated by the courts through mandamus proceedings.[205]

Turning to our example state, Indiana, pre-election challenges can be levied through title 3, chapter 8 of the Indiana Code.[206] This chapter allows individuals who are registered to vote in the district that the candidate is running in to challenge the candidate's qualifications by filing a sworn statement with the Indiana Election Division, no later than seventy-four days before the election, that sets forth the facts known to the voter justifying disqualification.[207] Within three days, they must hold a hearing for the challenge[208] and announce its determination no later than one day afterwards.[209] The losing party may then appeal that determination to the Indiana

---

.ms.gov/Elections-Voting/Pages/Candidate-Qualifying-Forms.aspx [https://perma.cc/ALV9-8PWA] (last visited Oct. 27, 2021).

[202] *See, e.g.*, N.H. BALLOT COMM'N, WRITTEN DECISION 2015-2, https://sos.nh.gov/elections/elections/ballot-law-commission/2015-2016-ballot-law-commission/ [https://perma.cc/T3NS-QR8K] (last visited Oct. 27, 2021) (denying the challenger's petition to remove Ted Cruz from the Presidential ballot).

[203] *See Candidate Filing Challenge State Form 46437*, IND. ELECTION DIV., https://forms.in.gov/Download.aspx?id=9438 [https://perma.cc/H4PE-FFNS] (last visited Oct. 27, 2021).

[204] N.H. REV. STAT. § 665:6. For an example of such a written objection, *see, e.g.*, N.H. BALLOT COMM'N, Written Decision 2015-2, https://sos.nh.gov/elections/elections/ballot-law-commission/2015-2016-ballot-law-commission/ [https://perma.cc/T3NS-QR8K] (last visited Oct. 27, 2021) (relating to a challenge of Ted Cruz's qualifications to be President of the United States); *see also Candidate Challenges,* N.C. ST. BD. OF ELECTIONS, https://www.ncsbe.gov/candidates/candidate-challenges [https://perma.cc/EG52-3QEQ] (last visited Oct. 27, 2021) (showing North Carolina operates in a similar way).

[205] SUPERVISOR'S HANDBOOK ON CANDIDATE QUALIFYING, FL. DEP'T OF ST. DIV. OF ELECTIONS 6 (2018) ("Any question as to a candidate's eligibility becomes a judicial question if and when an appropriate challenge is made in the courts.") (citing State *ex rel.* Shevin v. Stone, 279 So. 2d 17 (Fla. 1972)), https://soe.dos.state.fl.us/pdf/soe-handbook-on-candidate-qualifying-2018.pdf [https://perma.cc/9YBL-32X7].

[206] This chapter applies to both people seeking election to legislative offices and executive offices but *does not* apply to judicial offices. IND. CODE § 3-8-8-1. Further, a candidate cannot be challenged if they were successful against a previous challenge on "substantially the same grounds." IND. CODE § 3-8-8-2.

[207] *Id.* § 3-8-8-3; *see Candidate Filing Challenge State Form 46437*, *supra* note 203.

[208] IND. CODE § 3-8-8-4.

[209] *Id.* § 3-8-8-5.

court of appeals for errors of law "under the same terms, conditions, and standards that govern appeals in ordinary civil actions."[210] But "[r]egardless of the status of a challenge before the commission or the court of appeals," the challenged candidate's name *may not* be removed from the ballot sixty days before the election.[211] As a preview of the next Section, if the challenged candidate ends up winning the election and is later determined to be disqualified by law, then the office will be considered vacant and will be filled as otherwise provided by law.[212]

As noted, Indiana is a state that makes bringing a challenge particularly easy. The specialized form and clearly defined process may not exist in other states, but the general idea is the same: before an election takes place, voters can seek to prevent their state from placing the challenged candidate's name on the ballot; if the challenger succeeds in convincing the relevant decision maker (whether executive, administrative, or judicial) that the challenged candidate violated Section 3, then their name will be stricken and the election will proceed without them.

There does not, on the other hand, appear to be a method of preemptively challenging an appointment of a person to a state office that satisfies ripeness.[213]

2. Post-Election/Appointment, Pre-Assumption of Office

After an election has taken place, or after an appointment has been made, challenges to prevent officer-elects/appointees from taking office have a less-clear path. Typically, the only actor standing between the officer-elect/appointee and assumption of office is an actor many may expect has purely ministerial duties: the persons tasked with swearing said officer-elect/appointee into office and issuing their commission.[214] As with above, a full fifty-state survey is beyond the scope of this Article, but there does appear to be recourse in at least some states. The proper course of action for a challenge at this stage is likely a petition for a writ of mandamus to prevent the swearing in and commissioning of the officer-elect/appointee.[215] Alternatively, state officials tasked with swearing in newly elected or appointed officers may be able to come to a determination themselves, at which point the officer-elect/appointee would need to seek mandamus to compel their swearing in.[216]

---

[210] *Id.* § 3-8-8-6.

[211] *Id.* § 3-8-8-7.

[212] *Id.* § 3-8-8-8.

[213] *See generally Candidate Filing Challenge State Form 46437*, *supra* note 203.

[214] *See* Worthy v. Barrett, 63 N.C. 199, 200 (1869), *appeal dismissed sub nom.* Worthy v. Comm'rs 76 U.S. 611 (1869).

[215] *See, e.g.*, State *ex rel* Shevin v. Stone, 279 So. 2d 17, 22 (Fla. 1972) (challenging candidates via writ of mandamus).

[216] *See, e.g.*, *Worthy*, 63 N.C. at 200 ("It is insisted . . . that the County Commissioners . . . have no power to enquire as to his qualifications; . . . that their duty is merely ministerial, and involves the exercise of no discretion, and that the Court will enforce its performance by mandamus, and leave the petitioner's right to hold the office to be tested by proceedings under

In Indiana, the chosen example state, there may be one more possibility: challenges brought pursuant to the procedure described in the preceding Section that are not rendered final by sixty days prior to the election may be decided post-election, resulting in a declaration that the office is vacant.[217] Outside of that process, a challenge would likely need to be brought via a petition for a writ of mandamus directed at the Indiana Secretary of State, who the Indiana constitution entrusts the issuance of commissions,[218] or by the Secretary of State himself, via a finding that the officer-elect/appointee is ineligible and consequently refusing to issue the commission. If the Secretary of State unilaterally refuses to issue the commission, then mandamus may be sought by the officer-elect/appointee.[219]

3. Post-Assumption of Office

Once a person receives their commission and becomes a state officer, the primary way to effectuate Section 3 is through writs of *quo warranto*, though some states replace these writs with statutory mechanisms. Like mandamus, *quo warranto* is an extraordinary writ that originated in English common law.[220] While mandamus is used to compel public office holders to act, *quo warranto* is used to remove people who are found to be usurping their office.[221] Unlike mandamus, however, *quo warranto* originated as a prerogative writ—meaning that, at least originally, only the sovereign was able to initiate proceedings.[222] Eventually, this changed to allow private individuals to bring *quo warranto* proceedings in the name of the sovereign after requesting leave of court.[223] Multiple states have replaced this common-law writ with statutory or constitutional *quo warranto* variants.[224] It is also possible that

---

a *quo warranto*. The solemn act of administering an oath and inducting into office, may not be merely ministerial. But if it were, the Court will not compel them to do wrong, if it be clear that they did right.").

[217] IND. CODE § 3-8-8-8.

[218] IND. CONST. art. 15, § 6. Unlike at the federal level, Indiana's Secretary of State is elected, rather than appointed by the state's chief executive. *See, e.g.*, *Indiana Election Results*, IND. ELECTION DIV., https://enr.indianavoters.in.gov/archive/2018General/index.html [https://perma.cc/EUV8-8XKQ] (last updated Jan 01, 2019, 9:31 AM). Consequently, there is a larger chance that a Secretary of State could oppose gubernatorial appointees.

[219] *See, e.g.*, *infra* Section IV.C (discussing the *Worthy* cases, which stemmed from *sua sponte* refusal to swear somebody into office).

[220] For background on *quo warranto* as of 1897, *see Quo Warranto*, 2 BOUVIER'S LAW DICTIONARY & CONCISE ENCYCL. (Rawles Rev., 1897).

[221] *See id.*

[222] *See id.*

[223] *See Quo-Warranto-By Private Persons as Relators to Oust Others From Public Office–De Facto Officers*, 10 IND. L.J. 531, 531 (1935) (discussing the ability of private citizens to bring *quo warranto* proceedings) (internal citations omitted).

[224] *See, e.g.*, *Quo Warranto*, CAL. ATT'Y GEN. OFF., https://oag.ca.gov/sites/all/files/agweb/pdfs/ag_opinions/quo-warranto-guidelines.pdf [https://perma.cc/3GZK-6UF5] (last visited Oct. 27, 2021) (listing the *quo warranto* California statutes).

some states could abolish *quo warranto* proceedings and put in place a wholly new procedure for removing ineligible people from office.[225]

The example state, Indiana, has replaced the common-law writ by statute.[226] Informations may be filed against any person who "usurps, intrudes into, or unlawfully holds or exercises a public office . . . within Indiana" or who "does or allows an act which, by law, works a forfeiture of the officer's office."[227] These informations can be brought either "by the prosecuting attorney in the circuit court, superior court, or probate court, . . . whenever the prosecuting attorney determines it to be [their] . . . duty to do so" or "is directed by the court or other competent authority" or "by any other person . . . [who] claims an interest in the office . . . that is the subject of the information."[228] The person bringing the information must address the court with a "plain statement of the facts that constitute the grounds of the proceeding,"[229] but when brought by the county prosecutor, that statement must state whether a vacancy will result from ouster or whether a different person should be granted the office.[230] Then, "a summons shall issue, which shall be served and returned as in other actions. The defendant shall appear and answer, or suffer default, and subsequent proceedings are the same as in other cases."[231] If the court then finds that the officeholder is ineligible, then either the person ruled to have proper title will be given the office, and potentially be awarded damages, or a vacancy will be created as if a valid officeholder had died.[232]

***

Through the example of Indiana, this Section has explored potential paths that somebody looking to invoke Section 3 against a state officer might take. Similar

---

[225] I am not presently aware of any such new mechanisms, but they may presently exist because, at the risk of being a broken record, a full fifty-state survey is beyond the scope of this Article. Absent an accessible *quo warranto* approach, indirect attacks on qualifications through actions for injunctive relief, similar to what happens in the Appointment Clause context, may be available.

[226] *See* IND. CODE § 34-17-1-1.

[227] *Id.*

[228] *Id.* § 34-17-2-1. While, as discussed below, the federal government uses the "American Rule" to declare the runner-up of an election as not entitled to, and thus having no interest in, its outcome, there is nothing requiring states to do the same. *See infra* Sections III.B.3 and IV.A.1. Consequently, *quo warranto* mechanisms in some states that limit complaints to interested parties may nevertheless be more inclusive than for federal offices.

[229] IND. CODE § 34-17-2-5.

[230] *Id.* § 34-17-2-6.

[231] *Id.* § 34-17-2-7.

[232] *Id.* §§ 34-17-3-1 to -2. Damages, in this sense, likely are just the costs of litigation. *Id.* §§ 34-17-3-4 to -5 (listing the remedies for a victory by the plaintiff); *id.* § 34-17-3-7 (listing the remedies for a victory by the defendant).

paths, though using different mechanisms, are available in each state[233] and should be further expounded upon to guarantee the states are not allowing disqualified individuals to serve. The next Section will explore the paths that somebody looking to invoke Section 3 against a federal officer might take, and then this Part will conclude by examining how one can challenge a Member of Congress.

B. Federal Office Challenges

Section 3 as it pertains to federal officers is simpler than the state-office variant because there is uniformity in the rules. Unlike with states, the *only* federal officers "elected" by the people are electoral college members and nominees for President and Vice President of the United States.[234] All other offices are filled according to the Appointments Clause or the Twelfth Amendment.[235] What constitutes an office of the United States is discussed more in Section I.A. As with the previous Section, this Section will proceed by separating out challenges into three categories: pre-election/appointment; post-appointment but pre-assumption of office; and post-assumption of office.

1. Pre-Election/Appointment

Unlike the state offices discussed above, the only elected federal officers are presidential electors and nominees for the President and Vice President of the United States, though they are not democratically selected by the people of the several states themselves.[236]

Though it has not always been the case, the popular vote is now used in the selection of presidential electors in every state.[237] The different states still have a role, however, in selecting these electors even if they ultimately end up deferring to their people's will.[238] Because of this, each state hosts a popular election for presidential and vice-presidential candidates and then uses its results to appoint its

---

[233] *See, e.g.*, MISS. CODE ANN. § 23-15-961 (discussing the procedures for challenging candidates in Mississippi); *Election Official Forms: Challenge Forms*, MONT. SEC'Y STATE, https://sosmt.gov/elections/official-forms/#challenge-forms [https://perma.cc/GL2Q-SNTV] (last visited Oct. 27, 2021) (listing candidate challenge forms in Montana).

[234] As noted above, the electors are not actually federal officers and nominees for federal office are only representatives of their political party, but for convenience's sake they have been included in this Section. *In re* Green, 134 U.S. 377, 379 (1890) ("Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in Congress.").

[235] U.S. CONST. art. II, § 2; *id.* amend. XII.

[236] U.S. CONST. art. II, § 1.

[237] Chiafolo v. Washington, 140 S. Ct. 2316, 2319 (2020).

[238] *Id.* at 2321 n.1 (discussing the variation in two states' methods from the others).

electors.[239] These electors are appointed and, for the reasons noted above,[240] it may be impossible to preemptively challenge them.

But states can restrict ballot access for those who are constitutionally disqualified to be President or Vice President *for the primaries* through their challenging mechanisms discussed above, or they can refuse to allow their electors to vote for disqualified candidates.[241] Some states have tried to abuse this power by adding extraconstitutional qualifications, but they are limited to those in the Constitution.[242]

For non-elector appointed office, Section 3 enforcement may depend on the procedural mechanism by which the office must be filled. For principal officers and select inferior officers, the President must nominate somebody, and the Senate must confirm their appointment.[243] For all other officers of the United States, they may be appointed according to law by principal officers, the courts of law, or the President directly.[244] The former category can have their qualifications challenged before their appointment is confirmed by the Senate while the latter cannot, but recourse may be limited to political mechanisms because it is ultimately the Senate's choice.[245]

2. Post-Election (Day), Pre-Inauguration

After election day, states retain the "initial and principle authority" over election contests and are therefore the first place to contest the qualifications of the election's

---

[239] *Id.* at 2319.

[240] *See* discussion *supra* Sections III.A–B.

[241] To reiterate, while states can enforce constitutional disqualifications, states do not have the power to add qualifications or pass ballot-access laws that bar otherwise-qualified candidates from seeking federal offices. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–34 (1995); Schaefer v. Townsend, 215 F.3d 1031, 1034–38 (9th Cir. 2000). The *Term Limits* opinion could even be read as *mandating* that states enforce constitutional disqualifications. 514 U.S. at 833–34 ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to . . . evade important constitutional restraints."). If a state has reason to think that somebody is disqualified but refuses to act, they could be seen as using their discretion to "evade important constitutional restraints" on who can become President. There are not, however, many cases where presidential qualifications have been challenged. For an example of a state addressing a challenge per the procedures outlined above, see N.H. Ballot Comm'n, Written Decision 2015-2, https://sos.nh.gov/elections/elections/ballot-law-commission/2015-2016-ballot-law-commission/ [https://perma.cc/N58Q-UPKB] (last visited Oct. 27, 2021) (deciding that a challenger had not met their burden against Republican presidential candidate Ted Cruz's ballot access ahead of the 2016 election).

[242] Most recently, California tried to add its own qualifications to the office of the presidency, but both the State's Supreme Court and the United States District Court for the Eastern District of California rejected the law as against the state and federal constitutions. Griffin v. Padilla, 408 F. Supp. 3d 1169, 1187 (E.D. Cal. Oct. 2, 2019); Patterson v. Padilla, 451 P.3d 1171, 1191 (Cal. Nov. 21, 2019); *see also* Cook v. Gralike, 531 U.S. 510, 522 (2001) (explaining that states' control over ballot access must be a delegation from the federal Constitution).

[243] U.S. CONST. art. II, § 2.

[244] *Id.*

[245] *See id.*

winner.[246] But one must remember that "the presidential election is in essence 50 state and District of Columbia elections for presidential electors"[247] rather than one election for the President or Vice President. The state-level contests would more properly be used to disqualify presidential electors, rather than to disqualify the President-Elect.[248] But the state can always appoint somebody new to vote for the same person.[249] After the electors send their votes to be certified by a joint session of Congress, any Congressperson can contest any vote.[250] If at least one Senator and one Member sign a written challenge to a vote, the House and Senate will then convene separately to address the challenge.[251] But to disqualify a duly certified elector, *both* the House and Senate must agree that the certificate was not "regularly given."[252] If enough votes are contested successfully due to disqualification so that there is no President by the deadline, then the Vice President shall act as President.[253] If there is no Vice President due to disqualification, the President must then use the normal avenue for appointing a Vice President.[254] The political implications of Congresspeople stopping the winner of the presidential or vice-presidential election from becoming President or Vice President may make this method of Section 3 enforcement the least likely of all.[255]

---

[246] *How Can the Results of a Presidential Election Be Contested?*, CRS REPORTS & ANALYSIS, LEGAL SIDEBAR (Aug. 26, 2016), https://fas.org/sgp/crs/misc/contest.pdf [https://perma.cc/V3CM-Z7RZ] ; *see also* 3 U.S.C. §§ 5–6.

[247] LEGAL SIDEBAR, *supra* note 246.

[248] States could pass laws prohibiting their electors from casting votes for people disqualified by Section 3. This, theoretically, could provide a path for Supreme Court resolution after a state's supreme court weighs in on the candidate's rather than the elector's qualifications. But no individual state would have the right to challenge another state's electors' votes. *See* Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.).

[249] *See* Chiafolo v. Washington, 140 S. Ct. 2316, 2328 (2020).

[250] 3 U.S.C. § 15.

[251] *Id.*

[252] *Id.* It is not entirely clear whether Congress has the power to object to an elector as not-qualified or casting a ballot for a not-qualified President or Vice President, or whether their objections are limited to the form and transmission of the certificates. The procedures and limits for objecting were challenged after the 2020 election in the Eastern District of Texas and the District for the District of Columbia, but those complaints were dismissed for lack of standing. Gohmert v. Pence, 510 F. Supp. 3d 435, 443 (E.D. Tex. 2021), *aff'd* 832 F. App'x 349 (5th Cir. 2021) (per curiam); Wis. Voters All. v. Pence, 514 F. Supp. 3d. 117, 120 (D.D.C. 2021); *see also* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 614–16 (2004).

[253] U.S. CONST. amend. XII. If the Vice President is also disqualified, then the Speaker of the House would act as President. 3 U.S.C. § 19(a)(1)–(2).

[254] U.S. CONST. amend. XXV, § 2.

[255] Even after the 2020 election, when the desire among congresspeople to overturn state elections was at its highest since perhaps 1876, the attempts did not come close to succeeding. *See, e.g.*, *The Latest: Trump Promises 'Orderly Transition' on Jan. 20*, A.P. (Jan. 06, 2021, 10:15 PM), https://apnews.com/article/ap-electoral-college-congress-7af85d3c702e070464d7713c

3. Post-Assumption of Office

Because nobody will have standing to challenge someone's qualifications before they are nominated, and because the confirmation process relies on political remedies, most federal officers cannot be challenged until after they assume office.[256] And until another mechanism is made available by Congress, this must be done through *quo warranto* proceedings.[257] *Quo warranto* is an extraordinary writ that has not been federally invoked enough to have its bounds clearly delineated. In 1915, the Supreme Court held that, for a District of Columbia office, the District's *quo warranto* rules applied.[258] These rules allow *quo warranto* actions to be brought by the United States Attorney General or by an interested third party—someone with a claim to the office—with leave of court.[259] But the District of Columbia *quo warranto* rules were broad and purported to apply to all public officials within the District, so the Court said:

> [I]f a private citizen and taxpayer could institute quo warranto proceedings to test the title to the [District] office . . ., he could, under the same claim of right, institute like proceedings against any of those statutory officers of the United States who, in the District, exercise many important functions which affect persons and things throughout the entire country.[260]

42cf254a [https://perma.cc/JJ7Y-VL5G] (noting that the attempt to challenge Arizona's electors failed in the Senate by a vote of 93–6). A serious attempt at this may require repeal or invalidation of the Electoral Count Act of 1887. *See, e.g.*, *Gohmert*, 510 F. Supp. 3d at 438–39; *Wis. Voters All.*, 514 F. Supp. 3d. at 118. For an example of how this process could look without the Electoral Count Act, *see generally* PROCEEDINGS OF THE ELECTORAL COMM'N OF 1877, http://memory.loc.gov/cgi-bin/ampage?collId=llec&fileName=001/llec001.db&recNum=4 [https://perma.cc/AVJ4-TPVN] (last visited Oct. 27, 2021).

[256] *See* discussion *supra* Section III.A.3.

[257] As discussed *infra* note 365, there is no statute mandating *quo warranto* proceedings to disqualify officers. Instead, the federal courts have the ability to hear such disputes through the All Writs Act, codified at 28 U.S.C. § 1651, which preserves the common law writ when "appropriate in aid of their respective jurisdictions." *See also* Andrade v. Lauer, 729 F.2d 1475, 1497 (D.C. Cir. 1984) ("[T]he 'direct' attack which the doctrine provides as the exclusive remedy is a *quo warranto* action."). *But see In re* James, 241 F. Supp. 858, 860 (S.D.N.Y. 1965) ("The only federal authority for the institution of *quo warranto* proceedings is Title 16 of the District of Columbia Code . . . ."). Qualifications may also be challenged indirectly as part of an action seeking an injunction against official action, but that would not by itself result in the officer's removal from office. *Andrade*, 729 F.2d at 1498. *But see In re* Griffin, 11 F. Cas. 7, 20 (C.C.D. Va. 1869) (No. 5,815) (rejecting such an indirect attack without an *ex ante* determination that the officer was disqualified).

[258] Newman v. United States *ex rel.* Frizzell, 238 U.S. 537, 537–38, 544–46 (1915).

[259] *Id.* at 550 ("The interest which will justify such a proceeding by a private individual must be more than that of another taxpayer. It must be an 'interest in the office itself, and must be peculiar to the applicant.'"); *see also* D.C. CODE §§ 16-3502 to -3503.

[260] *Newman*, 238 U.S. at 551.

This language suggests that the Supreme Court considers all federal offices within the District of Columbia subject to the District's *quo warranto* rules. Some other courts have interpreted it more broadly. The District of Columbia Circuit and the Southern District of New York have read the Supreme Court's *Newman* opinion to mean that the District of Columbia *quo warranto* rules apply to all federal officers.[261] It appears equally likely that the Supreme Court's *Newman* opinion should be read to mean that all federal offices *in the District of Columbia* should be subject to the District's *quo warranto* rules but that other offices are subject to different rules.[262]

While the mechanisms for challenging non-District federal offices are not entirely settled,[263] offices within the District have a clearer enforcement mechanism. People who do not have a peculiar interest in the office must petition the Attorney General to institute a *quo warranto* proceeding.[264] If the Attorney General refuses, then the non-interested person cannot bring a challenge.[265] If the Attorney General refuses to institute a *quo warranto* proceeding for an interested person, then that person may apply to the United States District Court for the District of Columbia for leave to issue the writ in the name of the United States.[266] This application for leave must be verified and set forth the grounds for such relief.[267] The court then has broad discretion as to whether the writ should issue or not.[268]

The District of Columbia's *quo warranto* rules are "cumbersome and could easily operate to deprive a plaintiff with an otherwise legitimate claim of the opportunity to have his case heard."[269] This potential deprivation stems from problems with enforceability where, for example, an Attorney General is not especially motivated to highlight political allies' indiscretions. In most of these cases, the rules "effectively bar [] access to court," so there may be some necessary reliance on showing disqualification through a request for injunction against an action by said officer.[270] Such an injunctive action would have to be brought "at or around the time that the challenged government action is taken" and would have to show that the relevant agency "had reasonable notice under all the circumstances of the claimed defect in

---

[261] *In re James*, 241 F. Supp. at 858 (applying *quo warranto* rules in proceedings against the Office of the United States Congressional Representative of the 18th Congressional District of the State of New York).

[262] These "different rules" would likely have to derive from the common-law writ. Though, in light of *Newman*, it would make sense to use the rules from whichever state the federal office is located in, those states' rules—unlike the District's—do not constitute federal law. *See* D.C. Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

[263] FED. R. CIV. P. 81(a)(4).

[264] D.C. CODE §§ 16-3502 to -03; *Newman*, 238 U.S. at 549–50.

[265] *Newman*, 238 U.S. at 549–50.

[266] D.C. CODE § 16-3503.

[267] *Id.* § 16-3502.

[268] Andrade v. Lauer, 729 F.2d 1475, 1498 (D.C. Cir. 1984).

[269] *Id.*

[270] *Id.*

the official's title to office."[271] The prospects of such an action rely in large part on modern courts distinguishing or abrogating *In re Griffin*, where Chief Justice Chase, riding circuit, rejected a similar approach.[272] But given the general shift in which branch is entrusted with the Fourteenth Amendment and the familiarity courts have with Appointments Clause proceedings, it is not unreasonable to expect modern courts to do just that.[273]

C. Congressional Challenges

Unlike with officers of the United States and the several states, the decision maker for congressional qualification challenges does not change depending on procedural posture. Challenged Senator-elects will always be judged by the Senate and Representative-elects will always be judged by the House of Representatives.[274] And though there is a different standard for exclusion and expulsion—with exclusion requiring only a majority of the chamber and expulsion requiring two-thirds concurrence—Congress has repeatedly allowed challenged members-elect to be sworn in "without prejudice" to a challenge of their qualifications.[275] That means challenges brought prior to becoming a member of Congress ought to uniformly be resolved by a simple majority vote of the relevant chamber, regardless of how long the process drags on or whether they end up serving in the role in the interim. It is unclear whether sitting congresspeople who become disqualified are subject to exclusion or expulsion.[276] Regardless, the legislative immunity provided by the Speech or Debate Clause does not appear to protect Members from exclusion or expulsion by their chamber for disqualifying acts.[277]

---

[271] *Id.* at 1499.

[272] *In re* Griffin, 11 F. Cas. 7 (Chase, Circuit Justice, C.C.D. Va. 1869) (No. 5,815) (rejecting an indirect attack without an *ex ante* determination that the officer was disqualified).

[273] *See infra* note 369; Buckley v. Valeo, 424 U.S. 1, 126 (1976), *superseded in part by statute*, The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (noting as relevant whether an individual wields "significant authority"); *see also* Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991) (noting as relevant whether the tasks performed are "ministerial" and whether there is a grant of discretion); Lucia v. SEC, 138 S. Ct. 2044, 2054–55 (2018) (applying *Freytag* and holding SEC Administrative Law Judges are officers of the United States since they are effectively given quasi-judicial executive power).

[274] U.S. CONST. art. I, § 5.

[275] *See, e.g.*, *infra* Section IV.E.

[276] The question boils down to whether the distinction is temporal (exclusion being proper pre–swearing in and expulsion post–swearing in) or subject-matter specific (exclusion being proper for qualifications and expulsion for unruly behavior). It appears the latter has more merit, but arguments can be made both ways. *See* U.S. CONST. art. I, § 5, cl. 2. *See generally* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 391–97 (2004).

[277] U.S. CONST. art. I, § 6 ("[F]or any Speech or Debate in either house, [congresspeople]

The House of Representatives, unlike the Senate, allows for elections to be contested by any other candidate claiming a right to the office.[278] These contestants must, within thirty days, file with the Clerk of the House and serve upon the Representative-elect notice of the contest stating with particularity the grounds for the contest.[279] The Representative-elect then has thirty days to answer.[280] Following months of briefing, motions practice, and evidence gathering, the contest is determined on the papers by the House Oversight Committee.[281] But going into granular detail about this avenue for contest is unnecessary because Section 3 challenges will likely never survive a pre-answer motion to dismiss.[282] Contestants must be able to claim a right to the office, but disqualification of a Representative-elect does not nullify the votes cast for them and, under the American rule, no other candidate would have the requisite majority.[283] But the filing of a contest may be enough to put the House on notice and prompt them to investigate whether exclusion is proper.

While neither the House nor the Senate can create new qualifications,[284] they both can shape their exclusion (or expulsion) proceedings. Typically, either a Member-elect challenges another Member-elect's qualifications at the time of swearing in or a sitting Member petitions a Member-elect's qualifications prior to swearing in.[285] Either way, proper credentialing by the state officials in charge of administering the election creates a presumption of qualification and the challenger must establish a *prima facie* case for disqualification "before putting [the challenged] to the expense and the burden of making a defense."[286] Once such a *prima facie* case is made, the matters are typically referred to either a temporary specialized committee or a standing committee for hearings and recommendations, which are then presented to the chamber as a whole for a vote.[287] If a majority then votes to exclude, the election is declared vacant and the relevant constitutional procedure for filling the vacancy must be followed.[288]

---

shall not be questioned in any *other* Place") (emphasis added); *see also* Powell v. McCormack, 395 U.S. 486, 501–06 (1969) (highlighting the Speech or Debate Clause's function as protecting the legislative branch from intrusion by the judiciary or executive).

[278] 2 U.S.C. § 382(a).

[279] *Id.* §§ 382(a)–(b).

[280] *Id.* §§ 382(b), 383. Failure to answer does not, however, amount to an admission or entitle the contestant to the seat. *Id.* § 385.

[281] *Id.* §§ 381, 392.

[282] *Id.* § 383(b); *see also* JACK MASKELL, CONG. RSCH. SERV., QUALIFICATIONS OF MEMBERS OF CONGRESS 9–10 (2015), https://fas.org/sgp/crs/misc/R41946.pdf [https://perma.cc/4V6F-S3MC] ("It does not appear that a 'contested election' procedure or complaint . . . is the proper vehicle to challenge the 'qualifications' or eligibility of a Member-elect.").

[283] 2 U.S.C. § 383(b)(4); *infra* Section IV.A.1.

[284] Powell v. McCormack, 395 U.S. 486 (1969).

[285] MASKELL, *supra* note 282, at 5–6.

[286] *Id.* at 6–7 (quoting 1 HINDS' PRECEDENTS, *supra* note 103, § 427).

[287] *See generally infra* Part IV.

[288] *See infra* Section IV.A.1.

IV. NOTABLE APPLICATIONS OF SECTION 3

This Part will examine each notable invocation of Section 3, by federal courts, state courts, and each chamber of Congress, in chronological order.[289] Section 3 is jurisdictionally unique in that challenges against people claiming right to different offices are subjected to different, independent decision makers.[290] Nothing requires that these different adjudicatory bodies maintain a uniform standard or test—for example, the Senate could disregard the Supreme Court's test, were it to ever develop one, and vice versa[291]—but this Part treats each invocation as general precedent for Section 3 in hope that further developments would maintain some uniformity and thereby minimize doctrinal confusion.

A. The Kentucky & Tennessee Cases

In the two years separating congressional approval of the Fourteenth Amendment and its ratification, four elections were contested in the House of Representatives because of issues relevant to Section 3.[292] Three of those came from Kentucky and one from Tennessee.[293] The Senate also saw an election contest during this period, concerning another man from Tennessee.[294] Given the timing, the contestants could not *actually* invoke Section 3.[295] But because the Amendment had passed Congress only a year before the contests, and because those who brought them were among the Members who voted Yea,[296] these petitions were littered with relevant concepts, and we can judge the Fortieth Congress's reception to those similar arguments as indicative of their expectations as to Section 3's application.[297] That being said, there are important differences: the enforceability of these types of claims pre-ratification was tenuous at best and relied on an Act of Congress that was concerned only with

---

[289] There are a handful of other congressional invocations, but they largely represent only the most open-and-shut cases that provide no insight for the nuances of Section 3. *See* 1 HINDS' PRECEDENTS, s*upra* note 103, at 441–63.

[290] *See supra* Part III.

[291] Powell v. McCormack, 395 U.S. 486, 547 (1969) ("Particularly in view of the Congress' own doubts in those few cases where it did exclude members-elect, we are not inclined to give its precedents controlling weight. The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the [constitutional drafting].").

[292] 1 HINDS' PRECEDENTS, *supra* note 103, at 440–59.

[293] *Id.*

[294] *Id.* at 459–61.

[295] PROCLAMATION OF WILLIAM H. SEWARD, SEC'Y OF STATE (July 28, 1868), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=741 [https://perma.cc/5QCV-VC9R].

[296] CONG. GLOBE, 39th Cong., 1st Sess. 3041–42 (1866).

[297] H.R. DOC. NO. 40-13, at 1–2 (1867).

the oath of office;[298] and the relevant language was limited to protect American democracy from domestic enemies, the confederates, rather than the broader language of Section 3.[299]

1. The Exclusion of John Y. Brown

The case of *Smith v. Brown*[300] was the first, and perhaps most extreme, of these pre–Section 3 loyalty challenges. That contest saw a Representative-elect be excluded for writing a letter to a newspaper for publication. John Brown was accused in the *Louisville Courier* of saying, "I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks."[301] Brown, apparently outraged at the ambiguity of that statement, sent a letter to the editors offering a correction:

> This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the government of the Confederate States! What I did say was this:
>
> Not one man or one dollar will Kentucky furnish Lincoln to aid him in his unholy war against the South. If this northern army shall attempt to cross our borders, we will resist it unto the death; and if one man shall be found in our Commonwealth to volunteer to join them he ought and I believe will be shot down before he leaves the State.
>
> This was not said in reply to any question propounded . . . and is no more than I frequently uttered publicly and privately prior to my debate with him.[302]

This evidence alone was the basis for Brown's exclusion from the Fortieth Congress.[303]

---

[298] Act to Prescribe an Oath of Office, ch. 128, 12 Stat. 502–03 (1862) (repealed 1868) (requiring officers of the United States to swear or affirm, under penalty of perjury, that they had never, among other things, given aid or encouragement to those engaged in armed hostility against the United States); H.R. REP. NO. 40-59 (1868) ("John D. Young . . . is not entitled to take the oath of office as a representative in this house . . . or to hold a seat therein . . . .").

[299] Act to Prescribe an Oath of Office, ch. 128, 12 Stat. 502–03 (1862) (repealed 1868).

[300] House Comm. on Elections, Samuel E. Smith vs. John Young Brown, 40th Cong., 2d sess., H.R. Rep. No. 11 (1868).

[301] 1 HINDS' PRECEDENTS, *supra* note 103, at 445.

[302] *Id.* (emphasis omitted).

[303] *Id.* at 445–48.

As alluded to above, this exclusion was entirely unconstitutional.[304] Not only was this an example of an extraconstitutional qualification—a fact that was not lost upon a number of Congressmen[305]—but it was based on an Act of Congress plainly violative of the First Amendment. Had Section 3 been ratified by this point, these concerns would be assuaged.

The remainder of the Committee on Elections' efforts were focused on whether the challenger, Samuel Smith, was entitled to what would have been Brown's seat, having the second-most votes in his favor.[306] The so-called American Rule was then re-established; Smith was not entitled to the seat because he did not receive a majority of the votes and "any attempt to substitute therefor the will of a minority is an attack upon the fundamental principles of the Government."[307]

2. The Exclusion of John D. Young

Next, Congressman Samuel McKee contested the election of his would-be replacement, John D. Young.[308] The Committee on Elections concluded that Young was not entitled to take the oath of office as a Representative nor hold a seat in the House.[309] Representative McKee levied the following charges against Young in his challenge:

> [D]uring the late rebellion you did not remain loyal to the government of the United States; [] you voluntarily gave aid, countenance, counsel, and encouragement to persons engaged in armed hostility thereto; [] you were in full sympathy, free accord, and entire harmony with those persons who were engaged in armed rebellion against the government of the United States . . . ; [] in 1861 you avowed yourself in favor of raising and arming troops in Kentucky to resist the federal government . . . ; [] you did aid, countenance, advise, counsel, and encourage the raising or recruiting men for the purpose of resisting the authority and laws of the United States, and . . . such persons [] did array themselves in

---

[304] 88 CONG. REC. 2484 (1942); Powell v. McCormack, 395 U.S. 486 (1969) (holding the House of Representative may not exclude a duly elected representative for any reason unless it is mentioned in the Qualifications of Members Clause).

[305] 1 HINDS' PRECEDENTS, s*upra* note 103, at 446.

[306] *Id.* at 448–51.

[307] *Id.* at 450–51.

[308] H.R. DOC. NO. 40-13, at 1 (1867).

[309] H.R. REP. NO. 40-59, at 1, 3 (1868). Congress provided a general grant of amnesty by the requisite two-thirds majority following the Committee's disposition holding him ineligible. General Amnesty Act of 1872, ch. 193, 17 Stat. 142 (1872). Following this lift of his ineligibility, he was later elected to Congress in a different Kentucky congressional district. *YOUNG, John Duncan*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/People/Detail/21084 [https://perma.cc/7ZPL-VRKA] (last visited Oct. 27, 2021).

> armed hostility to the government of the United States, and contributed to the support of the same . . . ; [ ] you voluntarily gave information by means of which Union soldiers were captured by armed bands of rebels . . . . [W]hen summoned by the United States authorities in 1862 to take the oath of allegiance to the government of the United States, you refused to take said oath, and fled into Canada. . . . [Y]ou were loud in your denunciations of the government of the United States, and declared yourself openly for secession and the southern confederacy. [ ] [D]uring the late canvass for Congress in which you were a candidate, you declared that you left the country in 1862 because you could not and would not take the oath to support the Constitution and laws of the United States, for the reason that you were in favor of secession and desired the rebellion to succeed. [B]y reason of all these, and many other disloyal acts, you are disqualified by the Constitution and laws of the United States from holding any office of trust or profit thereunder.[310]

These charges run the gamut of what potentially could be enforced as aiding and comforting an enemy under Section 3, from simply declaring one's self in support of secession to actively exposing Union soldiers to Confederate forces so that they may be captured as prisoners of war.[311] As noted, these charges were framed as violations of the Ironclad Oath rather than Section 3.[312] The Committee, in resolving the dispute, utilized language both lending itself to the Ironclad Oath and the then-pending Section 3. For example, in House Report 40-29, the Committee went out of its way to state "aid and comfort may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position"[313]—despite the phrase not appearing in the Oath—before resolving that "John D. Young, having voluntarily given aid, countenance, counsel, and encouragement . . . is not entitled to take the oath of office . . . or to hold a seat."[314]

---

[310] H.R. DOC. NO. 40-13, at 1–2 (1867).

[311] *Id.*

[312] *Compare* Act to Prescribe an Oath of Office, ch. 128, 12 Stat. 502–03 (1862) (repealed 1868) (requiring hopeful officers to swear they "have never voluntarily borne arms against the United States . . . ; [ ] have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; [ ] have neither sought nor accepted . . . any authority or pretended authority in hostility to the United States; [ ] have not yielded a voluntary support to any pretended government . . . within the United States, hostile or inimical thereto."), *with* U.S. CONST. amend. XIV, § 3 ("No person shall be a . . . Representative in Congress . . . who . . . engaged in insurrection or rebellion against the [United States], or given aid or comfort to the enemies thereof.").

[313] H.R. REP. NO. 40-29, at 2 (1868) (internal quotation marks omitted).

[314] *Id.* at 12.

Voluntarily feeding and arming enemy soldiers and directing enemy soldiers as to the location of where they can capture American soldiers plainly constitutes aiding or comforting the enemy, so this discussion instead focuses on the Committee's other findings, relating to: words of encouragement, expressions of opinion, and disclaimers of loyalty.[315] On the merits, the Committee discussed Young's views that: the Civil War was a justified revolution, not a rebellion;[316] that President Lincoln "ought to be impeached and hung as high as Haman" but that Jefferson Davis should go unpunished;[317] and that the south should be independent.[318] The Committee also noted that nothing "show[ed] or indicate[d] that he ever was or ever claimed to be a Union man during the whole struggle for the life of the nation" nor that "he was even so lukewarm in his devotion to the government as to have been neutral and indifferent."[319] The Committee then concluded "such expressions and admissions . . . of sympathy . . . with the rebellious party, *taken in connection with* the open acts of 'aid and comfort to the enemies of the government of the United States,'" show that Young "cannot honestly and truly take the oath prescribed."[320]

The House appears to have been conflicted as to whether the speech acts noted above constituted aid or comfort to the Confederacy, stating that aid and comfort *may* be given by words of encouragement and expressions of opinion but not explicitly classifying his specific words or opinions as such.[321] Given how clearly the other acts are classifiable as aid and comfort, one interpretation is that the House decided they did not need to address the hard question. Another interpretation is that sympathetic statements showing passive disdain for the United States or its actions do not quite rise to the level of John Brown's call to action.

3. The Admission of Lawrence S. Trimble

The third of the Kentucky cases, *Symes v. Trimble*,[322] was the only one that resulted in admission. Lawrence Trimble was alleged to have engaged in "contraband trade with the enemies of the Government"—a charge which was found "too vague and uncertain to be relied on"—and with opposing the Lincoln Administration's "abolition war" effort while running for Congress in 1861.[323] Unlike above, however, Trimble was running as the Union candidate for Congress in opposition to Kentucky's secession efforts.[324] The Committee noted that "it is evident from the

---

[315] *Id.* at 2–6.
[316] *Id.* at 2.
[317] *Id.*
[318] *Id.*
[319] *Id.* at 5.
[320] *Id.* at 6 (emphasis added).
[321] *Id.* at 2.
[322] 1 HINDS' PRECEDENTS, s*upra* note 103, at 457–59.
[323] *Id.* at 458–59.
[324] *Id.* at 459.

whole testimony that his opposition was expressed in language similar to that . . . on the floor of Congress" and declared "his loyalty unquestioned."[325] The best reading of Trimble's case may be that because he was actively supporting the Union in opposition to a secessionist candidate when making these statements, he was actually aiding and comforting the United States rather than its enemies, albeit by politically unsavory means.

B. The Exclusion of Philip F. Thomas

Philip Thomas was elected to become one of Maryland's United States Senators, but rumors concerning his loyalty began to circulate.[326] Acting on these rumors, the Senate Committee on the Judiciary took up a challenge to his qualifications.[327] After the Chairman of the Judiciary Committee—Senator Lyman Trumbull—convincingly argued that "[i]t will not do to assume the position that every person who disagrees with us politically is an enemy of this country,"[328] it was discovered that Thomas "allowed his minor son to leave the paternal house to serve as a rebel soldier, and gave him at the time $100 in money."[329] It was also noted that the $100 was "in case he was captured and needed money in prison" and that Thomas thereafter "refused to communicate with him."[330] Following a lengthy discussion on whether the Fourteenth Amendment had been duly ratified—it had not—and on the ability of the Senate to add extraconstitutional qualifications, the Senate concluded that Thomas was not entitled to take the oath of office under the Ironclad Oath.[331] The Thomas challenge can be read to stand for the proposition that aiding or comforting *any* enemy of the United States—even one's own child—may trigger Section 3; aiding the enemy *state* is not required.

C. Worthy v. Barrett *and* Worthy v. Commissioners[332]

In 1868, the commissioners of Moore County, North Carolina independently refused to qualify a man as Sheriff who had served in the position both before and during the Civil War because of the Fourteenth Amendment and an accompanying state statute.[333] Sheriff Worthy petitioned the North Carolina courts for a writ of

---

[325] *Id.*

[326] *Id.* at 466.

[327] *Id.* at 466–70.

[328] U.S. SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793–1990, *supra* note 104, at 137.

[329] 1 HINDS' PRECEDENTS, s*upra* note 103, at 469.

[330] *See* U.S. SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793–1990, *supra* note 104, at 137–38.

[331] 1 HINDS' PRECEDENTS, s*upra* note 103, at 470.

[332] Worthy v. Barrett, 63 N.C. 199 (1869), *appeal dismissed sub nom.* Worthy v. Comm'rs, 6 U.S. 611 (1869).

[333] *Id.* at 199.

mandamus, insisting that county commissioners "have no power to enquire as to his qualifications" and insisted that the Court should "leave the petitioner's right to hold the office to be tested by proceedings under a *quo warranto*."[334] But, after a superior court judge granted the writ, the commissioners appealed and the state's supreme court dismissed the petition.[335]

The North Carolina Supreme Court held that: (1) holding any office under the confederate government; or (2) "[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service" disqualifies a person under Section 3.[336] It was uncontroverted that Sheriff Worthy served as Sheriff under the confederate government, so the court's discussion focused exclusively on the definition of an officer.[337] Justice Reade distinguished "officers" from "placemen," noting multiple factors such as whether there is payment for established duties, but ultimately settling on the simple formalist test discussed above and classifying a sheriff as an officer.[338]

Sheriff Worthy, not accepting the Supreme Court of North Carolina's determination, petitioned for a writ of error to the Supreme Court of the United States.[339] His petition stated:

> The 1st section of the 14th amendment of the Constitution of the United States, declares that, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'
>
> The Supreme Court of North Carolina has decided that a sheriff is an executive officer, and that the right to hold office by a person formerly a sheriff, and afterwards engaged in rebellion, is taken away by the 3d section of the 14th amendment. This is an assault upon an immunity and privilege granted to us by the 1st section of that same amendment. We have a right to know how far the guaranty of the 1st section extends . . . . Cases involving rights that are *protected* by the Constitution, come within the appellate jurisdiction of the Supreme Court, no matter whence the rights may spring.[340]

---

[334] *Id.* at 200.
[335] *Id.* at 199.
[336] *Id.* at 203.
[337] *Id.* at 200.
[338] *Id.* at 202.
[339] Worthy v. Comm'rs, 76 U.S. 611 (1869).
[340] *Id.* at 612–13 (internal citations omitted).

The Supreme Court dismissed the petition for lack of jurisdiction.[341] And in dismissing the petition, Chief Justice Chase noted that Worthy's "right" to the office was a *state* right, and that:

> [t]here was no decision by the Supreme Court of North Carolina against the validity of any treaty or act of Congress, or authority exercised under the United States; nor in favor of the validity of a statute of, or authority exercised under a State, and alleged to be repugnant to the Constitution, treaties, or laws of the United States.[342]

In other words, because the federal constitutional provision restricted a state right, and because Worthy did not challenge the state action as repugnant to Section 3, the Supreme Court refused jurisdiction over the petition. Further, the Privileges and Immunities Clause issue raised in the petition was not "set up, or specially claimed in the State court," so the Court could not use that as a basis for its jurisdiction.[343]

While the *Worthy v. Commissioners* Court seemed to open the door for the argument that a state's improper prohibition of somebody from taking office may implicate the Privileges and Immunities Clause, the *Slaughter-House Cases* convincingly slammed that door shut.[344] More importantly, the Supreme Court's opinion stands as an example of the jurisdictional complexities that one must worry about—without a well-pleaded state-court complaint, the federal courts may not be able to review Section 3 disqualifications.[345] Without identifying a *federal* right to the office claimed, those prohibited or removed from office by state actors may be barred from federal court.[346]

D. In re Griffin[347]

Following the ratification of the Fourteenth Amendment, there was a surge in recently freed slaves challenging criminal convictions because of their judges' confederate proclivities through *habeas corpus*.[348] One such case involved Caesar Griffin, who was sentenced to two years' imprisonment for assault with intent to kill

---

[341] *Id.* at 612.

[342] *Id.* at 613.

[343] *Id.*

[344] Slaughter-House Cases, 83 U.S. 36, 37 (1872) ("[P]rivileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof . . . .").

[345] *See Worthy*, 76 U.S. at 612.

[346] *See id.*

[347] 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

[348] C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1189–90 (2009) ("It was their position that the judges who conducted their trials were former Confederates who fell within the disqualified class set forth in the Amendment, making their actions a nullity and the resultant convictions void.").

by Judge Sheffey, a former officer of the rebelling state of Virginia.[349] Chief Justice Chase, serving as circuit justice for the Virginia Circuit,[350] stated "the question to be considered . . . is whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power."[351]

Griffin's attorney argued that Section 3 acts *proprio vigore*, "without the aid of additional legislation to carry it into effect."[352] He asserted Sheffey was usurping the office "in open defiance of the highest law of the land" and that, as a consequence, "he was not in law a judge . . . and his acts as a pretended judge have no legal validity whatsoever."[353] The attorney recognized that "public discussion of this question will doubtless tend to call public attention" as to whether he can continue to serve as a judge, but reassured the court they were neither seeking nor expecting Sheffey's removal from office.[354]

Sheffey's attorney conceded ineligibility *arguendo*[355] and went on to argue that:

> [U]ntil he is selected and condemned by name by due process of law, no judgment can have effect as against him. He must be personally condemned by an act of sovereignty like a . . . judgment of a court after trial and conviction. While, therefore, it may be true that a party condemned by a judge, ousted by name from office by a constitutional amendment, would be deprived of his liberty contrary to the constitution of the United States, it is clear that, until a judge is thus ousted by name . . . his holding office is still colore officii, and his acts those of a judge de facto. The constitutional amendment is a general act of attainder—a statute denouncing a general penalty for crime. The penalty applies to every person who is guilty; but his guilt can only be ascertained, the identity of the individual can only be made certain, the penalty

---

[349] *Griffin*, 11 F. Cas. at 8.

[350] This was one of the predecessors of the Fourth Circuit; circuit courts as we know them were not established until 1891. *See The U.S. Circuit Courts and the Federal Judiciary*, FED. JUDICIAL CTR., https://www.fjc.gov/history/courts/u.s.-circuit-courts-and-federal-judiciary [https://perma.cc/EC75-XBEP] (last visited Oct. 27, 2021).

[351] *Griffin*, 11 F. Cas. at 23.

[352] *Id.* at 12.

[353] *Id.*

[354] *Id.*

[355] *Id.* at 18 ("I shall first admit, for the purpose of this argument in this place, that Sheffey was, by the adoption of the constitutional amendment . . . rendered ineligible for his office, and from that moment became, in law, incapable of holding it. This being admitted . . . he was judge do [sic] facto when the judgment against petitioner was entered [and] [t]hat the act of a judge de facto has precisely the same legal effect as that of a judge de jure.").

> applied to that particular individual, only by due process of law—i.e., trial, conviction and judgment. . . . The constitutional amendment only differs from a penal statute in this, that being ex post facto, it could only have become law by becoming part of the constitution. . . . No officer, therefore, holding office, who is in fact ineligible under the constitutional amendment, can be affected by it until its provisions are applied to him according to law, nor can his holding be contrary to the constitution until such application is legally made.[356]

Chief Justice Chase concluded that Section 3 did not act *proprio vigore* and that Sheffey—regardless of his constitutional eligibility for office—had not yet been removed from office.[357]

The Chief Justice noted that a literal construction of the text acting alone could have the effect to "on the day of its promulgation, vacate[] all offices held by persons within the category of prohibition," and if that construction were used, it would make "all official acts, performed by them, since that day, null and void."[358] Dissatisfied by that result, the Chief Justice followed up by recognizing the "great attention" paid to the inconveniences that result from strictly literal constructions.[359] While noting that concerns about inconvenience cannot "prevail over plain words or clear reason," he said that "a construction, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require" it.[360] Then, he considered the immediate consequences of a *proprio vigore* Section 3: nullification of all official acts of all officers who did not voluntarily give up their office, including criminal sentences, deed transferences, etc.[361] These consequences would, in the Chief Justice's opinion, be disastrous.[362]

Again recognizing that inconveniences themselves are not sufficient to disregard the *sole* reasonable meaning, the Chief Justice stated:

> Of two constructions, either of which is warranted by the words . . . , that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly

---

[356] *Id.* at 21.
[357] *Id.* at 27.
[358] *Id.* at 24.
[359] *Id.*
[360] *Id.*
[361] *Id.* at 25.
[362] *Id.* ("It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of [the seceded] states.").

> required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.[363]

The *proprio vigore* reading would deprive a whole class of people of their held offices, "at once without trial," in a manner "inconsistent in the[ ] spirit and general purpose" of the numerous constitutional provisions that disallow deprivation of life, liberty, or property, without due process of law or that disallow bills of attainder and ex post facto laws.[364] The Chief Justice saw a second reasonable construction, contrary to Griffin's *proprio vigore* reading: Section 3 needs Section 5 legislation to become operative.[365] Section 5 states that: "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[366] According to Chief Justice Chase, this reading, also "warranted by the words" of Section 3, is in better harmony with the rest of the Constitution than the *proprio vigore* one.[367]

Absent congressional action, strict compliance with *In re Griffin* would render Section 3 null.[368] But in the intervening years, the Fourteenth Amendment has been reconceptualized as primarily being judicially, rather than congressionally, enforceable.[369] It would be inherently inconsistent to interpret "No state shall . . . ." as self-executing but "No person shall . . . ." as requiring enacting legislation.[370] Regardless,

---

[363] *Id.*

[364] *Id.* at 26.

[365] *Id.* A year after *In re Griffin*, Congress passed an act that provided for and required the enforcement of Section 3 ("the Enforcement Act"). Act of May 31, 1870, ch. 114, §§ 14–15, 16 Stat. 140, 143–44 (codified at Rev. Stat. §§ 1786–87 (1874) and 5 U.S.C. § 14a (1925) (repealed)). But the Enforcement Act's *quo warranto* provisions have since been repealed. Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993; *see also* Act of June 25, 1948, ch. 645, § 2383, 62 Stat. 683, 808.

[366] U.S. CONST. amend. XIV, § 5.

[367] *Griffin*, 11 F. Cas. at 25.

[368] As discussed *supra* Section III.B.3, modern courts would probably allow actions mirroring Appointments Clause suits.

[369] *Compare Ex Parte* Virginia, 100 U.S. 339, 345 (1880) (emphasis in original) ("It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged [by the Fourteenth Amendment;] Congress is authorized to *enforce* the prohibitions by appropriate legislation.") *and* Rothermel v. Meyerle, 136 Pa. 250, 254 (1890) (citing *Griffin*, 11 F. Cas. at 26) ("[I]t has also been held that the fourteenth amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."), *with* City of Boerne v. Flores, 521 U.S. 507, 522 (1997) ("Section 1 of the new draft Amendment imposed self-executing limits on the States."). For further discussion on this, see Thomas H. Burrell, *Justice Stephen Field's Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony*, 43 GONZAGA L. REV. 77, 100–05 (2008); Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 124 (1999).

[370] By "judicially enforceable" this Article is not suggesting a *proprio vigore* interpretation,

In re Griffin shows that due-process protections of the Fifth Amendment were not implicitly amended by Section 3 *proprio vigore*, and that no person is disqualified without the relevant decision maker proclaiming as such.

E. The Admission of Lewis McKenzie

The House of Representatives, by the time the Forty-First Congress began, had changed their *modus operandi* for Section 3 adjudication. When Lewis McKenzie's loyalty was questioned, the House allowed him to be sworn in as a Member of Congress "without prejudice" to the exclusion proceeding.[371] This leads to interesting questions of whether removal of a sworn in congressperson, which typically requires expulsion,[372] due to disqualification can be carried out by a simple majority through exclusion.[373] While that question was never answered, the Committee of Elections did answer the question of McKenzie's qualifications.

McKenzie was a member of the pre-secession Virginia House of Delegates. In that role, he voted for a resolution stating that, should negotiations break down between the northern and southern states, "every consideration of honor and interest demand that Virginia [] unite her destiny with the slaveholding States of the South."[374] He also voted for appropriating state funds for arms and munition, stating in support: "Virginia is not afraid. When the convention comes to a decision . . . and it is ratified by the people, she will take her position, and, if necessary, fight."[375] Then, he voted to appropriate funds to "the Emmet Guards and to the Irish volunteers . . . which soon after entered the Confederate service."[376] Finally, the military authorities of Virginia seized some of his possessions.[377] Just over two weeks later, the State of Virginia seceded.[378]

The Committee on Elections found that "the only government to which Mr. McKenzie yielded support . . . was that State of Virginia" and that "[i]t could not be pretended that he yielded support to any government hostile to the United States."[379]

---

like what Griffin had been seeking, is proper, but that Sheffey's attorney's argument—requiring due process before the penalty attached—should carry the day. *See supra* notes 351–52 and accompanying text.

[371] 1 HINDS' PRECEDENTS, s*upra* note 103, at 476.

[372] U.S. CONST. art. I, § 5.

[373] *See supra* note 274 and accompanying text; *see also, e.g.*, 1 HINDS' PRECEDENTS, s*upra* note 103, at 472–73 (relaying the Section 3 dispute detailed in H. COMM. ON ELEC., 41ST CONG., JOHN M. ZEIGLER VS. JOHN L. RICE, H.R. MISC. DOC. NO. 9 (2d. Sess. 1870)); *id.* at 473–75 (relaying the Section 3 dispute detailed in H. COMM. ON ELEC., 41ST CONG., GEORGE TUCKER VS. GEO. W. BOOKER, H.R. REP. NO. 41 (2d. Sess. 1870)).

[374] *Id.*

[375] *Id.* at 477.

[376] *Id.*

[377] *Id.*

[378] *Id.*

[379] *Id.*

The Committee further found that "[a] good deal of evidence in [McKenzie's] case was taken to show that . . . [he] was known and accepted generally by all, both the loyal and disloyal people . . . , as a friend of the Union cause."[380] Responding to the contestant's objection that his friendliness to the Union was irrelevant, the Committee conceded that, "[i]f the acts make him ineligible, neither prior, subsequent, nor contemporaneous loyalty could make him eligible or do more than furnish a ground for him to ask to be relieved from his disabilities," but found that such evidence of loyalty "though not receivable as a defense, is properly to be received, as enabling us the better to understand the acts themselves and to determine their true character."[381]

Without much further discussion, the Committee reported that "nothing shown in the evidence in this case makes [McKenzie] ineligible" under Section 3.[382] The apparent takeaway is the truism that aid and comfort given to an entity that is not yet an enemy of the United States cannot be used to disqualify somebody from holding office, even if that entity shortly thereafter becomes an enemy. The other thing that may be gleamed from McKenzie's case is that when statements are made or acts are committed that *could* be considered aid or comfort to an enemy of the United States but do not constitute a *prima facie* case, all relevant circumstantial and contextual evidence may be considered so that the decision maker may "better understand the acts themselves" and "determine their true character."[383]

F. United States v. Powell[384]

The Enforcement Act contained two relevant provisions. The first, from section 14, directed United States Attorneys[385] to seek removal of those disqualified by Section 3.[386] The second, from section 15, criminalized accepting office while disqualified by Section 3.[387] *Powell* concerned the second and took the form of a circuit judge charging the jury.[388] Amos Powell was being charged with accepting the office of sheriff while disqualified by Section 3.[389]

Powell argued that Section 3 "was passed to punish those high in authority in the rebellious states at the time of the outbreak of the Rebellion, for their bad faith toward the government they had sworn to support, and was not intended to reach

---

[380] *Id.*

[381] *Id.*

[382] *Id.*

[383] *Id.*

[384] 27 F. Cas. 605 (C.C.D.N.C. 1871) (No. 16,709).

[385] The Enforcement Act actually used the term "district attorney of the United States" rather than United States Attorney because United States Attorneys, as they exist now, did not exist at the time of promulgation. Act of May 31, 1870, ch. 114, §§ 9, 14, 16 Stat. 140, 142–43 (codified at Rev. Stat. § 1786 (1874) and 5 U.S.C. § 14a (1925) (repealed)).

[386] *Id.*

[387] *Id.* at 143–44.

[388] *Powell*, 27 F. Cas. at 606–07.

[389] *Id.* at 606.

those who had minor offices,"[390] but the court held otherwise.[391] The court directed the jury to read "[t]he words of the statute [as] broad enough to embrace every officer in the state," whether "legislative, judicial, or executive[.]"[392]

As for the substantive charges against Powell, it was said that he furnished a substitute for himself to the Confederate army and held a commission of justice of the peace under the Confederate government.[393] As to the former charge, Powell claimed that he did not furnish a substitute voluntarily but was conscripted and overcome by force so that he could not resist.[394] The court directed the jury that to "engage" in insurrection "implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebell[i]on . . . and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment."[395] The court clarified that "not every appearance of force nor timid fear [] will excuse [] actual participation in the Rebellion or Insurrection."[396] Instead, a defendant's conduct "must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape nor resist."[397]

As to the latter charge, the court was "of [the] opinion that he *might* well have held that office without giving adherence or countenance to the Rebellion."[398] Whether it rose to the level requisite for the indictment was left to the jury, and there is no record of their decision, but the court was open to the idea that serving as a peace officer was an action outside the bounds of engaging in insurrection or rebellion because "[i]t was absolutely necessary that during that commotion there should have been some to preserve order and to restrain the vicious and licentious, who . . . would have taken advantage of the turmoil to pillage and destroy friend and foe alike."[399]

It may be tempting to view *Powell* as standing primarily for the proposition that all Section 3 enforcement would be contingent on the voluntariness of the accused's disloyal actions; it is important to remember though that that conclusion is only expressly valid as to engaging in insurrection or rebellion, not giving aid or comfort.[400] This being said, the similarities between *engaging* in insurrection or rebellion and *giving* aid or comfort should allow for reading the voluntariness requirement into aid or comfort as well as engaging in insurrection or rebellion. Both "engaging" and

---

[390] *Id.* at 607.
[391] *Id.*
[392] *Id.*
[393] *Id.*
[394] *Id.* at 606.
[395] *Id.* at 607.
[396] *Id.*
[397] *Id.*
[398] *Id.*
[399] *Id.*
[400] *Id.* ("We are of opinion . . . that the word 'engage' implies . . . a voluntary effort to assist the Insurrection . . . ."). *But see* CONG. GLOBE, 39th Cong., 1st Sess. 2918–21 (1866).

"giving" are present participles that imply an action was taken. If this conclusion is carried over, the discussion about what constitutes voluntariness would be helpful precedent. The other proposition that it stands for is that holding a peacekeeping office necessary to a functioning society may not be enough to show participation in an insurrection and cause the disqualification to attach; circumstances are important and must be considered.[401]

G. The Exclusion of Victor L. Berger

In 1911, Victor Berger, the first Socialist Congressperson,[402] started the *Milwaukee Leader*, a Socialist periodical.[403] He lost his seat in the 1912 election.[404] Then, in April 1917, the United States declared war on Germany and formally entered the First World War.[405] This led top Socialists, including Berger, to draft and release a manifesto opposing American involvement in the war.[406] The *Milwaukee Leader*, still led by Berger, reprinted the manifesto and characterized it as a "cool, scientific Marxian declaration."[407] President Roosevelt characterized it as treason.[408] In addition to the manifesto's publication, the Socialists created a political platform of, among other things, "[r]esistance to compulsory military training and to the conscription of life and labor" and "[r]epudiation of war debts."[409] The *Milwaukee Leader* published and praised the party's platform,[410] and printed an editorial from Berger himself aimed at pressuring Milwaukee's Socialist mayor—who supposedly was worried subscribing to the party's stance on war would violate his oath of office—into toeing the party line.[411]

All of this, in addition to countless other war-related publications, led the Postmaster General to revoke the *Milwaukee Leader*'s mailing privileges under the Espionage Act because of a purpose and intent to:

---

[401] *See also* Hudspeth v. Garrigues, 21 La. Ann. 684, 685 (1869); The Reconstruction Acts, 12 U.S. Op. Atty. Gen. 141, 162 (1867) ("The interests of humanity require such officers for the performance of such official conduct in time of war or insurrection as well as in time of peace, and the performance of such duties can never be considered as criminal. I cannot bring myself to the conclusion that Congress could have meant that such purely civil and necessary offices involved the incumbent in the guilt of insurrection.").

[402] *See, e.g.*, *Victor Berger: Topics in Chronicling America*, LIBR. OF CONG., https://www.loc.gov/rr/news/topics/berger.html [https://perma.cc/U6EW-7WUZ] (last visited Oct. 27, 2021) (providing a timeline of Berger's public life).

[403] CANNON ON PRECEDENTS, *supra* note 161, at 53.

[404] *Id.*

[405] *Id.* at 57–58.

[406] *Id.*; *see also Berger Hearings*, *supra* note 17, at 117–20.

[407] CANNON ON PRECEDENTS, *supra* note 161, at 53; *see also 1 Berger Hearings*, *supra* note 17, at 906.

[408] CANNON ON PRECEDENTS, *supra* note 161, at 53.

[409] *Id.*

[410] *Id.*

[411] *Id.*; *see also 1 Berger Hearings*, *supra* note 17, at 907.

> [W]illfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, to promote the success of its enemies during [World War I], and willfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces of the United States, and to willfully obstruct the recruiting or enlistment service in the United States, to the injury of the service and of the United States.[412]

Four months later, Berger was indicted for violating the Espionage Act.[413] While awaiting trial, however, Berger was elected to the Sixty-Sixth Congress.[414] Ultimately, he was convicted and sentenced to twenty years' imprisonment.[415] Berger appealed, and while that was pending, he was set to be sworn into the Sixty-Sixth Congress.[416] But the Speaker of the House refused to administer the oath after another Member challenged his qualifications.[417] Following a year of congressional hearings, the House committee—tasked with determining whether Berger violated the Espionage Act, whether he gave aid or comfort to enemies of the United States during the First World War, and whether he was ineligible to a seat in the House—determined that he gave aid and comfort to the enemies of the United States and that he was disqualified by Section 3.[418]

Berger had argued that Section 3 was included to punish those who fought with the Confederacy and that it was entirely repealed when Congress provided blanket amnesty.[419] The Special Committee was not convinced:

> It must be perfectly evident that Congress has no power whatever to repeal a provision of the Constitution by a mere statute, and that no portion of the Constitution can be repealed except in the manner prescribed by the Constitution itself. While under the provisions of [Section 3] Congress was given the power, by a two-thirds vote of each House, to remove disabilities incurred under [Section 3], manifestly it could only remove disabilities incurred previously to the passage of the act, and Congress in the

---

412 *1 Berger Hearings*, *supra* note 17, at 6.

413 *See, e.g.*, *Victor Berger: Topics in Chronicling America*, *supra* note 402.

414 CANNON ON PRECEDENTS, *supra* note 161, at 8.

415 *Id.* at 61; *BERGER, Victor Luitpold*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/People/Detail/9304 [https://perma.cc/V6JM-9WP4] (last visited Oct. 27, 2021).

416 CANNON ON PRECEDENTS, *supra* note 161, at 8.

417 *Id.*

418 *Id.* at 54.

419 *Id.* at 55.

> very nature of things would not have the power to remove any future disabilities. This was plainly recognized when the words "heretofore incurred" were placed in the [amnesty] act itself.[420]

Berger also argued that Section 3, as an "outgrowth of the Civil War," could not be read to apply to the First World War.[421] Again, the Special Committee was not convinced. The Special Committee responded to that assertion by saying:

> It is perfectly true that the entire fourteenth amendment was the child of the Civil War and that its main purpose was the security and protection of the political and civil rights of the African race. It is equally true, however, that its provisions are for all time, and are as the United States Supreme Court well said in the case of *Yick Wo v. Hopkins*, "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality." It is inconceivable that the House of Representatives, which without such an express provision in the Constitution repeatedly asserted its right to exclude Members-elect for disloyalty, should ignore this plain prohibition which has been contained in the fundamental law of the Nation for more than half a century.[422]

Having established that Section 3 was current and applicable, the Special Committee turned to determine what it meant to "give aid or comfort" and what the First Amendment means by "freedom of speech."[423] The Special Committee turned to *McKee v. Young*, discussed above, in determining that "aid and comfort may be given to an enemy, by words of encouragement, or the expression of an opinion from one occupying an influential position" and then to the case of *Smith v. Brown*, also discussed above, to establish that past Congresses have successfully excluded for disloyalty based only on a letter written to a newspaper.[424] As to freedom of speech, the Special Committee quoted Justice Brandeis' opinion in *Sugarman v. United States*[425] in saying that "'freedom of speech' does not mean that a man may say whatever he pleases without the possibility of being called to account for it" and referred to Justice Holmes' opinion in *Schenk v. United States*,[426] which held that the

---

[420] *Id.*
[421] *Id.*
[422] *Id.* (internal citations omitted).
[423] *Id.* at 56.
[424] *Id.* at 56.
[425] 249 U.S. 182, 185 (1919).
[426] 249 U.S. 47 (1919).

content of publications, very similar to those at issue for Berger, could be used for Espionage Act violations.[427]

After considering all of the evidence, the House of Representatives voted, 311–1, to disqualify Berger.[428] The Special Committee was convinced that Berger violated the Espionage Act and "thus gave aid and comfort to its enemies."[429] One Member of the Special Committee had argued that the House should not decide that matter until Berger, whose appeal was still pending, had exhausted judicial recourse, but the House disagreed.[430] When a special election was called to fill what would have been Berger's seat, he was re-elected and the House again refused to seat him.[431] Eventually, the Supreme Court overturned Berger's Espionage Act conviction, though not on the merits.[432] Having his name "cleared" by the Supreme Court, Berger again ran for, and was elected to, the House of Representatives in 1922, where he served until losing the 1928 election.[433]

For some reason, the House of Representatives allowed him to take the oath of office and be sworn in as a Member, notwithstanding the existing Section 3 disqualification, without an amnesty resolution.[434] It is likely that the Sixty-Eighth Congress figured that, since the Supreme Court nullified the guilty verdict, he did not give aid or comfort to the Germans. As logical as that may sound, it is still contrary to Section 3. The House of Representatives determined, outside of the courts, that the actions being considered by the courts plainly showed that Berger did "willfully hinder, obstruct, and embarrass the Government of the United States and thus gave aid and comfort to its enemies, and . . . [wa]s unfit and ineligible to sit as a member" and thought allowing him into Congress "inconceivable."[435] The Sixty-Sixth Congress was correct in saying that "it [was] not only the right but the constitutional duty of the House to exclude him"[436] after finding that he gave aid and comfort to enemies of the United States and the Sixty-Eighth, Sixty-Ninth, and Seventieth Congresses failed to carry out their constitutional duties by allowing him to sit.

---

[427] CANNON ON PRECEDENTS, *supra* note 161, at 56. While *Schenk* was effectively overruled by *Brandenburg v. Ohio*, 395 U.S. 444 (1969), remember that Congress is the exclusive judge of their own qualifications and that Section 3 is not a mere statute. The Supreme Court's holdings regarding what Congress can criminalize by statute are not binding in the congressional Section 3 context.

[428] CANNON ON PRECEDENTS, *supra* note 161, at 58; 58 CONG. REC. 8261 (1919).

[429] CANNON ON PRECEDENTS, *supra* note 161, at 58.

[430] *See id.*

[431] *Id.* at 60–61.

[432] *See* Berger v. United States, 255 U.S. 22 (1921) (finding that the judge presiding over Berger's trial was prejudiced against Berger for being socialist).

[433] *BERGER, Victor Luitpold*, *supra* note 415.

[434] *See id.*

[435] CANNON ON PRECEDENTS, *supra* note 161, at 58; 58 CONG. REC. 8261 (1919).

[436] *Id.*

The case of Victor Berger helps inform analysis of Section 3 in three primary ways beyond its affirmation that it applies outside the context of the Civil War: first, by showing that, as suggested in *McKee v. Young* and *Smith v. Brown*,[437] simple words opposing the American war efforts with the intent to shift the tide of public opinion away from supporting them can be sufficient to render one disqualified under Section 3; second, as also evidenced by other Red Scare examples,[438] that social paranoia may expose people to Section 3 punishment simply for holding radical political views where similar comments made by mainstream politicians would be forgiven;[439] and third, that Congress, left to its own devices, may have trouble properly enforcing disqualifications as political circumstances change.

V. APPLYING THE TEST

This Section will use a hypothetical test–case of *X*, a former cabinet department secretary working as a registered lobbyist for a state-owned Iranian company. *X* was arrested in one of the 2020 George Floyd protests and wishes to enter Indiana's gubernatorial race. Because this is a state office and the dispute is before the election, the decision maker would be the Indiana Election Division and the challenge can be brought by any eligible Indiana voter.[440] Additionally, as a former cabinet-level secretary, *X* was an officer of the United States for Section 3's precondition and a state's governorship is an office that Section 3 can disqualify somebody from.[441] Having established that *X* is within the reach of Section 3, the remainder of this Part will work through a determination of *X*'s eligibility.

A. Did X Engage in Insurrection or Rebellion?

To be disqualified by Section 3 for engaging in insurrection or rebellion, somebody must voluntarily take part in a scheme that causes domestic unrest in opposition to state or federal laws after the President issues a Proclamation pursuant to the

---

[437] *See supra* Section IV.A.

[438] *See generally* Landon R.Y. Storrs, *McCarthyism and the Second Red Scare*, OXFORD RSCH. ENCYCS., https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-6 [https://perma.cc/2NMK-EVSN] (last visited Oct. 27, 2021).

[439] There may be wisdom in incorporating modern doctrine on loyalty oaths, such as the line of cases following *Cole v. Richardson*, 405 U.S. 676 (1972), to mitigate the potential for abuse of Section 3 against political rivals. *Cf.* Charles P. Pierce, *You Don't Need to Seat the 126 Republicans Who Signed onto the Covenant of Sedition*, ESQUIRE (Dec. 11, 2020), https://www.esquire.com/news-politics/politics/a34946989/bill-pascrel-don't-seat-republicans-texas-lawsuit-14th-amendment/ [https://perma.cc/W6ZF-VGP2]. But this is a political argument rather than a legal one and appears to be somewhat limited by precedent. *See generally supra* Part IV.

[440] *Candidate Filing Challenge State Form 46437*, *supra* note 203.

[441] U.S. CONST. amend. XIV, § 3.

Insurrection Act ordering the uprising to disperse.[442] *X* did not do so, and consequently cannot be disqualified on this basis. Following the murder of George Floyd in Minneapolis, protests sprung up across the country with the stated goal of enacting comprehensive police reform.[443] Some of these protests devolved into riots.[444] Whether a riot clears the insurrection hurdle is basically determined by the ability of the state's justice system to suppress it.[445] If the state cannot handle the uprising, then the state's legislature can request federal intervention.[446] No state legislature requested federal military intervention. Alternatively, the President can make a determination that an uprising deprives a state's people of their federal rights and label it an insurrection on this basis.[447] Whether the riots deprived people of their federal rights is a far tougher question, but it is one that does not need to be answered because President Trump never issued a proclamation ordering the agitators to disperse.[448] He never even tweeted something to that end.[449] Consequently, it does not appear that *X* can be said to have engaged in insurrection nor does it appear that he can be disqualified on that basis.

B. Did X Give Aid or Comfort to an Enemy of the United States?

Whether *X* gave aid or comfort to an enemy of the United States is really two questions: (1) can their act be considered aid or comfort; and (2) is the beneficiary an

---

[442] 10 U.S.C. §§ 253–54.

[443] *See* Abby Phillip, *George Floyd Protests Have Made Police Reform the Consensus Position*, CNN (June 9, 2020), https://www.cnn.com/2020/06/09/politics/police-reform-consensus-floyd-protest/index.html [https://perma.cc/DFX3-LSQ3].

[444] *See* Will Cleveland, *2 People Who Lit Cars On Fire During George Floyd Protests Plead Guilty to Federal Rioting Charge*, DEMOCRAT AND CHRONICLE (June 8, 2021), https://www.democratandchronicle.com/story/news/2021/06/08/rochester-may-30-riot-george-floyd-cars-fire-plea-deal/7607487002/ [https://perma.cc/Q53G-3WVY].

[445] 10 U.S.C. §§ 253–54.

[446] Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424.

[447] 10 U.S.C. §§ 253–54.

[448] While some protests were dispersed, there was no proclamation from the White House. *See* Michael D. Shear & Katie Rogers, *Trump and Aides Try to Change the Narrative of the White House Protests*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/06/03/us/politics/trump-protests.html [https://perma.cc/2GJD-TDH9].

[449] President Trump did tweet during the protests, but not ordering dispersal. *Compare* Jill Colvin & Colleen Long, *George Floyd Death: Trump Attempts to Explain 'Looting Leads to Shooting' Tweet*, ABC (May 29, 2020), https://abc7.com/trump-george-floyd-twitter-tweets/6219017/ [https://perma.cc/E5PL-JZMM] ("These THUGS are dishonoring the memory of George Floyd, and I won't let that happen. Just spoke to Governor Tim Walz and told him that the Military is with him all the way. Any difficulty and we will assume control but, when the looting starts, the shooting starts. Thank you!"), *with* Presidential Proclamation (April 15, 1861) ("I hereby command the persons composing the combinations aforesaid to disperse and retire peaceably to their respective abodes within twenty days from this date.").

enemy of the United States?[450] *X*'s work lobbying will be considered aid or comfort and Iran may be considered an enemy of the United States, so *X* might be ineligible on this basis.

1. Does Lobbying Qualify as Aid or Comfort?

Regardless of approach, lobbying should fall squarely within the definition of "aid or comfort."[451] Historically, lobbying is providing a service for one's client and, as shown by *Carlisle v. United States*,[452] providing goods or services was considered giving aid or comfort—regardless of if the provider actually believed in the cause they were furthering as long as they knew who it was they were providing the good to or the service for.[453] Lobbyists "cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the [client's cause], he does not sell them for that purpose. . . . [They] must be taken to intend the consequences of [their] own voluntary act."[454]

2. Is Iran an Enemy of the United States?

Enemies of the United States must "at least conform[] to the traditional requirement[s]" of an enemy, and such assertions must be "supported by other actions of the political departments."[455] Further, "[t]he declaration of enemy status cannot come in the indictment itself."[456] Whether Iran is an enemy of the United States is a question without a clear answer.

Black's Law Dictionary defines "enemy" as "adversary."[457] *Merriam-Webster* defines it as "one that is antagonistic to another"; "something harmful or deadly"; or "a military adversary."[458] A nationwide poll of American adults, conducted in 2019, shows that over three quarters of Americans view one of Russia, China, North Korea, and Iran as the single "greatest enemy" of the United States.[459] According to that poll, just under 10% of Americans in 2019—prior to the designation of the Iranian

---

[450] U.S. CONST. amend. XIV, § 3.

[451] *See id.*

[452] 83 U.S. 147 (1872).

[453] *See id.* at 151.

[454] *Id.*

[455] *See* Larson, *supra* note 99, at 923.

[456] *Id.*

[457] *Enemy*, BLACK'S LAW DICTIONARY (6th ed. 1990).

[458] *Enemy*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/enemy [https://perma.cc/D8XU-B5RB] (last visited Oct. 27, 2021).

[459] *Gallup Poll Social Series: World Affairs*, GALLUP NEWS SERV. (Feb. 10, 2019) [hereinafter *Gallup Poll*], https://news.gallup.com/file/poll/247154/190227NorthKorea.pdf [https://perma.cc/7F79-YN7K].

Revolutionary Guards as a terrorist organization and prior to the strikes that killed Soleimani[460]—considered Iran the *single greatest* threat to America.[461] That number, less than a decade ago, was over 30%.[462] In 2013, 45% of Americans considered Iran an enemy, and another 38% viewed it as an "unfriendly" country.[463] A more recent poll shows that Iran is the *least liked country* among Americans.[464] While the average American may consider Iran an enemy, a Section 3—or treason—determination must go deeper.

There is very little useful doctrine because federal treason charges have only been litigated in connection to major wars, such as World War II, where there was never a question as to who the enemy was.[465] The historical understanding of an enemy of the United States is a (1) subject of a foreign power that is in a state of open hostilities with the United States or (2) subjects of a domestic group exercising de facto sovereignty and levying war against the United States.[466] Iran is a foreign power, so the sole question is whether we are in a state of open hostilities. Ignoring "closed" hostilities, like Stuxnet,[467] there are a number of things that may indicate a state of open hostilities. The White House has claimed legal authority to use military action against Iranian forces.[468] The United States has stopped trade with and imposed economic sanctions on Iran.[469] Iranians chant "Death to America" in the

---

[460] *U.S. Officially Designates Iran's Revolutionary Guards a Terrorist Group*, REUTERS (Apr. 15, 2019, 8:57 AM), https://www.reuters.com/article/us-usa-iran/u-s-officially-designates-irans-revolutionary-guards-a-terrorist-group-idUSKCN1RR1BE [https://perma.cc/2S4K-7AU2]; Peter Bergen, Opinion, *The Killing of Iran's General Soleimani Is Hugely Significant*, CNN (Jan. 02, 2020, 11:06 PM), https://www.cnn.com/2020/01/02/opinions/killing-of-irans-general-soleimani-is-hugely-significant-bergen/index.html [https://perma.cc /DR23-KQFE].

[461] *Gallup Poll*, *supra* note 459.

[462] *Id.*

[463] Art Swift, *Americans Overwhelmingly See Iran as Enemy or Unfriendly*, GALLUP (Sept. 25, 2013), https://news.gallup.com/poll/164639/americans-overwhelmingly-iran-enemy-unfriendly.aspx [https://perma.cc/Q3JP-EFDT].

[464] *Gallup Poll Social Series: World Affairs*, GALLUP NEWS SERV. (Feb. 16, 2020), https://news.gallup.com/file/poll/287156/200303CountryRatings.pdf [https://perma.cc/64Q4-X9QY]; *see also* Mohamed Younis, *Do Americans Want War with Iran?*, GALLUP (Aug. 20, 2019), https://news.gallup.com/poll/265640/americans-war-iran.aspx [https://perma.cc/X6MY-QPFK] (showing that over 40% of Americans support war with Iran if economic sanctions do not achieve their goals).

[465] *See, e.g.*, Cramer v. United States, 325 U.S. 1 (1945).

[466] *See supra* Section I.D.2.

[467] *Stuxnet*, N.J. CYBERSECURITY & COMMS. INTEGRATION CELL (Aug. 10, 2017), https://www.cyber.nj.gov/threat-profiles/ics-malware-variants/stuxnet [https://perma.cc/J3XF-QQUE].

[468] NOTICE ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, U.S. HOUSE OF REPS. COMM. ON FOREIGN AFFAIRS (last visited Oct. 27, 2021), https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf [https://perma.cc/56FG-VHP7].

[469] *Financial Sanctions*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource

streets and compare the United States to a "poisonous scorpion whose nature it is to sting and cannot be stopped unless it is crushed."[470] American drones have attacked Iranian officials and Iran has struck back at American troops.[471] Though there is not a declared war, that is not needed to label a nation as an enemy.[472] To use the words of Justice Washington from *Bas v. Tingy*: America and Iran "certainly [are] not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of two governments."[473]

The President, who is tasked with controlling the military and maintaining diplomatic relations, recognizes a state of open hostility with Iran through repeated military strikes, imposition of sanctions, and elimination of diplomatic relations.[474] But the President has not expressly labelled Iran an enemy.[475] Further complicating the matter is that Congress has made clear that they oppose the President's treatment of Iran.[476] Structural questions of this sort are typically answered within the *Youngstown* framework.[477] This framework explains that there are three classifications of executive action: those that are in accordance with the views of Congress, where the President can exercise the joint powers of the branches; those where Congress has failed to weigh in on the issue, known as the "zone of twilight"; and those where Congress has opposed the President's action, where the President's power is "at its lowest ebb" and is limited strictly to Article II.[478] In issues of foreign relations such as these, the President reigns supreme.[479] So, regardless of which *Youngstown* classification this

---

-center/sanctions/programs/pages/iran.aspx [https://perma.cc/3PZ7-MAJR] (last visited Oct. 27, 2021).

[470] *Iranians Chant 'Death to America' to Mark U.S. Embassy Seizure*, REUTERS (Nov. 04, 2019, 2:22 AM), https://www.reuters.com/article/us-iran-usa-embassy/iranians-chant-death-to-america-to-mark-u-s-embassy-seizure-idUSKBN1XE0KK [https://perma.cc/Q9ET-N5PE].

[471] Bergen, *supra* note 460; *Iran Missile Strike: 50 US Troops Now Diagnosed With Brain Injuries*, REUTERS (Feb. 10, 2020, 12:18 PM), https://www.theguardian.com/us-news/2020/jan/28/us-troops-iran-brain-injury-attack-iraq [https://perma.cc/3R3S-V8JC].

[472] Bas v. Tingy, 4 U.S. (4 Dall.) 37, 41 (1800) (opinion of Washington, J.).

[473] *Id.*

[474] Bergen, *supra* note 460.

[475] Carol E. Lee & Courtney Kube, *Trump Authorized Soleimani's Killing 7 Months Ago, With Conditions*, NBC NEWS (Jan. 13, 2020), https://www.nbcnews.com/politics/national-security/trump-authorized-soleimani-s-killing-7-months-ago-conditions-n1113271 [https://perma.cc/LT7J-YWRG] ("[T]he U.S. commander in Iraq . . . raised the possibility of designating Soleimani and his Quds Force officers as enemy combatants[.] . . . [T]he idea was ruled out].").

[476] S. J. Res. 68, 116th Cong. (2020).

[477] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[478] *Id.* at 635–37.

[479] *See* Treaty of Amity, Commerce, and Navigation, United Kingdom-U.S., Nov. 19, 1794, 12 U.S.T. 13; *see also* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 74–90 (2007); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)

ends up in, the President has the power to make the determination. With the proper branch of the federal government weighing in, the decision maker—here a state election division—would only be taking action in line with the President's course of action.

But "declaring a nation or a group to be an 'enemy' is tantamount to a declaration of war" and "raises thorny questions of foreign relations."[480] Even after considering all of the hostile acts between the United States and Iran, it should be noted and weight should be given to the fact that there has been no formal label attached by the federal government. The President has labelled the Iranian Revolutionary Guards a terrorist group and has declared that he has the authority to strike Iranian forces, but he has not declared war and has sought to avoid escalation.[481] Iran's Supreme Leader has justified the chanting of "Death to America" by saying it means "Death to Trump," but they have avoided direct conflict by other than proxy forces.[482] Because of this, and because of Congress's skepticism regarding military conflict with Iran, a prudent decision maker may think it best to err on the side of not "declaring war."

***

Whether Iran is an enemy of the United States is a close call, and the Indiana Election Division could come out either way. If they decide that Iran is an enemy, then *X* would be disqualified from becoming Governor upon the decision becoming final. It is also possible that after the initial determination, the federal government could intervene and state its position more clearly before the appeal is heard. If the election division decides against Iran being an enemy, then *X* will be free to run for the governorship.

CONCLUSION

This Article has shown that the Fourteenth Amendment is more than its first section, and that Section 3 can be used to protect the integrity of the offices of the United States and the several States. It has broken down the text of Section 3 to identify what the law actually is and has analyzed precedent.[483] It has further devised

---

(indicating the shift in power from Congress to the President as the focus shifts from domestic to foreign affairs).

[480] *See* Larson, *supra* note 99, at 920–21.

[481] Jeff Mason, Ahmed Aboulenein & Parisa Hafezi, *U.S., Iran Both Appear to Signal Desire to Avoid Further Conflict*, REUTERS (Jan. 7, 2020, 2:39 AM), https://www.reuters.com/article/us-iraq-security/u-s-iran-both-appear-to-signal-desire-to-avoid-further-conflict-idUSKBN1Z60NL [https://perma.cc/S3TF-F22Q].

[482] Thomas Erdbrink, *'Death to America' Means 'Death to Trump,' Iran's Supreme Leader Says*, N.Y. TIMES (Feb. 8, 2020), https://www.nytimes.com/2019/02/08/world/middleeast/iran-trump-death-to-america.html [https://perma.cc/3CHG-4L3S].

[483] *See supra* Parts I–III.

an overarching test for future Section 3 challenges and applied that test to a hypothetical official; that application showed that seemingly innocuous things can call into question the qualifications of public officials.[484]

Section 3 is powerful and facially vague, making it an especially attractive cudgel for political warfare.[485] Thankfully, history and practice have clearly delineated certain limiting principles that should be maintained to limit its abuse.[486] To summarize: if somebody has taken an oath to uphold the Constitution for a position "exercising significant authority pursuant to the laws of the United States"[487] and then either (1) voluntarily takes part in a scheme causing enough domestic unrest to prompt an Insurrection Act proclamation[488] or (2) acts in a way that strengthens entities that the United States is in a state of open hostilities with, then they may be disqualified from holding any office under the United States, unless two-thirds of each chamber of Congress grants them amnesty.[489]

---

[484] *See supra* Part V.

[485] *The Quo Warranto Cases*, NASHVILLE UNION & AM. (Nov. 6, 1870), https://chroniclingamerica.loc.gov/lccn/sn85033699/1870-11-06/ed-1/seq-2/#date1=08%2F10%2F1868&index=3&date2=12%2F31%2F1872&dateFilterType=range&page=1 [https://perma.cc/3NTN-NNUN] ("The Court . . . held that the section being highly penal, must be strictly construed . . . .").

[486] *Id.* (reporting a court's holding that Section 3 "was highly penal, [and] must be strictly construed").

[487] Buckley v. Valeo, 424 U.S. 1, 126 (1976), *superseded by statute*, The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81; *see also* Freytag v. Comm'r, 501 U.S. 868, 881–82 (noting as relevant whether the tasks performed are "ministerial" and whether there is a grant of discretion).

[488] 10 U.S.C. §§ 253–54.

[489] *See* U.S. CONST. amend. XIV, § 3.