
WHAT HAPPENS IF THE BIDEN ADMINISTRATION PROSECUTES AND CONVICTS DONALD TRUMP OF VIOLATING 18 U.S.C. § 2383?†

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INTRODUCTION

President Trump’s term in office has drawn to a close, and the Biden administration has begun. Attorney General Merrick Garland will soon face a difficult decision: Should he pursue a criminal prosecution of Trump for his conduct leading up to, and during the events of January 6, 2020? One possible basis for prosecution would be under the Insurrection Act, 18 U.S.C. § 2383. This statute 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*.¹

In this Article, we take no position whether Trump committed the substantive offenses of inciting or engaging in an insurrection. Rather, we will analyze the potential legal consequences of convicting Trump under this statute. Specifically, what would it mean for Trump to be “incapable of holding *any office under the United States*.” Would this punishment disqualify Trump for serving a second term as President, should he be elected?

Attorney General Garland’s decision will be complicated because there are no settled authorities to answer these legal questions. He will also face tough political choices. Any prosecution could be seen as an effort to disqualify the

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1. 18 U.S.C. § 2383 (emphasis added).

presumptive Republican nominee for President in 2024. In effect, a Biden Administration prosecution could knock out its most likely political opponent. A substantial segment of the public may view the Attorney General as disenfranchising tens of millions of voters. This decision is fraught with difficulty.

However, we think Garland's decision is simpler in one regard: Trump's conviction under § 2383 would not prevent his serving in the White House again. In our view, if Trump were convicted of violating § 2383, he would be disqualified from holding *appointed* federal positions. However, that conviction would not disqualify him from holding the presidency or any other *elected* federal position. We think our reading is correct as a matter of original public meaning with respect to the Constitution of 1788. And this conclusion is unchanged by Sections 3 and 5 of the Fourteenth Amendment. Our position is supported by modern Supreme Court and other federal court precedent.

In our view, even if Trump were convicted of violating § 2383, he would not be disqualified from serving a second term as President.

This Article proceeds in five parts. Part I explains that under the Constitution of 1788, Congress cannot add qualifications for elected federal officials. To illustrate our position, Part II analyzes an anti-bribery statute that the first Congress enacted in 1790. This statute imposes additional qualifications on certain federal positions. But, we argue, it should not be read to impose additional qualifications on elected federal positions. In Part III, we consider whether our general position is altered by the ratification of the Fourteenth Amendment. In other words, do Sections 3 and 5 of the Fourteenth Amendment give Congress the power to impose additional qualifications on holding elected federal positions? Part IV traces the history of the Insurrection Act, 18 U.S.C. § 2383. The Insurrection Act has remained virtually unchanged since President Lincoln signed it into law in 1862. This law should not be read to impose additional qualifications on elected federal officials. Finally, in Part V, we consider an amended, hypothetical version of § 2383 in which Congress expressly invoked its powers under Sections 3 and 5 of the Fourteenth Amendment. Even under this hypothetical statute, we still do not think Congress could disqualify former President Trump from serving a second term in office.

I. UNDER THE CONSTITUTION OF 1788, CONGRESS CANNOT ADD QUALIFICATIONS FOR ELECTED FEDERAL OFFICIALS.

The Constitution of 1788 imposes express qualifications for *elected* officials serving in the federal government.² There are three qualifications on representatives. First, representatives must “have attained to the Age of twenty five

2. The Constitution also imposes some rudimentary qualifications on federal electors. *See* U.S. CONST. art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”) (the Elector Incompatibility Clause). In *Chiafalo v. Washington*, the Court held that the states can regulate how presidential electors vote. 140 S. Ct. 2316 (2020). But the Court did not resolve the precise status of electors. *See* Josh Blackman, *Chiafalo v. Washington Did Not Resolve the Precise*

Years”³ Second, they must have “been seven Years a Citizen of the United States”⁴ And third, “when elected,” the Representative must “be an Inhabitant of that State in which he shall be chosen.”⁵

The Constitution of 1788 imposes three somewhat stricter qualifications on senators. First, senators must “have attained to the Age of thirty Years”⁶ Second, they must be “nine Years a Citizen of the United States”⁷ Third, “when elected,” the Senator must “be an Inhabitant of that State in which he shall be chosen.”⁸ The Constitution authorizes a governor to temporarily fill a senate vacancy by appointment.⁹ In these situations, it is not clear that the inhabitancy qualification applies, as temporary senators are not “elected.”

Finally, the Constitution of 1788 imposes three even more stringent qualifications on the presidency. First, the person holding the “Office of President” must be a “natural born Citizen.”¹⁰ Second, he must have “attained . . . the Age of thirty five Years”¹¹ And third, he must have “been fourteen Years a Resident within the United States.”¹²

Article II’s qualifications apply to a regularly-elected President. Those qualifications also apply to a Vice President who succeeds to the presidency after the President has died.¹³ Indeed, the prevailing view is that the qualifications applicable to the presidency are also applicable to the vice presidency.¹⁴ However, it is not clear that Articles II’s qualifications for the presidency apply to a temporary or acting President.¹⁵

Status of Electors, REASON: VOLOKH CONSPIRACY (July 6, 2020, 1:04 PM), <https://reason.com/volokh/2020/07/06/chiafalo-v-washington-did-not-resolve-the-precise-status-of-electors/> [<https://perma.cc/ZND7-YZG3>].

3. U.S. CONST. art. I, § 2, cl. 2.

4. *Id.*

5. *Id.*

6. U.S. CONST. art. I, § 3, cl. 3.

7. *Id.* Who was nine years a “citizen of the United States” in 1788? One of us has written that citizenship of the United States may have begun after the Declaration of Independence. See Josh Blackman, *Original Citizenship*, 159 U. PA. L. REV. PENNUMBRA 95 (2010); see also Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (“The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774.”).

8. See U.S. CONST. art. I, § 3, cl. 3.

9. See U.S. CONST. art. I, § 3, cl. 2 (“[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make *temporary Appointments*.” (emphasis added)); U.S. CONST. amend. XVII (“[T]he legislature of any State may empower the executive thereof to make *temporary appointments* [when vacancies may happen] until the people fill the vacancies by election as the legislature may direct.” (emphases added)).

10. U.S. CONST. art. II, § 1, cl. 5.

11. *Id.*

12. *Id.*

13. See U.S. CONST. art. I, § 2, cl. 2.

14. See U.S. CONST. amend. XII (“[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

15. U.S. CONST. amend. XXV, § 3 (“[S]uch powers and duties shall be discharged by the Vice President as *Acting President*.” (emphasis added)); see James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMM. 575, 582–83 (2000).

Our argument starts from a basic premise: Absent express constitutional authorization, Congress cannot impose additional qualifications for elected federal officials beyond those already expressly enumerated in the Constitution. This position is not novel. In *Federalist No. 60*, Alexander Hamilton argued that Congress lacks the power to add to the qualifications for elected federal positions. He wrote, “[t]he qualifications of the persons who may choose or be chosen [for a seat in Congress], as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the [national] legislature.”¹⁶ And *Powell v. McCormack* concluded that James “Madison had expressed similar views in [*Federalist No. 52*], and his arguments at the Convention leave no doubt about his agreement with Hamilton on this issue.”¹⁷ Ultimately, *Powell* judicially ratified Hamilton’s position.

The Supreme Court reaffirmed this historical analysis in *U.S. Term Limits v. Thornton*.¹⁸ This case examined whether the states, as opposed to Congress, have the power to add to the Constitution’s qualifications for elected federal positions. The *Thornton* Court explained that “the debates at the state conventions . . . ‘also demonstrate the Framers’ understanding that the qualifications for members of Congress had been fixed in the Constitution.’”¹⁹

Justice Thomas dissented in *Thornton*. He concluded that the Constitution did not restrict a *state*’s power to impose additional qualifications on holding elected federal positions. But Justice Thomas did not express disagreement with *Powell*, which held that *Congress* lacks the power to impose additional qualifications on elected federal positions. Justice Thomas apparently agreed with “the detail with which the majority recites the historical evidence set forth in *Powell v. McCormack*”²⁰ But that history, he wrote, should not “obscure the fact that this evidence has no bearing on the question now before the Court” concerning state-imposed qualifications.²¹

We take no position on whether the Constitution prohibits the states, rather than Congress, from imposing additional qualifications on members. We do agree with the *Powell* Court and Justice Thomas’s *Thornton* dissent: as a matter of original public meaning, Congress cannot detract from, add to, or amend the qualifications the Constitution specifies for elected federal positions.

The lower courts have extended the holding of *Powell* to the presidency. Chief Judge Posner wrote that Congress could not modify the requirement “that the President [must] be at least 35 years old”²² For example, a federal statute

16. THE FEDERALIST NO. 60 (Alexander Hamilton); see also Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL STUD. 95, 113–20 (2016) (collecting authority). But see *id.* at 115 n.59 (collecting some limited counter-authority).

17. 395 U.S. 486, 540 (1969).

18. 514 U.S. 779 (1995).

19. *Id.* at 792 (quoting *Powell*, 395 U.S. at 541).

20. *Id.* at 885 (Thomas, J., dissenting).

21. *Id.* (Thomas, J., dissenting).

22. *Herman v. Local 1011, United Steelworkers of Am.*, 207 F.3d 924, 925 (7th Cir. 2000).

requiring the President to reach the age of forty would be unconstitutional.²³ Here, Chief Judge Posner cited *Powell* and *Thornton*.²⁴ District courts have also reached similar conclusions.²⁵ Professor Derek Muller observed, “courts have occasionally treated the holding in *U.S. Term Limits, Inc. v. Thornton*, which found the qualifications for members of Congress enumerated in the Constitution as exclusive, applicable to presidential elections, too.”²⁶

Congress has authority under Article I to impose qualifications for the positions that it creates by statute—that is, *appointed* federal positions. But *Powell* and *Thornton*, and other federal court precedents, held that Congress does not have authority to impose additional qualifications for positions created by the Constitution—that is, *elected* federal positions. We find further support for this position in the 1790 Anti-Bribery Statute, which was enacted by the first Congress.

II. THE 1790 ANTI-BRIBERY STATUTE SHOULD NOT BE READ TO IMPOSE ADDITIONAL QUALIFICATIONS ON ELECTED FEDERAL POSITIONS.

In 1790, Congress enacted an anti-bribery statute. The law declared that a defendant convicted of bribing a federal judge “shall forever be disqualified to hold any *office of honor, trust, or profit under the United States*.”²⁷ This statute mirrors the Constitution’s Disqualification Clause, which provides “Judgment in Cases of Impeachment [by the Senate] 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 . . .*”²⁸

If the presidency were an “Office of honor, Trust or Profit under the United States,” then the 1790 statute purports to add a new qualification for the presidency. A person convicted of violating this statute *still* could not be president, even if he were elected and otherwise meets the other constitutional qualifications: he is a natural born citizen, has reached the age of thirty-five, and had been a resident in the United States for fourteen years. But Congress does not have the power to add, by statute, new qualifications for the presidency or for members

23. *Id.*

24. *Id.*; see also *Walker v. United States*, 800 F.3d 720, 723–24 (6th Cir. 2020) (“Neither Congress nor the states can add to the constitutional qualifications for holding federal elective office. Because the constitutional qualifications make no mention of convictions, under federal law, Walker could always run for and hold federal public office.” (internal citations omitted)).

25. See, e.g., *De La Fuente v. Merrill*, 214 F. Supp. 3d 1241, 1253 n.11 (M.D. Ala. 2016) (“The Qualifications Clause lays down the *sole qualifying criteria* for the office of President of the United States.” (emphasis added)); *Liberty Legal Found. v. Nat’l Democratic Party of USA, Inc.*, 868 F. Supp. 2d 734, 741 (W.D. Tenn. 2012); *United States v. Caron*, 941 F. Supp. 238, 254–55 (D. Mass. 1996); see also *Nat’l Comm. of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 75–76 (W.D. Tex. 1996); *Gordon v. Sec’y of State of N.J.*, 460 F. Supp. 1026, 1027 (D.N.J. 1978).

26. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 571 (2015).

27. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 21, 1 Stat. 112, 117 (1790) (emphasis added).

28. U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

of Congress. If the President or any other elected federal official holds an “Office . . . under the United States,” then the 1790 anti-bribery statute would be unconstitutional. For this reason, we think the better view is that the phrase “office . . . under the United States” in the 1790 Act does *not* reach the presidency or any other elected federal position. This language would only extend to appointed federal positions.

Again, our position is not novel. Indeed, we raised this position in the Emoluments Clauses litigation.²⁹ The Civil Division of the United States Department of Justice, which represented President Trump in his official capacity, agreed with our analysis. DOJ stated, “[T]he 1790 Act enacted by the First Congress would in fact run afoul of such [constitutional] restrictions if applied to Members of Congress or the President, if such officials hold “offices under the United States.”³⁰

If Congress had tried to impose new qualifications on elected federal positions in 1790, we would expect some members to have dissented. We would also expect there to be some record of objections in the Executive Branch or in the press. But we have found no such contemporaneous discussions, debates, or objections, even in private correspondence. The better view is that the First Congress used the phrase “Office . . . under the United States” to refer to appointed federal officers, but not to elected federal officials. We conclude this phrase was so understood in 1790.³¹ And this understanding explains why there was no recorded contemporaneous objections on this issue.

We find further support for our position in other federal statutes. During the Early Republic, Congress imposed disqualifications against persons convicted of several different crimes. Those statutes also used the phrase “office . . . under the United States.” For example, the First Congress enacted the Treasury Act of 1789. It provided that a wrongdoer “shall . . . forever thereafter [be] incapable of holding any *office under the United States*.”³² For the reasons expressed by Hamilton and the Supreme Court, that statute could not bar a person from serving as President or as a member of Congress.

The first Congress enacted other similar statutes. One law provided that an “officer of the customs” who takes or receives a bribe shall “be forever disabled from holding any office of trust or profit under the United States.”³³ Another

29. Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* in Support of the Defendant at 12–13, *Blumenthal v. Trump*, No. 1:17-cv-01154-EGS, 2017 WL 4230605 (D.D.C. Sept. 19, 2017), <https://ssrn.com/abstract=2996384> [<https://perma.cc/K5C9-73C3>].

30. Defendant’s Supplemental Brief in Support of his Motion to Dismiss and in Response to the Briefs of *Amici Curiae* at 23, *Blumenthal v. Trump*, No. 1:17-cv-01154-EGS, 2018 WL 2042235 (D.D.C. Apr. 30, 2018) [<https://perma.cc/MJ32-VAUW>].

31. Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 1: The Constitution’s Taxonomy of Officers and Offices*, WASH. POST: VOLOKH CONSPIRACY (Sept. 25, 2017, 9:04 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/25/the-emoluments-clauses-litigation-part-1-the-constitutions-taxonomy-of-officers-and-offices/> [<https://perma.cc/7KXJ-PSQ2>].

32. Treasury Act of 1789, ch. 12, § 8, 1 Stat. 65, 67 (1789).

33. An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, § 35, 1 Stat. 29, 46 (1789).

statute provided that a collector who makes false records shall “be rendered incapable of serving in any office of trust or profit under the United States.”³⁴

We should hesitate before concluding that the First Congress, which included several Framers and ratifiers, enacted several plainly unconstitutional statutes. We should hesitate before concluding that President Washington signed several plainly unconstitutional statutes. And we should be especially cautious to conclude, more than two centuries later, that the First Congress and President Washington acted unconstitutionally—when there are no known reports from that time in which anyone alleged these actions were unconstitutional or even suspect.

The Supreme Court has recognized that a special solicitude is afforded to the First Congress.³⁵ We recognize that early Congresses took actions that the courts later disapproved of. But such judicial disapproval generally concerned highly controversial legislation, or unusually complex and technical legislation. For example, the Sedition Act of 1798 was highly controversial. And the Supreme Court later suggested the law was unconstitutional.³⁶ Even at the time it was enacted, prominent figures like Thomas Jefferson and James Madison contested the Sedition Act’s constitutionality.³⁷ Another example is the Judiciary Act of 1789, which was enacted by the first Congress. This statute was highly complex and technical legislation. It functioned as something akin to a statutory constitution for the judiciary.³⁸ As every law student knows, *Marbury v. Madison* declared part of this law unconstitutional. Given the novelty and complexity of the 1789 Act, the first Congress was more likely to make an error, than it would with a more mundane statute.

By contrast, the 1790 Anti-Bribery Act was just such a mundane criminal statute. It was neither particularly controversial, nor particularly complex. Furthermore, we have found no contemporaneous record of any debate in Congress or by the public objecting, arguing, or even suggesting, that the act was unconstitutional. Nor have we found any contemporaneous, or even any antebellum, evidence to suggest that the “Office . . . under the United States”-language used in the 1790 Anti-Bribery Act extended to elected federal positions. The Judiciary Act of 1789 built an entirely new and complex structural constitution for the

34. An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for Other Purposes, ch. 11, § 34, 1 Stat. 55, 64–65 (1789).

35. See *Myers v. United States*, 272 U.S. 52, 136 (1926); *Schell v. Fauche*, 138 U.S. 562, 572 (1891).

36. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”).

37. See The Virginia Resolution (Madison) (Dec. 24, 1798) (contending that Sedition Act was unconstitutional); The Kentucky Resolution (Jefferson) (Nov. 16, 1798) (same); see also James Madison, Report on the Virginia Resolutions (Jan. 1800) (same) [<https://perma.cc/CKQ5-L6HJ>].

38. See Edward Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 541–42 (1914), <http://bit.ly/2xfihSI>; James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1573–74 (2001); cf. Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1321–31 (2003).

judiciary. By contrast, the 1790 Anti-Bribery Act merely used an extant drafting convention: “Office . . . under the United States.”³⁹

In 1960, Justice Frankfurter observed that Congress would continue to enact “a large group of federal statutes [that] [had] disqualif[ied] persons from holding any *office . . . the United States* because of their conviction of certain crimes, generally involving official misconduct.”⁴⁰ Furthermore, Justice Frankfurter indicated “Federal law . . . *frequently and of old*” had “[b]arr[ed] convicted felons from certain employments” through statutes using the phrase “office . . . under the United States.”⁴¹ In our view, 18 U.S.C. § 2383 is one such a statute.

The 1790 anti-bribery statute and 18 U.S.C. § 2383 both disqualify a convicted person from holding an “office . . . under the United States.” Under the Constitution of 1788, we are confident that Congress cannot impose additional qualifications on elected federal positions. Therefore, the better view is that the phrase “office . . . under the United States” as used in these two statutes, and in many other federal disqualification statutes, does not extend to elected federal positions, including the presidency and members of Congress. We now discuss whether the Fourteenth Amendment, ratified in 1868, alters our analysis.

III. DO SECTIONS 3 AND 5 OF THE FOURTEENTH AMENDMENT GIVE CONGRESS THE POWER TO IMPOSE ADDITIONAL DISQUALIFICATIONS ON HOLDING ELECTED FEDERAL POSITIONS?

Under the Constitution of 1788, Congress cannot impose additional qualifications on the presidency and members of the House and Senate. But the Fourteenth Amendment, ratified in 1868, gave Congress a new power. Specifically, Section 3 of the Fourteenth Amendment disqualified certain people from holding certain positions in certain circumstances. Section 3 provides, in its entirety:

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.⁴²

39. Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 2: The Practices of the Early Presidents, the First Congress and Alexander Hamilton*, WASH. POST: VOLOKH CONSPIRACY (Sept. 26, 2017, 12:37 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/26/the-emoluments-clauses-litigation-part-2-the-practices-of-the-early-presidents-the-first-congress-and-alexander-hamilton/> [https://perma.cc/B4Q4-E733].

40. *De Veau v. Braisted*, 363 U.S. 144, 159 (1960) (plurality opinion) (Frankfurter, J.) (emphasis added) (quotation marks omitted).

41. *Id.* at 158–59 (emphasis added).

42. U.S. CONST. amend. XIV, § 3.

And Section 5 gave Congress the power to enforce the Fourteenth Amendment, including Section 3. Section 5 provides, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”⁴³

Section 3 of the Fourteenth Amendment has three elements that are directly relevant to our analysis.⁴⁴ First, the *jurisdictional* element specifies which positions are subject to Section 3. Section 3 extends to a “person . . . 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.”

Second, the *offense* element defines the conduct prohibited by Section 3. Specifically, the offense element regulates the conduct of a person satisfying the jurisdictional element who “shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof”

Third, the *disqualification* element defines the legal consequences, or punishment, that Section 3 imposes. A person who satisfies the jurisdictional *and* offense elements of Section 3 shall not 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”

We think it is unsettled precisely how Section 3 was designed to be enforced and implemented.⁴⁵ Our analysis, however, focuses on a different question: What are the legal consequences that apply to a person affected by the operation of Section 3? Under the original understanding of the Constitution of 1788, Congress lacks the power to impose additional qualifications for elected federal positions, including Senators and Representatives. But Section 3 expressly disqualifies some people from holding the position of Senator and Representative. Congress could rely on its Section 5 powers to enforce this type of disqualification pursuant to Section 3.

Section 5 gives Congress the power to enforce Section 3 of the Fourteenth Amendment—that is, “the provisions of this article.” Chief Justice Chase briefly addressed sections 3 and 5 in *In re Griffin*, a federal circuit court decision.⁴⁶ But, as far as we are aware, the Supreme Court has not specifically addressed the scope of Congress’ Section 5 powers with respect to Section 3. However, the

43. *Id.* § 5.

44. See Josh Blackman & Seth Barrett Tillman, *Is the President an “Officer of the United States” for Purposes of Section 3 of the Fourteenth Amendment?*, REASON: 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/> [<https://perma.cc/CHA6-9Q5Q>].

45. See, e.g., *In re Griffin*, 11 F. Cas. 7 (C.C. D. Va. 1869) (Chase, C.J.); Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. (forthcoming 2021) (manuscript at 7 n.20), <https://ssrn.com/abstract=3749407>; Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMM. (forthcoming 2021) (manuscript at 10 n.29), <https://ssrn.com/abstract=3748639>; see also 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/5QNG-TGUV>].

46. *Griffin*, 11 F. Cas. at 26 (“The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections. And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment.”).

Supreme Court has interpreted Congress' Section 5 powers with respect to Section 1 of the Fourteenth Amendment. In *Boerne v. City of Flores*, the Court explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁴⁷ By analogy, we do not think Congress' Section 5 powers are plenary with respect to Section 3. Section 3 imposes express textual limits with respect to its jurisdictional, offense, and disqualification elements. Section 5 only authorizes legislation that takes into account these textual limits. In our view, only such legislation would be "appropriate" in this context. We will presume that the "congruence and proportionality" test under current doctrine would also apply to Section 5 legislation that enforces Section 3.

We think the better view is that Congress could enact a statute, pursuant to the Fourteenth Amendment, that would disqualify a defendant from serving in Congress if that person falls within the jurisdictional element and committed the conduct described in the offense element. Why? Because the disqualification element of Section 3 includes an express bar against serving in Congress.

What about the presidency? Could Congress *also* enact a statute, pursuant to the Fourteenth Amendment, that would disqualify a convicted defendant from serving as President? Is § 2383 such a statute? The answer to this question is more complex. The disqualification element of Section 3 expressly lists a bar against serving in Congress, but there is no such express bar against serving as President. Again, the disqualification element precludes a disqualified defendant from serving as "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"

The only way for the presidency to be covered by the disqualification element of Section 3, is if the presidency is an "office . . . under the United States." We think this issue poses some difficulty with respect to Section 3. Why? We have explained that the phrase "office . . . under the United States" as used in the Constitution of 1788 did not reach any elected federal officials. But the Fourteenth Amendment was ratified eight decades later in 1868. It is possible that linguistic drift occurred. By 1868, the phrase "office . . . under the United States" may have taken on a new and expanded meaning that extended to the presidency. We have avoided reaching any firm conclusion in our prior publications on this aspect of Section 3's "office . . . under the United States"-language.⁴⁸ And for the reasons that we will explain below, this question can be avoided with respect to the scope of statutory disqualification under § 2383.

47. 521 U.S. 507, 520 (1997).

48. See Josh Blackman & Seth Barrett Tillman, *If Donald Trump Is Convicted of Violating 18 U.S.C. § 2383, Will He Be Disqualified from Serving as President?*, REASON: VOLOKH CONSPIRACY (Feb. 18, 2021, 1:46 PM), <https://reason.com/volokh/2021/02/18/if-donald-trump-is-convicted-of-violating-18-u-s-c-%c2%a7-2383-will-he-be-disqualified-from-serving-as-president/> [<https://perma.cc/NP8M-XA3C>] ("[A]t this juncture, we take no position whether the President holds an 'office . . . under the United States' for purposes of Section 3 of the Fourteenth Amendment.").

IV. THE HISTORY OF 18 U.S.C. § 2383.

In its present form, 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*.⁴⁹

Part IV of this Article will trace the history of this statute from 1862 to 1878 to 1909 to 1948 to 1994 to the present.

A. *The Act of July 17, 1862*

The modern Insurrection Act, now reported at 18 U.S.C. § 2383, was first enacted by the 37th Congress, as the Act of July 17, 1862.⁵⁰ This statute includes the same two core elements found in today's 18 U.S.C. § 2383. First, the offense is defined as "incite, set on foot, assist, or engage in any rebellion or insurrection." Second, the disqualification element states that a convicted person "shall forever be incapable and disqualified to hold any office under the United States." *Statutes at Large* reports that the bill was "Approved, July 17, 1862."⁵¹ President Lincoln signed this bill into law, along with an explanatory act.⁵²

If the members of the 37th Congress and Lincoln understood the phrase "office . . . under the United States" to include elected federal positions, then the statute would have had the effect of imposing additional qualifications on elected federal positions. And, according to Hamilton in *Federalist* No. 60, such a statute would be unconstitutional. We have every reason to believe members of government from this time were familiar with Hamilton's position. Professor Kurt Lash observed that the *Federalist Papers* had "continued acceptance . . . as canonical documents" and "played major roles during the Reconstruction debates."⁵³ For example, Representative Charles Eldridge of Wisconsin quoted and cited from *Federalist* No. 60 in a January 27, 1869 speech supporting a suffrage amendment.⁵⁴ Here, Eldridge recited the passage in which Hamilton wrote, "The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the Constitution, and are unalterable by the Legislature."⁵⁵ We doubt members of the 37th Congress would have deliberately enacted a statute that imposed unconstitutional qualifications on elected federal officials. Moreover, this reading is consistent with the Supreme Court's modern jurisprudence as articulated in *Powell v. McCormack*.

49. 18 U.S.C. § 2383 (emphases added).

50. The Act of July 17, 1862 law can be found at ch. 195, § 2, 37 Stat. 590.

51. 37 Stat. 592.

52. 37 Stat. 627.

53. 2 KURT LASH, THE RECONSTRUCTION AMENDMENTS xiii (2021).

54. *Id.* at 468 (reproducing Cong. Globe, 40th Cong., 3d Sess., 638–58 (Jan. 27, 1869)).

55. *Id.*

What about the Fourteenth Amendment? Doesn't the offense defined by the 1862 statute track the language of Section 3 of the Fourteenth Amendment? Yes, there are similarities between the language of the statute and Section 3. And we address those similarities later in this Article. But this 1862 bill that President Lincoln signed was enacted *before* the 1868 ratification of the Fourteenth Amendment. Therefore, Congress could not have enacted this 1862 statute based on its authority under Section 5 of the Fourteenth Amendment. *Congress could only have relied on the Constitution of 1788.* And, for reasons explained in Part I, the original Constitution did not permit Congress to add additional qualifications for elected positions. It follows that the better view is that the 1862 Act, and its "office . . . under the United States"-language, were not understood as reaching elected federal positions such as the presidency.

B. Revised Statutes, Second Edition (1878)

A version of the 1862 Insurrection Act appears in the *Revised Statutes, Second Edition (1878)*. Section 5334 states:

Every person who *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 punished by imprisonment not more than ten years, or by a fine of not more than ten thousand dollars, or by both such punishments; and shall, moreover, be incapable of holding any office under the United States.*⁵⁶

To understand this version of the 1862 statute, we first need to provide a brief history of the *Revised Statutes*. The first edition of the *Revised Statutes* was published in 1875. In *United States v. Bowen*, Justice Miller wrote that the *Revised Statutes* "must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873."⁵⁷ An 1879 decision from the United States Court of Claims observed, "[i]t was no doubt the desire and understanding of Congress that the revision [that is, the *Revised Statutes*] should generally reproduce and express the pre-existing laws so far as it was practicable to do so."⁵⁸

The second edition of *Revised Statutes* was published in 1878, a decade after the ratification of the Fourteenth Amendment. And the second edition includes Section 5334. Yet, there is no evidence that Congress sought to invoke Sections 3 and 5 of the Fourteenth Amendment with respect to Section 5334. And even if Congress had tacitly invoked Sections 3 and 5 of the Fourteenth Amendment as an additional enumerated power to *authorize* the statute, there is no evidence Congress sought to change the *meaning* of the statute's "office under

56. *Section 5334, in REVISED STATUTES OF THE UNITED STATES 1035–36* (Washington, D.C. Government Printing Office, 2d ed. 1878) [hereinafter *Section 5334*] (emphases added). A reproduction of the statute, in *Revised Statutes*, can be found on the Hathi Trust website. See *Revised Statutes of the United States*, HATHI TRUST, <https://babel.hathitrust.org/cgi/pt?id=uiug.30112046463706&view=1up&seq=1139> (last visited Apr. 26, 2021) [<http://bit.ly/3gkwr6>].

57. 100 U.S. 508 (1879).

58. *Wright v. United States*, 15 Ct. Cl. 80 (1879).

the United States”-language. To the contrary, the history of this statute suggests that the meaning of “office under the States” in the 1862 statute was unchanged by subsequent reproductions in *Revised Statutes*. And there is no evidence that this meaning changed following ratification of the Fourteenth Amendment in 1868. Nor is there any evidence that contemporaries thought this meaning changed.

In other Reconstruction era statutes, however, Congress expressly invoked the newly ratified Fourteenth Amendment. Other statutes expressly relied on Section 3’s references to specific positions or classes of positions. For example, in 1870, Congress passed an *Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes*.⁵⁹ Section 15 of the 1870 statute specifically invoked Section 3 of the Fourteenth Amendment. Section 15 provides:

That any person who shall hereafter knowingly accept or hold any *office under the United States*, or any state, to which he is ineligible under the *third section of the fourteenth article of amendment of the Constitution . . .* shall be deemed guilty of a misdemeanor against the United States⁶⁰

Congress knew how to invoke Section 3. And Congress knew how to refer to the specific positions or classes of positions referenced in Section 3. We think the meaning of the Insurrection Act was unchanged between 1862, when President Lincoln signed it, and 1878, when it appeared in *Revised Statutes*, over a decade later.

C. *The Act of March 4, 1909*

The Act of March 4, 1909, including a revised version of the Insurrection Act, appeared in 35 Stat. 1088. This statute codified, revised, and amended the penal laws of the United States. Section 4 of the 1909 act 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 therefore, shall be imprisoned not more than ten years, or fined not more than ten thousand dollars, or both; and shall, moreover, be incapable of holding any *office under the United States*.⁶¹

Section 4 of the 1909 Act was very similar to the version that appeared in the *Revised Statutes*.⁶² But there were slight revisions. “[E]very person” was changed to “Whoever.” “[S]hall be punished by imprisonment” was changed to “shall be imprisoned.” “[O]r by a fine of not more than” was changed to “or fined not more.” For our analysis, the most important element was unchanged: “shall, moreover, be incapable of holding any office under the United States.”

59. An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes, ch. 114, § 15, 16 Stat. 140, 143–44 (1870).

60. *Id.* (emphases added).

61. 35 Stat. 1088 (emphasis added).

62. See Section 5334, *supra* note 56.

If the 60th Congress understood the phrase “office under the United States” to include elected positions, then the 1909 Act would run afoul of Hamilton’s reading of the 1788 Constitution. It is conceivable that with the 1909 Act, Congress sought to rely on its Section 5 powers to enforce Section 3. By the early twentieth century, the Fourteenth Amendment was already well established. And Congress had long ago enacted legislation that invoked Section 3, including the 1870 statute.⁶³ But there is no evidence Congress sought to invoke Sections 3 and 5 of the Fourteenth Amendment through the 1909 Act. And even if Congress had tacitly invoked Sections 3 and 5 of the Fourteenth Amendment as an additional enumerated power to *authorize* the statute, there is no evidence Congress sought to change the *meaning* of the statute’s “office under the United States”-language. The changes made in 1909 were purely technical. And these changes were made as part of a seventy-one-page omnibus bill with more than 340 sections that revised many federal criminal statutes.⁶⁴ There is no indication that Congress intended to deviate from the meaning of the statute enacted in 1862.

D. *The Act of June 25, 1948*

In 1948, the 80th Congress made a minor technical change to the language of the 1909 Act. The 1948 act provides:

Whoever incites, sets on foot, assists, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be find not more than \$10,000 or imprisonment not more than ten years, or both; and shall be incapable of holding any *office under the United States*.⁶⁵

There was only one change: the word “moreover” was deleted after the word “shall.” Westlaw includes a notation from the House Report: “Word ‘moreover’ was deleted as surplusage and minor changes were made in phraseology.”⁶⁶ The operative provision remained unchanged: “incapable of holding any office under the United States.”

Again, we have no reason to believe this minor technical change invoked a new source of constitutional authority. There is no evidence that Congress sought to invoke Sections 3 and 5 of the Fourteenth Amendment. And even if Congress had tacitly invoked Sections 3 and 5 of the Fourteenth Amendment as an additional enumerated power to *authorize* the statute, there is no evidence Congress sought to change the *meaning* of the statute’s “office under the United States” language.

63. *See supra* Part IV.B.

64. 35 Stat. 1088, 1088–1159.

65. 62 Stat. 808 (emphasis added).

66. H.R. REP. NO. 80-304 (1948). This source appears in the historical notes section on the modern statute, 18 U.S.C. § 2383.

E. The Violent Crime Control and Law Enforcement Act of 1994

Congress amended the 1948 Insurrection Act as part of the omnibus Violent Crime Control and Law Enforcement Act of 1994. Section 330016 of that bill is titled, “Correction of Misleading And Outmoded Fine Amounts In Offenses Under Title 18.” This provision revised the fine amount in many statutes, including the present-day 18 U.S.C. § 2383. There was only one change: “not more than \$10,000” was changed to “under this title.”⁶⁷ Today, the Insurrection Act 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*.⁶⁸

Again, the operative provision remained unchanged: “incapable of holding any office under the United States.” Indeed, this language has remained virtually unchanged since 1862. And there is no evidence Congress sought to invoke Sections 3 and 5 of the Fourteenth Amendment to authorize the statute. And even if Congress had tacitly invoked Sections 3 and 5 of the Fourteenth Amendment as an additional enumerated power to *authorize* the statute, there is no evidence Congress sought to change the *meaning* of the statute’s “office under the United States” language. The 1994 omnibus bill made technical changes to many statutes. Had Congress enacted an altogether new statute in 1994 that used the phrase “office under the United States,” we would try to determine how that phrase was understood in 1994. But in this context, the statute was re-enacted with no substantive changes. In our view, Congress took no action to alter the meaning of the phrase “office under the United States” in the Insurrection Act between 1862 and 1994.

We conclude that Congress, at no time since 1862, has attempted to alter or expand the meaning of the phrase “office . . . under the United States” as used in the original Insurrection Act.

There is a direct, unbroken chain between the 1994 statute and Abraham Lincoln’s signature on the original 1862 statute. We do not think 18 U.S.C. § 2383, which remains almost unchanged from its original 1862 text, is premised on Congress’ Section 5 powers. In short, under the Constitution of 1788, and the Constitution of 1868, 18 U.S.C. § 2383 should not be read as permitting or imposing any additional qualifications on elected federal positions. If Donald Trump were convicted of violating 18 U.S.C. § 2383, he would not be disqualified from serving as president.

67. Westlaw included a notation with Section 330016: “1994 Amendments. Pub. L. 103-322, § 330016(1)(L), substituted ‘under this title’ for ‘not more than \$10,000.’”

68. 18 U.S.C. § 2383 (emphasis added).

Next, we will consider this analysis under a hypothetical *civil* version of 18 U.S.C. § 2383 that expressly invokes Congress' powers under Section 5 to enforce Section 3. This analysis would also be relevant if the Department of Justice disagrees with our interpretation of 18 U.S.C. § 2383. In that scenario, DOJ would have to determine the scope of disqualification under the Insurrection Act.

V. WHAT IF A FUTURE CONGRESS RE-ENACTS 18 U.S.C. § 2383 PURSUANT TO ITS POWERS UNDER SECTIONS 3 AND 5 OF THE FOURTEENTH AMENDMENT?

What if a future Congress re-enacts 18 U.S.C. § 2383 as a civil statute pursuant to its powers under Sections 3 and 5 the Fourteenth Amendment? That is, Congress enacted a new statute that expressly found that the phrase "office . . . under the United States" in the statute had the *same* meaning as the phrase "office . . . under the United States" in Section 3 of the Fourteenth Amendment. And, in this hypothetical statute, Congress expressly invoked its power under Section 5 of the Fourteenth Amendment. We think this hypothetical provides a useful exercise to illustrate the interplay between the elements of Section 3 and Section 5. We also recognize that some critics may not be persuaded by our discussion of the history of § 2383. These critics may contend that the actual Insurrection Act already invokes Congress' powers under the Fourteenth Amendment. For these critics, we put forward the analysis below to address how the Fourteenth Amendment could affect one's understanding of the Insurrection Act. Additionally, the Biden Justice Department may not agree with our interpretation of 18 U.S.C. § 2383. The analysis in this section will address how DOJ may view the prosecution of former-President Trump for a purported violation of 18 U.S.C. § 2383. Even if DOJ's understanding of the actual § 2383 veers from our own, Attorney General Garland may interpret the Insurrection Act in conformity with our hypothetical § 2383.

Our hypothetical § 2383 begins with the same text as the actual § 2383, minus the reference to imprisonment or other criminal liability. We frame the hypothetical statute in civil terms to avoid any concerns based on the Ex Post Facto Clause.⁶⁹ Under long-standing and current doctrine, civil sanctions are not subject to the Ex Post Facto Clause.⁷⁰ We also present a modified version of § 2383, which expressly invokes Congress' Section 3 and Section 5 authority. We do so to illustrate what legal consequences would flow from such a modified statute. We do not address other conceivable statutes that veer further from the text of the Insurrection Act. Such other statutes may conceivably provide a broader scope for Congress' enforcement powers.

Our hypothetical statute includes two additional sections concerning the Fourteenth Amendment. It provides:

69. See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed [by Congress]."); see also U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . ex post facto Law . . .").

70. *Calder v. Bull*, 3 U.S. 386, 399 (1798) (Iredell, J., *ad seriatim*) (noting that "the true construction of the [Ex Post Facto Clause] extends to criminal, not to civil, cases").

Section 1: 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.

Section 2: For purposes of this statute, the phrase “office under the United States” shall have the same meaning as the phrase “office, civil or military, under the United States” in Section 3 of the Fourteenth Amendment.

Section 3: Pursuant to its authority under Section 5 of the Fourteenth Amendment, Congress finds that this statute is an “appropriate” and “congruent and proportional” means to enforce Section 3 of the Fourteenth Amendment.

Once again, Section 3 of the Fourteenth Amendment provides, in its entirety:

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.

The hypothetical statute differs from Section 3 with respect to the latter’s jurisdictional element, offense element, the disqualification element.

A. *The Jurisdictional Element*

The hypothetical statute applies to “whoever.” That is, any person who engages in the proscribed conduct can be subject to disqualification. But the jurisdictional element of Section 3 of the Fourteenth Amendment does not apply to “whoever”—that is, *any person*. Rather, the jurisdictional element refers to four specific categories of people, including any:

person . . . who, having previously taken an oath, as a [1] member of Congress, or as an [2] officer of the United States, or as a [3] member of any state legislature, or as an [4] executive or judicial officer of any state, to support the Constitution of the United States.

Let’s start with a very simple example. A defendant who *never* swore any oath to support the Constitution would not fall within the scope of Section 3’s jurisdictional element. The imposition of a fine against this defendant under the statute would be constitutional on its face, and as applied. The federal government can impose a fine on a defendant who engages in insurrection. This authority is based on Congress’ enumerated powers under Article I. And Congress had this power even before the enactment of the Fourteenth Amendment. Moreover, Congress can impose a fine on the defendant even though he never swore an oath to the Constitution. The authority to fine a defendant for insurrection would derive from the Constitution of 1788, without regard to Section 5 of the Fourteenth Amendment. But if judgment is entered against the defendant, the statute could

not disqualify him from serving in Congress. Section 3 did not authorize Congress to impose any disqualification on a person who never swore an oath to the Constitution.

Consider a second example: a civil servant of the federal government who swore an oath to the Constitution, but who does not squarely fit in the second of the four listed categories. The civil servant is not an “officer of the United States,” as that expression is used in Section 3 of the Fourteenth Amendment. (We assume the phrase “officer of the United States” in Section 3 is coextensive with how that phrase was used in the Constitution of 1788, such as in the Appointments Clause.⁷¹) For example, consider a federal civil servant who is not a principal or inferior “officer of the United States.” He may be what *Buckley v. Valeo* referred to as an “employee of the United States.”⁷² If the federal civil servant violated our hypothetical § 2383, he would not fall within the ambit of the jurisdictional element of Section 3. Therefore, that civil servant could not be disqualified from serving in Congress.

Consider a third example: a former President who, during his entire career in public service only swore a single oath to uphold the Constitution: the presidential oath of office. (This hypothetical describes Donald Trump, the first and only President who lacked prior political and military service.⁷³) Would this former President fit in the second category? Is the President an “officer of the United States”? Our view is that the President is not an “officer of the United States” for purposes of the jurisdictional element Section 3 of the Fourteenth Amendment.⁷⁴ More importantly, whether or not this view is correct with regard to the hypothetical and actual § 2383, a judge and jury would have no occasion to decide whether a defendant fits within *any* of the four jurisdictional categories in Section 3. The hypothetical § 2383 lacks an important statutory element: Was the defendant an “officer of the United States”? Thus, any judgment against a defendant, including former President Trump, based on the hypothetical § 2383, would not include a finding that the defendant was an “officer of the United States.”

Our hypothetical statute applies to “whoever.” We do not think the enumeration of these four categories in Section 3 of the Fourteenth Amendment can be

71. U.S. CONST. art. II, § 2, cl. 2 (“The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .” (emphasis added)); see *supra* note 44 (discussing whether the President is an “officer of the United States” for purposes of Section 3 of the Fourteenth Amendment).

72. 424 U.S. 1, 126 n.162 (1976) (“‘Officers of the United States’ does not include all *employees of the United States*, but there is no claim made that the Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States.” (emphasis added)); see also Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an “Officer of the United States” or an “Employee of the United States”?*, LAWFARE: HARD NAT’L SEC. CHOICES (July 23, 2018, 2:50 PM), <https://www.lawfare-blog.com/robert-mueller-officer-united-states-or-employee-united-states> [<https://perma.cc/F794-RXVQ>].

73. Zachary Crockett, *Donald Trump Is the Only US President Ever with No Political or Military Experience*, VOX (Jan. 23, 2017, 10:07 AM), <https://www.vox.com/policy-and-politics/2016/11/11/13587532/donald-trump-no-experience> [<https://perma.cc/YM9J-SZXX>].

74. See Blackman & Tillman, *supra* note 44 (discussing whether the President is an “officer of the United States” for purposes of Section 3 of the Fourteenth Amendment).

reduced to the phrase “whoever.” Professor Gerard Magliocca has considered some evidence to the contrary.⁷⁵ He quoted two speeches that Representative John Bingham made about Section 3. In one speech, Bingham stated, “[N]o man who broke his official oath with the nation or State, and rendered service in this rebellion shall, except by the grace of the American people, be again permitted to hold a position, either in the National or State Government.”⁷⁶

In another speech, Bingham said:

No person who took an oath of office, either Federal or State, to support the Constitution of the United States, and in violation of his oath, voluntarily engaged in the late atrocious rebellion against the Republic, shall ever hereafter, except by the special grace of the American people, for good cause shown to them, and by special enactment, be permitted to hold any office of honor, trust, or profit, either under the Government of the United States or under the government of any State of the Union.⁷⁷

If we take Bingham at his word, a federal civil servant who does not fall within the four enumerated categories would *still* be covered by Section 3’s jurisdictional analysis. We would be hesitant to take Bingham so literally here. Bingham was perhaps summarizing an intricate list of provisions. Or perhaps Bingham was trying to save time in his speech by using a shorthand. Or perhaps Bingham was mistaken. But the plain text of the jurisdictional element of Section 3 of the Fourteenth Amendment is not as broad as Bingham and others have suggested.

Indeed, the Framers could have used different language to accomplish that goal. For example, the Joint Committee of Reconstruction approved a very different draft version of Section 3. It focused on voter disenfranchisement, rather than disqualification. And that draft version of Section 3 used the phrase “all persons.” It provided:

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.⁷⁸

However, the Senate did not approve the House’s draft version of Section 3. Rather, the Senate adopted the version of Section 3 that was ratified—with its intricate “office”-language.

Likewise, the Equal Protection Clause in Section 1 of the Fourteenth Amendment uses the language “any person.” It provides that no state shall “deny to *any person* within its jurisdiction the equal protection of the laws.” That provision has broad scope, and it applies to “whoever” falls within a state’s jurisdiction.

75. Gerard Magliocca, *John Bingham on Section 3 of the 14th Amendment*, PRAWFSBLOG.COM (Feb. 9, 2021, 9:12 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2021/02/john-bingham-on-section-3-of-the-14th-amendment.html> [https://perma.cc/XP9T-N9BR].

76. *Id.* (emphasis added).

77. *Id.* (emphasis added).

78. *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, LIBR. CONG., <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=072/llcg072.db&recNum=592> [https://perma.cc/EB26-XFZ7] (emphasis added).

Instead of using Section 3's intricate "office"-language, the Framers of the Fourteenth Amendment could have simply removed the four enumerated jurisdictional categories from Section 3. Consider this red-lined version of Section 3:

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.

That provision would have been much simpler. This redlined version also would have better cohered with Section 1's language. Plus, Bingham's comments would be consistent with this alternate drafting. But the Framers of Section 3 of the Fourteenth Amendment did not adopt such language. In short, to be covered by Section 3's jurisdictional element, one must fit within its four enumerated categories.

B. *The Offense Element*

The offense element in the hypothetical statute differs from the offense element in Section 3. The hypothetical statute applies to one who "*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." By contrast, section 3 of the Fourteenth Amendment applies to one who "*engaged* in insurrection or rebellion against the [United States], or given aid or comfort to the enemies thereof."

There is an important word that appears in the hypothetical § 2383, but does not appear in Section 3: "*incites*." Under Section 3, one must "*engage*[]" in insurrection." But the statute permits disqualification for *inciting* an insurrection. We think this disparity may be significant.

Let's assume a defendant is in fact covered by the jurisdictional element. That is, he fits within one of the four enumerated categories of jurisdictional positions. If a judgment is entered against the defendant, which found that the defendant *incited* an insurrection, then the defendant can be fined under the statute. But what about disqualification? We think it likely that the defendant could be disqualified from holding an appointed position that Congress created. Congress could impose that sort of disqualification based entirely on the Constitution of 1788. We think it is unsettled whether Congress could impose a disqualification for an elected position based on incitement to an insurrection. There is a gap between engaging in insurrection and inciting an insurrection.

Under *Boerne v. City of Flores*, it is not clear if this statute would alter the scope of Section 3.⁷⁹ In other words, our hypothetical § 2383, which refers to

79. 521 U.S. 507, 520 (1997).

“incites . . . insurrection,” may have unconstitutionally expanded the meaning of Section 3’s “engage[] in the insurrection”-language. We are uncertain whether this hypothetical statute is “congruent and proportional” to Section 3. Similarly, we are also uncertain whether Section 3 could authorize disqualification in regard to elected federal positions for an insurrection-related lesser-included offense, or for an inchoate crime, such as attempted insurrection or conspiracy to commit insurrection.

These questions are difficult. Fortunately, the judge and jury adjudicating the trial under our hypothetical statute would not need to settle these questions with finality.

Unfortunately, should the defendant seek to run for or hold elected federal positions after being convicted, other actors would need to settle issues related to the scope of disqualification. In the first instance, this role would fall to county and state election commissions. Later, courts hearing appeals from such commissions may have to resolve the scope of disqualification.⁸⁰ Ultimately, perhaps even Congress may have to decide these questions in the face of a disputed presidential election. Under the Electoral Count Act of 1887, Congress has the responsibility to count the electoral votes.⁸¹ And, at that point, members of Congress can raise objections. Resolving the eligibility of a presidential candidate at this late juncture is perhaps the worst possible option.

C. *The Disqualification Element*

The disqualification element in the hypothetical statute is narrower than the disqualification element of Section 3. The hypothetical statute extends disqualification to one category of positions: those holding “any office under the United States.” The hypothetical statute provides that “[f]or purposes of this statute, the phrase “office under the United States” shall have the same meaning as the phrase “office, civil or military, under the United States” in Section 3 of the Fourteenth Amendment.”

The disqualification element of Section 3 of the Fourteenth Amendment is broader than the disqualification element of the statute. The former applies to 4 categories of positions: “[1] Senator or Representative in Congress, or [2] elector of President and Vice-President, or . . . any office, civil or military, [3] under the United States, or [4] under any State.”

We read Category #3 as “any office, civil or military under the United States.” And we read Category #4 as “any office, civil or military . . . under any State.” Both the hypothetical statute and Section 3 extend to Category #3: “any

80. We assume that candidates and voters would have standing to contest ballot access disputes. We also assume that such disputes are justiciable, notwithstanding the political question doctrine. *Cf.* Barnett v. Obama, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788, at *14 (C.D. Cal. Oct. 29, 2009), *aff’d*, Drake v. Obama, 664 F.3d 774 (9th Cir. 2011) (declining to reach the issue of “whether in all cases the interpretation of the natural born citizen clause would present a political question”).

81. 3 U.S.C. § 15.

office . . . under the United States.” But the hypothetical statute does not reference the first, second, or fourth category. We can draw an inference from the enumeration of the first category in the hypothetical statute. Section 3 lists “Senator or Representative in Congress” separately from “any office . . . under the United States.” This drafting decision suggests the Framers of the Fourteenth Amendment thought that members of Congress did not hold an “office . . . under the United States.”

Here, we make a simple argument based on principles of statutory interpretation. If the Constitution extends disqualification to four categories of positions, and the statute only refers to Category #3, then we can infer that Congress did not intend to extend statutory disqualification to Categories #1, #2, and #4. Disqualification would *only* extend to Category #3: “any office, civil or military under the United States.”

Could Congress enact another hypothetical version of § 2383 that could disqualify a person from serving in Congress? Yes, Congress would have to invoke Category #1 from Section 3 of the Fourteenth Amendment: “Senator or Representative in Congress.” But our hypothetical statute does not invoke Category #1.

We acknowledge an alternate reading of Section 3 is conceivable: a “Senator or Representative” could be a type of an “office . . . under the United States.” In other words, a Senator or Representative would fall in the first and third jurisdictional category of Section 3 of the Fourteenth Amendment. Under this interpretation of our hypothetical statute and the Fourteenth Amendment, disqualification could extend to holding a seat in Congress. But we think this latter reading is atextual, and it is less likely to prevail in the courts. Had the Framers thought the phrase “office . . . under the United States” was a catchall that included all federal positions—appointed and elected—they would not have needed to enumerate specific elected federal positions, such as Senators and Representatives. Indeed, if Senators and Representatives were “office[s] . . . under the United States,” then enumerating them separately would be entirely redundant. The better reading is that members of Congress do not hold an “office . . . under the United States.”

Consider this red-lined version of Section 3 that strips all specific office-language.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

Stated more simply, without the strikeouts:

No person shall hold any office, who, having previously taken an oath 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.

It is tempting to read Section 3 of the Fourteenth Amendment as if this red-lined version was the actual text of the Constitution. But it is not. In this red-lined version, the disqualification element extends to all offices, and the jurisdictional element applies to all people who swore an oath to the Constitution. But the Framers of the Fourteenth Amendment did not adopt such a simple, streamlined version of Section 3.

Would a judgment under our hypothetical § 2383 for engaging in insurrection disqualify a person from serving as President? The analysis here differs from our analysis for disqualifying a person from serving in Congress. Section 3's disqualification element expressly lists Senators and Representatives, but it does not specifically list the President. Whether the President holds an "office . . . under the United States" for purposes of Section 3 is unsettled—at least based on our survey of the extant literature and other legal and historical material. If the President does not hold an "office . . . under the United States" for purposes of Section 3, then a judgment under the hypothetical § 2383 of engaging in insurrection could not disqualify the defendant from serving as President.

Under our hypothetical § 2383, what would it take to disqualify a former President, who only swore one constitutional oath, from serving a second term? That is, what would it take to disqualify a former President like Donald Trump? The presidency would have to fit within both the jurisdictional element of Section 3 of the Fourteenth Amendment, as well as the disqualification element of Section 3 of the Fourteenth Amendment. In other words, the presidency would have to be an "officer of the United States"⁸² for purposes of the jurisdictional element. In addition, one who holds the position of President must hold an "office . . . under the United States" for purposes of the disqualification element. Stated simply, two factors must be satisfied. First, former President Donald Trump must have been an "officer of the United States." And second, former President Donald Trump must have held an "office . . . under the United States." Under our hypothetical § 2383, a judge and jury would not have to decide whether these two factors are satisfied. A final judgment against the President would disqualify the defendant from holding any "office . . . under the United States." But the court rendering a civil judgment under our hypothetical § 2383 would have no occasion to decide the actual scope of that disqualification. Specifically, the judge and jury would not resolve whether that disqualification extends to elected federal positions, such as the presidency.

Ultimately, the scope of disqualification under § 2383 could only be addressed, if at all, by various downstream actors. For example, these issues may be resolved by county and state electoral commissions, courts hearing appeals

82. Our position is that the President is not an "officer of the United States" for purposes of Section 3 of the Fourteenth Amendment. See Blackman & Tillman, *supra* note 44.

from those commissions, and possibly Congress. A final judgment imposing disqualification against a defendant under this statute would not determine the practical scope of disqualification. Nor would the judge's § 2383 ruling control the decisions of downstream actors who will decide whether a disqualified defendant is precluded either from being placed on the ballot or from holding any elected federal position, including the presidency. Can downstream actors disqualify a person in the absence of some judicial ruling by a court of record, following an adversarial hearing with notice and opportunity to be heard, regarding the jurisdictional and disqualification elements of Section 3?⁸³ We take no position on this question.

CONCLUSION

We think it unlikely that the Biden administration will bring a criminal prosecution against former President Trump. We also think a conviction unlikely should he be prosecuted. But even if Trump were convicted of violating 18 U.S.C. § 2383, we do not think he would be disqualified from running for and serving a second term as President, should he win re-election.

In order to disqualify Trump, from running for and serving a second term as President should he win re-election, on the basis of a conviction under § 2383, many legal hurdles must be overcome. Some of these hurdles would have to be overcome at the criminal trial. Other hurdles would have to be overcome in other downstream legal proceedings. Those hurdles would arise before county and state electoral commissions, courts hearing appeals from those commissions, and possibly Congress.⁸⁴ Here we list four of those hurdles.

1. The President would have to be an "officer of the United States" as that phrase is used in the jurisdictional element of Section 3 of the Fourteenth Amendment. Unlike virtually all other politicians, former President Trump *only* took one oath to support the Constitution: the presidential oath of office. He could *only* fit within Section 3's jurisdictional element if the President is an "officer of the United States."
2. The presidency would also have to be an "office . . . under the United States" as used in the disqualification element of Section 3 of the Fourteenth Amendment.
3. Prosecutors would have to secure a conviction, based upon proof beyond a reasonable doubt, that Trump engaged in "insurrection." We do not think it clear that a conviction for "incitement" to commit "insurrection," or for an inchoate insurrection-related crime, or insurrection-related lesser-included offense, is legally sufficient to disqualify Trump from running for and serving a second term as President should he win re-election.

83. *In re Griffin*, 11 F. Cas. 7 (C.C. D. Va. 1869) (Chase, C.J.).

84. *See supra* notes 81–82.

4. 18 U.S.C. § 2383 is a “congruent and proportional” means to enforce Section 3 of the Fourteenth Amendment.

If any of these hurdles are not overcome, a conviction under 18 U.S.C. § 2383 would not be sufficient to disqualify Trump from running for and serving a second term as President should he win re-election. Furthermore, a final judgment under this statute would not determine the practical scope of disqualification. Nor would that judgment control the decisions of the downstream actors who will decide whether a disqualified defendant is precluded either from being placed on the ballot or from holding any elected federal position, including the presidency.

Our position here was not created in the wake of January 6, 2021. In 2016, Tillman publicized a similar analysis regarding a hypothetical conviction of Secretary Clinton under 18 U.S.C. § 2071, the Federal Records Act. That statute provides:

Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any *office under the United States*.⁸⁵

We think there is some good evidence to suggest that the President does not fit within the *jurisdictional element* of Section 3 of the Fourteenth Amendment—that is, he is not an “officer of the United States.”⁸⁶ If the President is not an “officer of the United States” for purposes of Section 3 of the Fourteenth Amendment, then § 2383 could not be used to disqualify Trump from running for and serving as President should he win re-election.

Likewise, if the presidency is not an “office . . . under the United States” for purposes of Section 3 of the Fourteenth Amendment, then § 2383 could not be used to disqualify Trump from running for and serving as President should he win re-election. We reaffirm our longstanding position: under the Constitution of 1788, the President does not hold an “office . . . under the United States.”⁸⁷ But at this juncture, we take no position whether the President holds an “office . . . under the United States” for purposes of Section 3 of the Fourteenth Amendment. Based on our most recent survey of the extant literature and other legal and historical material—much of which was published in the wake of January 6, 2021—we think this issue remains unsettled.

Going forward, the Biden Department of Justice faces a difficult choice. There are legal and political upsides and downsides to prosecuting Trump under § 2383. If Trump were convicted, it may lead some people to conclude that he is

85. Federal Records Act, 18 U.S.C. § 2071 (emphasis added); *see also* Brief for the Appellee Democratic National Committee at 25, *Faas v. Clinton*, No. 17-11381, 2017 WL 3492561 (11th Cir. Aug. 4, 2017) (citing Seth Barrett Tillman, *Secretary Clinton Can Relax Because Section 2071 Disqualification Does Not Apply to The Presidency: A Response to Michael B. Mukasey and Cause of Action* (Sept. 22, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650328).

86. *See* Blackman & Tillman, *supra* note 44.

87. *See supra* note 31.

disqualified from running for and serving a second term as President should he win re-election. We think this issue is far from clear, but recognize that election boards, courts, and even Congress could reach that conclusion in good faith.⁸⁸ But what if Trump were acquitted of a § 2383 charge? Trump could credibly argue on that basis that he did not engage in insurrection, and thus did not run afoul of Section 3. (In much the same way, Trump could cite his two acquittals from impeachment trials as proof of his exoneration.) The decision to bring this prosecution will be made at the highest levels of the Department of Justice, likely by Attorney General Garland. And we suspect these legal and political risks would factor into the future Attorney General's decision. Yet, even if Trump is prosecuted and convicted, the scope of disqualification would remain for another day.

88. *See supra* notes 81–82.