No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,
v.
NORMA ANDERSON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR PROFESSOR KURT T. LASH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Kurt T. Lash is a professor at the University of Richmond School of Law. He teaches and writes about the history and original understanding of the Constitution. He has published multiple books on the history of the Fourteenth Amendment, including *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (Cambridge University Press, 2014) and, most recently, *The Reconstruction Amendments: Essential Documents* (2 volumes) (University of Chicago Press, 2021). He has an interest in advancing an historically accurate judicial interpretation of the Fourteenth Amendment, including Section Three, and recently wrote a manuscript on this topic: *The Meaning and Ambiguity of Section Three* (Oct. 3, 2023), available at https://ssrn.com/abstract=4591838.*

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Section Three of the Fourteenth Amendment expressly addressed a set of unique concerns that faced the Republican members of the Thirty-Ninth Congress. The looming return of leading rebels to public office threatened to obstruct congressional reconstruction at a federal and state level. No Republican seriously feared that the national electorate would place a former rebel like Jefferson Davis in the White House. Instead, Republicans feared that the leaders of the recent rebellion would use their remaining *state* level popularity to secure a seat in Congress or receive appointment to federal or state office—including that of presidential elector. Once ensconced in these positions, they would combine their votes with northern Democrats and thwart Republican efforts to protect the freedmen's fundamental rights and the constitutional rights of all American citizens. Section Three expressly and successfully addressed these specific concerns and did so without having to abridge the right of the national electorate to choose their candidate for President of the United States.

Although it is textually possible to read Section Three of the Fourteenth Amendment as impliedly including future presidential candidates, nothing about the text or its history requires such a reading. At best, the text is ambiguous. Although Presidents hold "offices," it is neither textually nor historically clear that Presidents hold a "civil office under the United States." Although the ratifiers might have clarified their understanding during the ratification debates, the historical record does not contain any

ratifier commentary on this issue whatsoever. This combination of an ambiguous text and ratifier silence prevents any originalist-based conclusion that the people meant to constitutionally constrain their choice of President.

At the time of the Fourteenth Amendment, well-established congressional precedent and legal authority defined the phrase "civil [office] under the United States" as referring to appointed offices and not to the apex political positions of Senator, Representative or President of the United States. This principle was first established by Blount's Case in 1799 and was the authoritative view of Justice Joseph Story in his *Commentaries on the Constitution* (1833). The members of the Thirty-Ninth Congress were well-aware of Blount's Case and they accepted Story's Commentaries as an authoritative statement on the meaning of constitutional language. In light of this commonly understood background, it would have been remarkably negligent of the framers to have presumed courts of law would ignore both congressional precedent and legal authority and read the office of President into a term traditionally understood as applying to appointed positions.

In addition to precedent and legal authority, a commonsense reading of Section Three supports reading the provision as not including the office of the President of the United States. At the time of the Fourteenth Amendment, people commonly referred to the apex political positions of United States Senator, Representative, and President as "offices." Section Three enumerates the first two "offices." It does not enumerate the third. Instead, these expressly named

offices are followed by a general catch-all reference to "civil or military [offices] under the United States or under any State." By beginning with expressly enumerated high federal positions and then moving to a general term that included lower federal and state offices, Section Three provides a textbook example of a provision that should be read according to the canon of construction known as *expressio unius est exclusio alterius*: The inclusion of one thing means the exclusion of another.

During the Senate debates, former United States Attorney General Reverdy Johnson applied this rule of construction and noted that the "specific exclusion in the case of Senators and Representatives" in Section Three led him to presume that the framers had intentionally excluded the office of President of the United States. Johnson's interpretive reliance on the "specific exclusion" of Senators and Representatives is a perfect example of how the *expressio unius* canon works.

At the time, Reverdy Johnson politely allowed himself to be interrupted and "corrected" by Lot Morrill, who referred Johnson to the general catch-all provision. Although Johnson accepted Morrill's correction, he nevertheless defended his initial reading as having been prompted by the text of Section Three. Although Johnson was "corrected," the text was not. If the text and structure of Section Three prompted a lawyer as sophisticated as Attorney General Johnson to read the text through the lens of *expressio unius*, and do so during a prepared speech *about* Section Three, this establishes beyond doubt the reasonableness of such a reading. Nor did the public

learn of Morrill's correction (if, in fact, Morrill was correct). The Morrill-Johnson exchange went unreported in the press. Thus, since an originalist reading of constitutional text texts seeks public understanding, not framers' intent, the Johnson-Morrill exchange reveals the *inherent* ambiguity of Section Three—an ambiguity only exacerbated by any ratifier aware of the principles announced in Blount's Case and Story's *Commentaries*.

Section Three's inherent ambiguity was not addressed, much less resolved, during the ratification debates. Despite intensive research by scholars and lawyers, no one has produced a single example of a ratifier expressly claiming that the text included the office of the President of the United States. The most scholars have produced from the period prior to ratification are three brief references to Section Three in papers like the "Gallipolis Journal" and the "Milwaukee Daily Sentinel." Less than a handful of editorials out of thousands of newspaper articles cannot reasonably be understood as representing a public resolution of Section Three's textual ambiguity. Instead, the silence of the ratifiers and the paucity of public commentary is itself evidence that the prospect of a "rebel President" was not a matter of serious concern to either the framers or the ratifiers.

It is textually and historically reasonable to limit the scope of Section Three to issues that *were* of serious concern to the framers and ratifiers. In 1866, loyal American voters did not need protection from themselves. No one worried that the national electorate would choose Jefferson Davis over Ulysses S. Grant. Republicans faced a real and imminent

danger arising out of state-level pockets of southern disloyalty. Influential rebels might exploit their remaining local popularity and secure state appointment to the Senate, state election as Representative or state selection as a presidential elector. Once in office, these obstructionist Democrats would join forces with their northern counterparts and either block the enactment of federal legislation or help elect a northern Democrat like Horatio Seymour as President. Section Three expressly targets all of these real and imminent dangers by barring leading rebels from obtaining these key offices.

Section Three did not bar all rebels from serving as presidential electors, but only those who had taken a leading role in the rebellion. Although radical Republicans would have disenfranchised any person who had participated in the rebellion, moderate Republicans successfully insisted on limiting the scope of Section Three to only the rebellion's leaders. Moderates believed this would secure a sufficiently trustworthy southern electorate. As Senator William Windom declared during the framing debates, "if leading rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the loyal men of the South will control." The strategy worked. Although some former rebel soldiers participated as presidential electors in the election of 1868, a combination of loyal southern and northern electors chose the Republican Ulysses S. Grant over the Democrat Horatio Seymour.

In sum, Section Three addressed real and imminent dangers facing the Republic in 1866. The text does not clearly address the office of the President

of the United States. And there are strong textual, structural, precedential, constitutional and commonsense reasons supporting an interpretation that excludes the office of President. At best, on this issue Section Three is inherently ambiguous and nothing in the ratification debates resolved that ambiguity one way or another.

Although the Constitution contains limitations on those who the people can choose for their President, those limitations are expressly declared and were robustly debated at the time of ratification. Section Three contains an ambiguous text and its possible constraint on the national electorate received no discernable ratification debate whatsoever. There is no originalist case for imposing such a restriction on the American people. The Court should reverse.

ARGUMENT

I. Section Three's text is ambiguous about inclusion of the President.

Although Section Three clearly addressed real and imminent dangers to reconstruction, the text is ambiguous about its inclusion of the office of President of the United States. Section Three of the Fourteenth Amendment says:

> 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.[1]

Although Section Three expressly names the offices of Senator, Representative and elector of President of the United States, the text does not expressly enumerate the *office* of President of the United States. That office is not included unless the people understood the text as impliedly including the nation's highest office within the phrase "any office, civil or military, under the United States."

It is not enough to determine whether the people viewed the president as holding an "office"—that would render superfluous the words requiring that the office be "civil or military, under the United States."[2] Since the presidency is not a military office, this court must determine whether there was a consensus public understanding in 1868 that the President holds a "civil [office] under the United States."

A. Around 1868, "civil officer under the United States" was not understood to include apex political positions.

At the time of the Fourteenth Amendment, well-established congressional precedent and legal

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[1] U.S. Const. amend. XIV, § 3.

[2] "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803).

authority—including the most respected legal treatise in the country—established that the phrase "civil officer under the United States" did not include the apex political positions of Senator, Representative or President of the United States.

Congressional precedent dates back to 1799 when the United States Senate had to determine whether a Senator fell within the Impeachment Clause's reference to "The President, Vice President and all civil Officers of the United States." U.S. Const. art. II, § 4. In what became known as "Blount's Case,"[3] the Senate ruled that Senators were not "civil officer[s], within the meaning of the Constitution of the United States."[4] As James Asherton Bayard, Sr., argued at the time, the phrase "office under the United States . . . means the *Government* of the United States, for the United States grants no office but through the Government."[5] "The Government," Bayard continued, "consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it."[6]

Bayard's argument won the day, and the Senate rejected a resolution declaring that Senator Blount was a "civil officer of the United States, within the meaning of the Constitution, and therefore liable to be

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[3] See 8 *The Debates and Proceedings the Congress of the United States* 1797–1799, at 2245 (1851), *available at* http://bit.ly/47ue2jj.
[4] *Id.* at 2318.
[5] *Id.* at 2258 (emphasis added)
[6] *Ibid.*

impeached."[7] The precedent established in Blount's Case remains the standard understanding of the Impeachment Clause to this day.[8]

In his influential *Commentaries on the Constitution*, Justice Joseph Story echoed Bayard's argument in Blount's Case and explained that the Senate had correctly concluded that "civil officers of the United States" were those who "derived their appointment from and under the national government."[9] "In this view," Story explained, "the enumeration of the president and vice president [in the Impeachment Clause] was indispensable; for they derive, or may derive, their office from a source paramount to the national government."[10] This is why the Impeachment Clause says "'the president, vice president, and *all civil officers* (not all *other* civil officers) shall be removed.'"[11]

The Members of the Thirty-Ninth Congress accepted Joseph Story as "our highest commentator" on the Constitution,[12] and they cited and quoted his

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[7] *Id.* at 2318.

[8] See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional*, 48 Stan. L. Rev. 113, 115 (1995) (describing the Senate's ruling in Blount's Case as correct).

[9] See 2 Joseph Story, *Commentaries on the Constitution of the United States* 259 (1833).

[10] *Id.* at 259–60.

[11] *Id.* at 260 (emphasis in original).

[12] *E.g.*, Charles Sumner, Speech on the Impeachment of Andrew Johnson 5 (1868), *available at* https://bit.ly/3RFVpEs.

work repeatedly during congressional debates.[13] Members of the Reconstruction Congress were particularly aware of Blount's Case and Story's analysis. In the Thirty-Eighth Congress, Senator Reverdy Johnson reminded his colleagues that, according to Bayard's argument in Blount's Case, "it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it."[14]

Blount's Case and Story's adoption of Bayard's argument in that case remained well known and authoritative throughout the Reconstruction Congress. As Senator Charles Sumner declared only months before the ratification of the Fourteenth Amendment, Bayard's arguments in Blount's Case had been "adopted by no less an authority than our highest commentator, Judge Story."[15]

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[13] Examples are too numerous to list. Some of the more notable examples include John Bingham's use of Joseph Story during the Fourteenth Amendment drafting debates. See Speech of John Bingham, January 25, 1866, *in* 2 *The Reconstruction Amendments: Essential Documents* 60 (Kurt T. Lash, ed., 2021); *id.* at 115 (speech of January 27, 1866).

[14] Cong. Globe, 38th Cong., 1st Sess., at 329 (Senator Reverdy Johnson quoting Bayard's argument in Blount's Case).

[15] See Sumner, *supra* note 12, at 5. A House Committee discussed both Blount's Case and Story's authoritative view soon after the passage of the Fourteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., at 3935. Although the committee expressed some doubts about Story's discussion of Blount's Case, they declined to challenge his conclusion and advised Congress to leave the precedent unchanged. See *id.* at 3940.

Throughout the ratification period, multiple speeches and newspaper essays referenced the precedent of Blount's Case and Story's explanation of that precedent in his *Commentaries*.[16] In April 1868, for example, the Louisville Daily Journal published an extended editorial discussing whether the President was "an officer of the United States."[17] In their essay, the editors expressly point to the Impeachment Clause and Story's Analysis of Blount's Case:

> [T]he President and Vice President are not included among "civil officers of the United States," but on the contrary, are distinguished from them, the language of the Constitution being "The President, Vice President, and all civil officers of the United States," not, "The President, Vice President, and all *other* civil

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[16] What might seem an obscure precedent today was, at the time, directly relevant to debates over presidential impeachment. See, *e.g.*, *The Impeachment Question*, Daily Inter Ocean (published as The Chicago Republican) (Oct. 25, 1866), at 4 (essay discussing the impeachment of "senator Blount in 1799" and quoting Story's analysis in his *Commentaries*). Blount's Case also played a high profile role in the debates over Senator Benjamin Wade's eligibility as a "civil officer" who Congress might name as an impeached Andrew Johnson's replacement. See, *e.g.*, *The Eligibility of the President Pro Tempore of the Senate to be Acting President*, Daily National Intelligencer (Washington, D.C.) (Apr. 18, 1868), at 2 (discussing Sen. Wade's eligibility, and citing Pascal, Story and Wharton's analysis of Blount's Case). For additional examples, see Kurt T. Lash, *The Meaning and Ambiguity of Section Three* (Oct. 3, 2023), at 13, available at https://ssrn.com/abstract=4591838.

[17] Louisville Daily Journal (Louisville, Kentucky) (Apr. 15, 1868), at 1.

> officers of the United States." The language implies that the President and Vice President are not officers of the United States. It fairly admits of no other construction. In the words of Mr. Justice Story, "it does not even effect to consider them officers of the United States." See Section 973 of Story's Commentaries. The argument is thus supported by the authority of the most celebrated commentator on the Constitution as well as by the language of the Constitution itself."[18]

Given the widespread awareness of Blount's Case and Story's *Commentaries*,[19] it would have been remarkably negligent of the framers to expect that the public and courts of law would ignore those authorities and read a reference to "civil or military [offices] under the United States" as impliedly including the office of the President of the United States. Such sloppy

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[18] *Ibid.*; see John Connolly, *Did Anyone in the Late 1860s Believe the President was not an Officer of the United States?* (Dec. 6, 2023), at 3, available at https://bit.ly/3vjCarc (citing this and related sources).

[19] Story was not alone in his understanding of Blount's Case and the Impeachment Clause. See, *e.g.*, John Norton Pomeroy, *An Introduction to Constitutional Law of the United States* 481 (1868) ("In 1797, upon the trial of an impeachment preferred against William Blount, a Senator, the Senate decided that members of their own body are not 'civil officers' within the meaning of the Constitution. . . . The term 'civil officers,' therefore, embraces, therefore, the judges of the United States courts, and all subordinates in the Executive Department."); George W. Pascal, *The Constitution of the United States* 185 (1868) ("A senator or representative in congress is not such a civil officer." (citing "Blount's Trial" and Story's *Commentaries*)).

draftsmanship would be especially surprising in light of Republican insistence on correctly labeling the office of the President of the United States.

In fact, no Republican in the Thirty-Ninth Congress ever referred to the President as holding a "civil office," or as a "civil officer under the United States." Instead, they used terms like "Chief Executive," or the "Chief Executive Officer of the Government."[20] When the Democrat Andrew Johnson referred to himself as the "Chief *Civil* Executive Officer of the United States," Republicans mocked Johnson for failing to know how to properly refer to his own office.[21] According to Republican Senator Jacob Howard, President Johnson had invented a phrase "not contained in the Constitution or the laws of the land."[22]

B. Rules of construction suggest Section Three excludes the apex office of the President.

In addition to congressional precedent and legal authority, commonsense rules of textual construction suggest that Section Three should not be read as including the office of the President of the United States.

Section Three begins by expressly naming Senators, Representatives, and electors of the

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[20] The Republican Attorney General James Speed, for example, referred to the President as the Chief Executive Officer of the Government. See Cong. Globe, 39th Cong., 1st Sess., at 775.
[21] *Id.* at 2551.
[22] *Ibid.*

President of the United States—positions involving the three apex political positions in the federal government. These expressly enumerated positions are followed by a general catch-all provision referring to "all offices, civil or military, under the United States." It was common at the time of the Fourteenth Amendment to refer to Senators, Representatives, and electors as holding an "office."[23] Nevertheless, the

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[23] For the "office of Senator" see New York Tribune (New York, New York) (Apr. 13, 1866), at 1 (reporting a speech by Charles Sumner delivered on April 12, 1866, noting that his late colleague Sen. Foote "was happy in the office of Senator"); Boston Daily Advertiser (Boston, Massachusetts) (July 31, 1866), at 1 (reporting news from New Hampshire) ("George G. Fogg of Concord will be appointed by Gov. Smyth to fill the vacancy in the office of Senator to be occasioned by the anticipated resignation of Senator Clark"); Philadelphia Inquirer (July 27, 1866), at 1 ("[T]he credentials of Mr. Patterson were returned to the Judiciary Committee, with instructions to inquire into his qualifications for the office of Senator."). For the "office of Representative," see *Official Proceedings of the Republican Convention*, Daily Inter Ocean (published as the Chicago Republican) (June 14, 1866), at 8 ("[T]he Hon. Elihu B. Washburne was declared the unanimous nominee of the convention for the office of Representative in Congress."). For the "office of presidential elector," see Cincinnati Daily Enquirer (Cincinnati, Ohio) (Sept. 21, 1864), at 1 (essayist writing of his nomination as a candidate "for the office of elector at the next presidential election"); Sweetwater Forerunner (Sweetwater, Tennessee) (Nov. 26, 1868), at 2 (essay discussing "whether the latter gentleman is eligible to the office of elector. The fourteenth amendment to the Constitution provides that no person shall be elector of President or Vice President, who after taking an oath . . ."); S.S. Nicholas, Letters on the Presidency, *in Conservative Essays, Legal and Political* 478, 480 (1869) (describing members of the electoral college as holding the "office of elector").

framers did not leave the inclusion of these positions to implication (as "civil offices"), but expressly named them as included offices.

This text and structure support a reasonable presumption that the framers intentionally excluded the office of President of the United States. The legal term for this commonsense presumption is *expressio unius est exclusio alterius*," or "the inclusion of one thing means the exclusion of another."[24]

One of the most sophisticated lawyers in the Senate initially relied on this rule of construction to conclude that the framers had intentionally excluded the office of President. In his speech addressing Section Three of the Fourteenth Amendment, Senator and former United States Attorney General Reverdy Johnson remarked: "[former rebels] may be elected President or Vice President of the United States, and why did you omit to exclude them?"[25] When Lot Morrill interrupted Johnson's speech and referred him to the general catch-all reference to "civil" offices, Johnson politely conceded "[p]erhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives."[26]

The former Attorney General did not confess to being inattentive or not noticing the catch-all term.

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[24] See Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law* 25–26 (1997) (canons such as *noscitur a sociis* and *expressio unius est exclusio alterius* are "commonsensical").
[25] Cong. Globe, 39th Cong., 1st Sess., at 2899.
[26] *Ibid.*

Instead, Senator Johnson explained that he had been "*misled*" by "the *specific exclusion* in the case of Senators and Representatives." This is a textbook example of a reader applying the *expressio unius* canon. It is irrelevant whether Johnson was truly persuaded by Morrill's interruption or whether he simply politely conceded the point to continue with his speech. Either way, that the structure misled the former Attorney General and thus required a "correction" is itself evidence of textual ambiguity. Put another way, even if Johnson was "corrected," the text was not.

Any ratifier applying a commonsense approach to Section Three would have been similarly "misled." Nor was there anyone to "correct" such a reasonable interpretation. Although newspapers reported Johnson's speech on Section Three, they did not report his exchange with Senator Morrill.[27]

Attempting to force the high office of President of the United States into a general catch-all provision cover low level federal positions like postmasters also violates the related commonsense canons of construction known as *noscitur a sociis* ("it is known by its companions") and *ejusdem generis* ("of the same sort").[28] As Justice Scalia explained, *ejusdem generis* is "only a more specific application" of *noscitur a sociis*, and "stands for the proposition that when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same

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[27] See Lash, *supra* note 16, at 37.
[28] See Scalia, *supra* note 24, at 26.

sort."[29] In the case of Section Three, a general catch-all—that includes all manner of lower appointed federal offices and follows an express listing of high federal offices—is reasonably read as including only similar appointed offices. This commonsense reading also matches the definition of "civil offices under the United States" provided in authoritative contemporary treatises like Story's *Commentaries* and Pomeroy's treatise on the Constitution.[30]

II. The ratifying debates did not resolve the inherent ambiguity of Section Three.

Theoretically, Section Three's ambiguous treatment of the office of the President could have been discussed and resolved during the ratification debates. If the ratifiers shared a consensus understanding of an otherwise ambiguous text, that could sufficiently answer the question of original public understanding.

Here, however, despite intense historical research by multiple scholars, no one has yet discovered a single example of a ratifier discussing the issue, much less interpreting Section Three as including the office of President of the United States. Historical documents contain hundreds of pages of ratification debate on all five sections of the Fourteenth

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[29] *Ibid.*

[30] See 2 Story, *supra* note 9, at 259 ("civil officers of the United States" were those who "derived their appointment from and under the national government"); Pomeroy, *supra* note 19, at 481 ("The term 'civil officers,' therefore, embraces, therefore, the judges of the United States courts, and all subordinates in the Executive Department.").

Amendment.[31] On this issue, however, there is silence. The text's ambiguous application to the office of President went undiscussed and unresolved.[32]

Despite the silence of the ratifying assemblies, some scholars argue that less than a handful of comments in newspaper essays can be reasonably viewed as representing the consensus understanding of the ratifiers.[33] The paucity of even this secondary evidence undermines the argument. In two years of public debate and likely thousands of newspaper essays on the proposed Fourteenth Amendment, researchers have managed to locate *three short* comments in papers like the Gallipolis Journal where a speaker seemed to think that Section Three included the office of President.[34] But these references are

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[31] See 2 *The Reconstruction Amendments*, *supra* note 13 (collecting original documents relating to the framing and ratifying of the Fourteenth Amendment).

[32] Republican comments that Section Three barred rebels from holding "office" cannot reasonably be read in a manner that renders superfluous the full text of Section Three which refers to "civil [office] under the United States." Such abbreviated descriptions of Section Three in political stump speeches could mean nothing more than that Congress had protected every office that was realistically vulnerable to rebel infiltration.

[33] See, *e.g.*, Roger Parloff, *"For Whatever Reason": Will the Colorado Supreme Court Apply the Constitutional Insurrectionist Bar to Presidents?*, Lawfare (Dec. 6, 2023), https://bit.ly/3vonEhX.

[34] See, *e.g.*, Chicago Tribune (June 22, 1867), at 2, 4 (speech by Rawlins); Gallipolis Journal (Gallipolis, Ohio) (Feb. 21, 1867); *Shall We Have a Southern Ireland?*, Milwaukee Daily Sentinel,

exceedingly rare, none involved a ratifier, and all took place *after* the state of the publication had already ratified the amendment. Such thin historical evidence cannot reasonably be read as establishing a consensus understanding of Section Three.

III. Reading Section Three as excluding the office of the President is textually and historically reasonable.

A. Though prior drafts of Section 3 enumerated the office of the President, the final draft omitted this language.

Congress considered multiple drafts of what ultimately became Section Three of the Fourteenth Amendment.[35] Some drafts expressly applied to future rebellions,[36] while others expressly applied only to "the late insurrection."[37] The final draft omitted any

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(July 3, 1867). Even these very few references are not always correctly reported. For example, one scholar cites an 1866 newspaper article that he claims argues that removing Section Three would "leave 'Robert E. Lee . . . as eligible to the Presidency as Lieut. General Grant.'" John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. 1, 7 n.37 (2023). In fact, the author is not referring to Section Three at all. He is simply criticizing the south's belief that "a rebel is as worthy of honor as a Union soldier; that Robert E. Lee is as eligible to the Presidency as Lieut. General Grant." Indianapolis Daily Journal (July 12, 1866), at 2.

[35] For a discussion of the entire drafting process, including proposed drafts, see Lash, *supra* note 16, at 14–39.

[36] Lash, *supra* note 16, at 63–64 (Appendix) (McKee's First Proposal and Wilson's Proposal).

[37] *Ibid.* (listing the Joint Committee Draft, McKee's Second Proposal, and Garfield's Proposal).

reference to either past or future events.[38] On this issue, as with others, the text remained ambiguous and was read in different ways by different framers and ratifiers.[39]

One prior draft expressly addressed the office of the President of the United States. Introduced by Representative Samuel McKee, that draft declared in part:

> No person shall be qualified[40] or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate, who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the government of the United States . . . .[41]

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[38] *Id.* at 59.

[39] *Compare* Speech by John Hannah (Aug. 25, 1866) (Section Three "not only applies to the perjured officials who engaged in the recent rebellion, but to all such who, in time to come, may be guilty of a similar crime."), *with* Report of the Minority of the Committee on Joint Resolution (Jan. 18, 1867), in 2 *The Reconstruction Amendments*, *supra* note 13, at 354 (arguing, without rebuttal, that Section Three applied to "past offenses and offenders only, and containing no guarantees for the future"). See also Lash, *supra* note 16, at 45.

[40] Newspapers read this term as meaning "nominated." See, *e.g.*, Illustrated New Age (Philadelphia, Pennsylvania) (Feb. 20, 1866), at 1.

[41] Cong. Globe, 39th Cong., 1st Sess., at 919.

Newspapers published McKee's draft at the time of its introduction,[42] and the members of the Joint Committee from the House would have known of its submission.[43] No member in the House supported McKee's submission, and it was never discussed by the Joint Committee. In fact, from the time of McKee's submission in February 1866 to the final passage of the Fourteenth Amendment in June, not a single member of Senate or House supported McKee's draft or proposed their own draft targeting the office of the President of the United States.

This is not surprising. There is no evidence that any member of Congress feared the American public might elect a former leader of the rebellion as President of the United States. Obviously, no Republican would do so, and it would have been politically suicidal for the national Democratic Party to nominate as their presidential candidate a rebel responsible for the deaths of 300,000 Union soldiers.

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[42] See, *e.g.*, Boston Daily Advertiser (Mar. 14, 1866), at 4 (full proposal); Evening Post (New York, New York) (Mar. 3, 1866), at 4 (paraphrasing McKee's amendment as "no person should be qualified to hold the office of President or Vice President . . . who should have voluntarily aided the rebellion, or who should hereafter be guilty of similar offenses"); Albany Evening Journal (Albany, New York) (Mar. 3, 1866), at 3 (same); Hartford Daily Courant (Hartford, Connecticut) (Mar. 5, 1866), at 3 (same).

[43] Roughly half of the members of the Joint Committee were also members of the House, who knew about McKee's draft and likely listened to McKee's lengthy speech advocating his proposal. McKee himself most likely took advantage of House rules and directly submitted his proposal to the Joint Committee without the need for an official vote. See Lash, *supra* note 16, at 17.

It was quite possible, however, that former rebels might try to leverage their remaining *local* popularity to secure a seat in Congress or insinuate themselves onto a southern state's slate of presidential electors. When the Joint Committee on Reconstruction presented their draft of the Fourteenth Amendment, the third section of that amendment expressly addressed these obvious and imminent dangers to the success of Republican Reconstruction.

B. The Joint Committee on Reconstruction ignored the office of the President and instead focused on Congress and the electoral college.

On April 30, 1866, the Joint Committee submitted a proposed five-sectioned Fourteenth Amendment.[44] Section Three of that draft declared:

> Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.[45]

The Joint Committee draft ignored the office of the President of the United States. Instead, the drafters focused on rebel disruption of Congress or the electoral college. Barring Jefferson Davis from the presidency meant little if obstructionist rebels could infiltrate the state's slate of electors and support the nominee of the

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[44] See 2 *The Reconstruction Amendments*, *supra* note 13, at 156.
[45] *Ibid.*

Democratic Party. As the Evening Post reminded its readers during the 1868 presidential election, "[t]he electors of President and Vice President are under no legal obligation to vote for any specific candidate."[46] The Joint Committee understood the danger and targeted the college, not the office.

Throughout the House debates, no one criticized the proposal for failing to target the office of the President of the United States. Instead, numerous Republicans insisted that the Joint Committee's draft did not adequately secure the electoral college. Michigan Representative John Longyear, for example, complained that Section Three would be "easily evaded by appointing electors of President and Vice President through their legislatures, as South Carolina has always done."[47] Ohio Representative John Bingham similarly objected that the Joint Committee's draft allowed states to avoid the clause by simply "appoint[ing] electors for President and Vice President."[48]

Although the House passed the amendment as drafted, similar objections about the electoral college were raised in the Senate. On May 23, 1866, Joint Committee member Jacob Howard introduced the amendment to his colleagues in the Senate.[49] Howard supported all of the proposed amendment with the

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[46] *The Mode of Electing the President*, Evening Post (New York, New York) (Nov. 18, 1868), at 2.
[47] Cong. Globe, 39th Cong., 1st Sess., at 2537.
[48] *Another Hitch in the Plan*, Plain Dealer (Cleveland, Ohio) (May 17, 1866), at 3.
[49] Cong. Globe, 39th Cong., 1st Sess., at 2764.

exception of the third section. According to Howard, this provision would "have no practical benefit" because "it will not prevent rebels from voting for members of the several State Legislatures. . . . The Legislature when assembled has the right, under the Constitution, to appoint presidential electors itself if it choose to do so. . . . It is very probable that the power of the rebel States would be used in exactly that way. We should therefore gain nothing as to the election of the next or any future President of the United States."[50]

Newspapers reporting on the proposed amendment castigated the Joint Committee's draft and its failure to secure the electoral college. According to an article in the National Intelligencer, the Joint Committee's failure to anticipate legislative appointment of electors demonstrated the "grossest ignorance of constitutional law."[51]

Senate Republicans ultimately decided the draft needed amendment. Rather than debate needed changes in open session, Republicans gathered in a private caucus to discuss changes to the Joint Committee's draft. When they returned to the Senate, they submitted a new draft of Section Three which closed the electoral college loophole.

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[50] *Id.* at 2768.

[51] Daily National Intelligencer (Washington, DC) (May 5, 1866), at 2. See also New Hampshire Patriot and State Gazette (published as New Hampshire Patriot and Gazette) (Concord, New Hampshire) (May 16, 1866), at 1 (same).

C. The final draft of Section Three also focused on Congress and the electoral college, but expanded the text to include lower federal and state offices.

While meeting in caucus, Senate Republicans appointed a subcommittee that included Jacob Howard and tasked them with making needed changes to the Joint Committee draft.[52] On May 29, the Republicans returned to the Senate chamber and Jacob Howard submitted proposed amendments to the proposed Fourteenth Amendment.[53] In addition to adding a Citizenship Clause to Section One, this new draft completely rewrote Section Three. The relevant language of the new draft declared:

> 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, . . .[54]

Like the Joint Committee draft, the new version expressly targeted Congress and the electoral college. However, instead of prohibiting rebels from *voting* for these offices, the final draft prohibited leading rebels from *holding* these offices. This approach closed the loophole left open by the Joint Committee draft by prohibiting leading rebels from serving as presidential electors, whether elected or appointed.

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[52] See Lash, *supra* note 16, at 31.
[53] Cong. Globe, 39th Cong., 1st Sess., at 2869.
[54] U.S. Const. amend. XIV, § 3.

Following the expressly named offices of Senator, Representative and presidential elector, the draft added a general catch-all provision that prohibited leading rebels from taking "any office, civil or military, under the United States or under any State." As noted, according to leading treatise writers like Joseph Story, civil offices under the United States included offices bestowed by executive appointment.[55] There was good reason to add the additional language: Democrat President Andrew Johnson's promiscuous pardons and ill-advised appointments of former rebels infuriated Republicans. As Benjamin Butler declared to a crowd only months later, "I charge Andrew Johnson with improperly, wickedly and corruptly using and abusing the constitutional power of pardons for offenses against the United States, and in order to bring traitors and Rebels into places of honor, trust and profit under the Government of the United States."[56]

The final draft thus fixed the problems with the Joint Committee draft and expressly extended its protections to federal and state offices that also were vulnerable to rebel obstructionism. Nothing in this drafting history suggests the framers wanted to target the office of the President.

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[55] See 2 Story, *supra* note 9, at 259 ("civil officers of the United States" were those who "derived their appointment from and under the national government"); Pomeroy, *supra* note 19, at 481.
[56] See *Condemning Johnson's Appointments: Impeachment Speech of Benjamin F. Butler at the Brooklyn Academy of Music*, New York Tribune (New York, New York) (Nov. 26, 1866), at 8.

D. Section Three secured a sufficiently trustworthy electoral college.

Instead of needlessly disenfranchising the American electorate, Section Three guards the presidency by way of the electoral college.

Some scholars claim that it is unreasonable to think that the framers would rely solely on the electoral college as the mechanism for protecting the presidency from rebel obstructionism. After all, they point out, Section Three only bars leading rebels from serving as presidential electors and does not prohibit participants in the rebellion who had not violated a prior oath.[57] And we know that some former Confederate soldiers did serve as electors in the 1868 presidential election.[58]

In fact, the participation of non-leading rebels in the 1868 election proves the reasonableness of barring leading rebels from the electoral college rather than the blunderbuss approach of national disenfranchisement. Although Radical Republicans like Thaddeus Stevens would have targeted anyone who had participated in the rebellion,[59] more moderate Republicans focused their distrust on rebel leaders. Moderates believed that lower-level participants in the rebellion had either been coerced into supporting the Confederacy or would become

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[57] See, *e.g.*, Ilya Somin, *Yes, Trump is Disqualified From Office*, Cato Institute (Dec. 1, 2023), https://bit.ly/3Ng1ch7.

[58] See Gerard Magliocca, *Ringing in the New Year with Confederate Presidential Electors*, Balkinization (Jan. 1, 2024), https://bit.ly/4aRrMHx.

[59] See Cong. Globe, 39th Cong., 1st Sess., at 3148.

loyal Americans once leading rebels had been removed from political power. As Senator Daniel Clark explained during the Section Three debates, "I much prefer that you should take the leaders of the rebellion, the heads of it, and say to them, 'You never shall have anything to do with this Government,' and let those who have moved in humble spheres return to their loyalty and to the Government."[60] During those same debates, Senator William Windom declared that "if leading rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the *loyal* men of the South will control it."[61] The fact that former rebel soldiers participated as presidential electors, in other words, is exactly what moderate Republicans accepted and anticipated.

The moderate Republican strategy worked. Despite the scattered participation of non-leading rebels as presidential electors in 1868, a combination of loyal northern and southern electors chose Ulysses S. Grant over the Democratic candidate Horatio Seymour.[62]

CONCLUSION

Text, structure, congressional precedent, legal authority, and commonsense interpretation support reading Section Three as guarding the presidency by way of the electoral college, *not* by disqualifying any person from seeking the office of President of the United States.

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[60] *Id.* at 2771.
[61] *Id.* at 3170.
[62] See Lash, *supra* note 16, at 7.

Although the above is the best reading of Section Three, the text itself remains unresolvedly ambiguous. It is possible to read the text as either excluding or impliedly including the office of President of the United States. There is no evidence that the ratifiers resolved this ambiguity one way or another.

That being so, the Court cannot impose Section Three disqualification as simply another constitutional qualification for the office of President. Current constitutional qualifications for the presidency are expressly declared and were publicly vetted and debated prior to their adoption.[63] Here, potential disqualification to hold the office of President is not expressly announced by the text and was not publicly debated in the ratifying assemblies.

Because neither the text nor its history supports a conclusion that the people shared an original understanding that Section Three included the office of the President, courts lack the constitutional authority to apply Section Three in a manner that disqualifies any person seeking the office of President of the United States. The contrary ruling of the Colorado Supreme Court should be reversed.

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[63] See generally Pauline Meier, *Ratification: The People Debate the Constitution, 1787-1788*, at 333, 371 (2010).

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