

The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment

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In the aftermath of the [events of January 6, 2021](#), in and around the U.S. Capitol, there have been calls for accountability for those who participated, as well as for those who may have helped instigate it. The breach of the Capitol resulted in numerous injuries, multiple deaths, and significant property damage. It also delayed Congress's constitutional duty of certifying electoral votes for President-elect Joseph Biden and caused Capitol Police and other law enforcement personnel to evacuate the Vice President and Members of Congress from the House and Senate floors to safer locations. Some [observers](#), [historians](#), and [other commentators](#) are [wondering](#) whether the [Disqualification Clause of the Fourteenth Amendment](#) might provide a mechanism to disqualify individuals who participated in or encouraged the siege, including former and sitting government officials, from holding office.

Invocation of the Disqualification Clause raises a number of novel legal questions involving the activities that could trigger disqualification, the offices to which disqualification might apply, and the mechanisms to enforce disqualification. The clause has been seldom used, and the few times it has been used in the past mainly arose out of the Civil War—a very different context from the events of January 6. It is therefore unclear to what extent historical precedents provide useful guidance for its application to the events of January 6. This Legal Sidebar describes the Disqualification Clause, explains to whom it might apply and what activities could incur a bar on holding office, and discusses possible mechanisms to implement it.

The Disqualification Clause

[Section 3 of the Fourteenth Amendment](#) provides:

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.

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The Constitution of the United States
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In short, Section 3 disqualification appears to apply to any covered person who has taken an oath to uphold the Constitution of the United States and thereafter either (1) engages in insurrection or rebellion against the United States or (2) gives aid or comfort to the enemies of the United States, unless a supermajority of Congress “removes such disability.”

Enacted in the aftermath of the Civil War, Section 3 seems specifically [designed for the Reconstruction Era](#) but [may be applicable](#) to modern times as well. Section 3 was for the most part used only for the short period between its ratification and the 1872 enactment of the [Amnesty Act](#). The Amnesty Act removed the disqualification from most Confederates and their sympathizers and was enacted by a two-thirds majority of Congress in accordance with the terms of Section 3. Some argue the Amnesty Act operates [retrospectively](#). In a recent case, *Cawthorn v. Amalfi*, discussed in this [Legal Sidebar](#), the U.S. Court of Appeals for the Fourth Circuit found that the Act does not apply to later insurrections or treasonous acts.

Section 3 of the Fourteenth Amendment does not expressly require a criminal conviction, and [historically](#), one was not necessary. Reconstruction Era federal prosecutors [brought civil actions](#) in court to oust officials linked to the Confederacy, and Congress [in some cases](#) took action to refuse to seat Members. Congress last used Section 3 of the Fourteenth Amendment [in 1919](#) to refuse to seat a [socialist Congressman](#) accused of having given aid and comfort to Germany during the First World War, irrespective of the Amnesty Act. The Congressman, [Victor Berger](#), was eventually seated at a subsequent Congress after the Supreme Court [threw out](#) his espionage conviction for judicial bias. Recently, various groups and organizations have [challenged](#) the eligibility of certain candidates running for Congress, arguing that the candidates’ alleged involvement in the events surrounding the January 6, 2021, breach of the Capitol render them ineligible for office. No challenges have to date resulted in the disqualification of any candidate.

To Whom Does Section 3 Apply?

According to the text of Section 3, the bar against office-holding applies to Members of Congress, officers of the United States, members of state legislatures, and state executive or judicial officers, who previously swore an oath to support the Constitution of the United States and later break that oath by committing the acts mentioned. The offices to which such persons are then barred include seats in Congress, membership in the Electoral College, and any civil or military office under the United States or any state. Although not expressly referenced, the bar appears historically to have applied to [judgeships](#). There is an [argument](#) that because the President is not covered explicitly by the provision, the presidency itself is exempt from the disqualification. In contrast, the [Impeachment Clause](#) of the Constitution explicitly applies to the “President, Vice President and all civil Officers of the United States,” which suggests that the President might not be a “civil Officer of the United States” whose oath of office would subject him to possible disqualification. However, it may be more likely that the office of the President is included as an office under the United States (unlike Members of Congress and electors, which may be why they are expressly included), so that any person subject to the disqualification is ineligible to serve as President. One scholar notes that [the drafting history](#) of Section 3 of the Fourteenth Amendment suggests that the office of the President is covered:

During the debate on Section Three, one Senator asked why ex-Confederates “may be elected President or Vice President of the United States, and why did you all omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation.” Another Senator replied that the lack of specific language on the Presidency and Vice-Presidency was irrelevant: “Let me call the Senator’s attention to the words ‘or hold any office, civil or military, under the United States.’”

In the January 2021 [article of impeachment](#) against President Donald Trump, the House of Representatives, citing Section 3 of the Fourteenth Amendment, appears to have presumed that the Disqualification Clause would operate as a bar against President Trump continuing to serve as President,

presumably due to his previous oath of office and his alleged “incite[ment of] violence against the Government of the United States.”

What Activities Trigger the Bar?

Determining who has engaged in either of the two disqualifying activities—that is, engaging in insurrection or rebellion or giving aid or comfort to an enemy—is likely to be a difficult task given the scarcity of precedents and lack of clear definitions.

Engaging in Insurrection and Rebellion

The U.S. Constitution does not define *insurrection* or *rebellion*. Article 1, Section 8, clause 15, of the U.S. Constitution does [empower](#) Congress to call forth the militia “to suppress Insurrection.” It seems to follow that Congress has the authority to define *insurrection* for that purpose, which it has arguably done through enactment of the [Insurrection Act](#). [Part of that Act](#) authorizes the President to call up the militia and armed forces in the event of “unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States [that] make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings. . . .” That language might provide a point of reference for interpreting the Disqualification Clause. [Another part of the Insurrection Act](#), enacted approximately three years after the Fourteenth Amendment and thus arguably particularly relevant to discerning the original understanding of the Amendment, authorizes the use of armed forces in cases where insurrectionists “oppose[] or obstruct[] the execution of the laws of the United States or impede[] the course of justice under those laws.” Congressional activities, including fulfilling the constitutional duty of certifying electoral votes, would arguably qualify as an execution of the laws of the United States. The availability of judicial proceedings to enforce the law, however, may provide a countervailing consideration.

As the Supreme Court has [observed](#) in the context of the Insurrection Act, it is generally up to the President to determine whether a civil disturbance rises to the level of an insurrection or obstruction of the laws serious enough to overcome the ability of civil authorities to suppress it. Consequently, a presidential invocation of the Insurrection Act would likely suffice to establish the existence of an insurrection for Fourteenth Amendment disqualification purposes. However, presidential invocation of the act might not be necessary.

Two constitutional powers also arguably authorize Congress to determine the occurrence of an insurrection by legislation: the Militia Clause and Section 5 of the Fourteenth Amendment. The Militia Clause (Art. I, § 8, cl. 15) grants Congress the authority to [call forth the militia](#) to “suppress Insurrections.” [Section 5 of the Fourteenth Amendment](#) provides Congress “the power to enforce [the Amendment] by appropriate legislation.” A legislative determination that an insurrection occurred pursuant to one of these constitutional authorities would likely at least be accorded judicial weight in the event of a prosecution for insurrection or any procedure Congress might put in place to determine disqualification under Section 3.

Once an insurrection is deemed to have occurred, the question becomes whether a specific person engaged in it. Section 3 does not establish a procedure for determining who is subject to the proscription on holding office, instead providing only a process by which the disability may be removed (i.e., by two-thirds vote in both houses). Congress has also not set forth a procedure for determining who is subject to the disability imposed by Section 3. Although definitions of *insurrection* and *rebellion* for purposes of the Fourteenth Amendment would not necessarily be confined by statute, it would appear that a criminal conviction for insurrection or the “levying of war” prong of treason would provide sufficient proof, and each of them contains a bar on holding office. The insurrection statute, [18 U.S.C. § 2383](#), provides:

Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

The treason statute, [18 U.S.C. § 2381](#), similarly provides, in relevant part, “[w]hoever, owing allegiance to the United States, levies war against them . . . is guilty of treason . . . and shall be incapable of holding any office under the United States.”

Giving Aid or Comfort to the Enemy

One who gives aid or comfort to an enemy of the Constitution of the United States is also disqualified from holding office under the Fourteenth Amendment. This language appears to mirror that in the Constitution’s [Treason Clause](#), which defines *treason* in part as adherence to U.S. enemies, “giving them aid and comfort.” [Scant Supreme Court case law](#) arising out of World War II defining the provision of aid and comfort indicates that [mere association](#) with an enemy is probably [insufficient](#) but that [otherwise innocuous acts](#) may suffice if they are intended to provide material advantage to an enemy. There is also some indication of how *aid or comfort* was interpreted under Section 3 soon after its ratification. After the Civil War, during a hearing to determine whether John D. Young provided aid and comfort to the Confederacy and, therefore, was ineligible to be seated in the House of Representatives, the Committee of Elections was of the “opinion 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.”

One difficulty in applying the aid or comfort prong is determining the proper definition of *enemy*. The term *enemy* is [traditionally understood](#) to encompass citizens of foreign countries in open hostilities with the United States. During the Civil War, the Supreme Court [clarified](#) that citizens of the Confederacy, while not foreign, may be treated as enemies as well as traitors. During World War II, the Supreme Court [determined](#) that a U.S. citizen who acted as a member of a belligerent invasion of the United States by joining a group of Nazi saboteurs who landed on shore might be treated as an enemy. History therefore suggests that an “enemy” is one who owes allegiance to an opposing government and not merely a U.S. citizen opposing the U.S. government or part thereof.

Implementation

It is unclear whether Section 3 is self-executing, which, if it is not, would leave federal and state courts or election authorities without power to determine the eligibility of candidates unless Congress enacts legislation to permit it. Courts have produced [mixed results](#) on this question. Section 3 does not expressly provide a procedure for its implementation other than Section 5’s general authority of Congress “to enforce [the Fourteenth Amendment] by appropriate legislation.” There might be multiple ways Congress could enforce the Disqualification Clause, including relying on federal criminal prosecution for insurrection and treason, allowing private civil enforcement through writs of *quo warranto* or other procedures, enacting new legislation establishing general procedures for adjudicating disqualification under Section 3 or for identifying specific disqualified individuals, or unicameral measures by the House or Senate to exclude or expel individuals from their respective houses. What follows is a discussion of a sampling of these alternatives and the novel legal questions they would pose.

As previously mentioned, prosecutions for insurrection under [18 U.S.C. § 2383](#) or treason under [18 U.S.C. § 2381](#), if successful, would result in a bar to “holding any office of the United States.” Consequently, any individuals convicted under those laws for engaging in activities related to the events of January 6 could be disqualified from holding current or future federal office without any specific congressional response to the events and without regard to whether they had previously taken an oath to

uphold the Constitution. To date, it does not appear that the Department of Justice has brought any charges under these two statutes in connection with the events of January 6.

Alternatively, an injured private party could ask a judge to issue a writ of *quo warranto* to prevent the seating of, or to oust from office, an individual who allegedly engaged in disqualifying activities. Although it is unclear who would have standing to bring such a suit, it is possible that opposing candidates or individuals eligible to hold the office in question could survive this constitutional, prudential inquiry. In a recent Fourth Circuit decision, the court found that individuals who had petitioned the state board of elections to prevent Representative Madison Cawthorn from appearing on the ballot had standing to appeal the injunction against the board due to their rights under state law to challenge his candidacy before the board. Other court challenges to congressional candidacy based on the Disqualification Clause brought by private litigants have largely failed.

Congress could also enact new legislation to enforce Section 3 in the aftermath of January 6, much like it did in response to the Civil War. Congress initially provided enforcement of Section 3 of the Fourteenth Amendment through enactment of the First Ku Klux Klan Act in 1870. Section 14 of that Act directed the district attorney in each district in which a potentially disqualified person held office to file a writ of *quo warranto* against the office-holder before a judge. Section 15 of the Act made it a misdemeanor for a person disqualified under the Fourteenth Amendment to hold state or federal office, enforcement of which required a court conviction. However, after two years, Congress reversed course by providing amnesty from the disqualification under the First Ku Klux Klan Act through enactment of the Amnesty Act in 1872. Congress passed the Amnesty Act by more than a two-thirds vote in accordance with the Disqualification Clause. The Ku Klux Klan Act provisions no longer appear in the *U.S. Code*, and Congress has not since exercised its authority under Section 5 of the Fourteenth Amendment to enact legislation providing a general procedure for the executive and judicial branches to determine who is subject to the bar on holding office.

In contrast to general procedural legislation akin to the Ku Klux Klan Act, there is some debate as to whether Congress can enact a law naming specific individuals subject to disqualification. As is discussed in another Legal Sidebar, some argue that Congress has that right under Section 3, while others counter that such a measure might conflict with the constitutional prohibition on bills of attainder. The Supreme Court has described a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” It is unclear whether legislation to implement Section 3 is subject to the constitutional prohibition on bills of attainder or was instead intended as a constitutional exception to it. Whether disqualification from holding office constitutes punishment for the purposes of the Bill of Attainder Clause is also unclear. Due to these uncertainties, legislation that specifically identifies individuals for disqualification would likely result in litigation.

Article I, § 5, of the Constitution provides the House and Senate with varying degrees of control over their own membership through the distinct constitutional powers of exclusion for failure to meet constitutionally prescribed qualifications and expulsion for nearly any reason. Either of these powers could be used to enforce a disqualification under the Fourteenth Amendment, at least with respect to an individual’s ability to serve in Congress.

An exclusion occurs when either the House or Senate refuses to seat a Member-elect. That power derives from the Constitution’s charge that “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members” and may be achieved by the vote of a simple majority. An expulsion, on the other hand, occurs when either chamber removes one of its current Members. That power derives from the Constitution’s explicit statement that “Each House may . . . with the Concurrence of two thirds, expel a Member.” As reflected in the provision, an expulsion requires the consent of two-thirds of the chamber.

The power to expel is much broader in scope than the power to exclude. Both chambers have “almost unbridled discretion” to determine the type of misconduct that warrants expulsion. The Supreme Court has suggested, for example, that Congress’s expulsion power “extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.” Grounds for exclusion, however, are limited to those enumerated in the Constitution. In *Powell v. McCormack*, the Court established that “the Constitution leaves the [House and Senate] without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution” but expressly left open whether the Disqualification Clause creates such a “qualification” within the meaning of Art. I, § 5. As shown in the Berger experience discussed above, Congress has previously viewed Section 3 of the Fourteenth Amendment as establishing an enumerated constitutional qualification for holding office and, consequently, a grounds for possible exclusion.

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