HAS DONALD TRUMP EFFECTIVELY DISQUALIFIED HIMSELF FROM THE PRESIDENCY: RESPECTED CONSTITUTIONAL EXPERTS JUST WEIGHED IN

There are two unmistakable features of Trumpworld with which we regrettably all are too familiar. One is the inevitable sense that countless actions that he takes or situations he creates are unprecedented, and the second is that, since 2015 there were, and continue to be, so many unprecedented actions/situations that each soon gets drowned out by the next. Speaking of one, I would like to rewind to a theme that animated legal and political pundits at the time of Trump's second impeachment – namely, the opportunity presented by that second impeachment to ensure that Trump would never again hold federal office. Those conversations largely melted away in the mainstream media after the Senate failed to convict (with some references surfacing briefly in March 2022[1]), but they are now back again in focus.

I explore below the conclusions reached from an unexpected quarter that, as a matter of constitutional law, Donald Trump is unequivocally disqualified from again holding the office of the President of the United States, or any other state or federal office covered by the Constitution. Consideration of this question is all the more timely given the accepted view that none of the pending criminal prosecutions of Trump (even if convicted) preclude him from running in the 2024 election or serving as president if he wins.

"The Sweep and Force of Section Three"

Last week, two prominent conservative law professors, William Baude and Michael Stokes Paulsen, in a law review article ("The Sweep and Force of Section Three") to be published next year, assert that Donald Trump is ineligible to be president under Section Three of the Fourteenth Amendment to the Constitution (the so-called "Disqualification Clause").[2] In a conversation with the Washington Post summarizing their conclusions, Professor Baude is crystal clear: "Donald Trump cannot be president – cannot run for president, cannot become president, cannot hold office – unless two-thirds of [each chamber of] Congress grants him amnesty for his conduct on Jan. 6."

Section Three of the Fourteenth Amendment was enacted in the aftermath of the Civil War and bars any former federal office holder (that is, having previously taken an oath to support the Constitution) from again holding federal office if he/she "shall have engaged in insurrection or rebellion." Baude and Paulsen reach the following specific conclusions as to

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1 An action was brought in 2022 before the North Caroline State Board of Elections by a group of North Carolina voters seeking to disqualify Rep. Madison Cawthorn (NC-13) from running for re-election, based on Section Three of the Fourteenth Amendment.

2 Section Three provides:

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

Section Three, which they describe as a "radical" rule, its "sheer sweep … dramatic." "Despite its long slumber," Section Three:

- remains an enforceable part of the Constitution, and is not limited to addressing the circumstances of Reconstruction in the immediate aftermath of the Civil War;
- is constitutionally self-executing, operating as an immediate disqualification from office, without the need for additional action by Congress (*e.g.*, implementing legislation under Section Five of the Fourteenth Amendment), meaning Section Three can and should be enforced by every official, state or federal, who judges qualifications for public office (this latter feature they describe as being akin to "a constitutional immune system, mobilizing *every* official charged with constitutional application to keep those who have fundamentally betrayed the constitutional order from keeping or reassuming power");
- in effect repeals, supersedes or simply satisfies any potential conflict with other constitutional rules, including rules against bills of attainder or *ex post facto* laws, the Due Process Clause and the First Amendment (as to the latter, the authors note that "the proper construction of Section Three terms ('insurrection,' 'rebellion,' 'aid and comfort,' 'enemies') will leave much speech and advocacy completely free. But in cases where it does not, the terms of Section Three, not the construction of the First Amendment, decide where the line is.");
- covers a broad range of conduct against the authority of the constitutional order ("engaged" in "insurrection" or "rebellion"), including many instances of indirect participation or support as "aid or comfort"; and
- covers a broad range of former officeholders, including the Presidency.

Baude and Paulsen conclude the section outlining the second of their conclusions as follows:

> "Tying together all of these different procedures and possibilities: consider briefly (and not-so-hypothetically) a violent insurrection on the seat of government, by a mob joined or given aid and comfort by various government officials, from a state representative or commissioner to a U.S. Senator to the President himself. From the moment of their participation in the insurrection, those officials would be legally ineligible to hold their offices, thanks to Section Three of the Fourteenth Amendment. How this would play out practically might vary across them. As the state official returned home, he would immediately be subject to state law procedures such as a quo warranto suit. He might be removed by such a suit, or might well choose to resign instead. … As for the hypothetical President, by right he ought to be immediately subject to impeachment and conviction by Congress, and perhaps also a Twenty-fifth Amendment declaration by the Vice President and supported by the cabinet. Even if those things did not happen, if he sought re-election, state election officials around the country would be bound by Section Three in deciding whether to put him on the ballot, even in the primary."

In addressing what they term "the urgent question of the day," Baude and Paulsen conclude that "the overall package of events" that many Americans associate with January 6th – false claims of voter fraud, attempted subversion of states' selection of electors, efforts to convince the Vice President to unconstitutional claim a power he did not possess; efforts of members of Congress to reject votes lawfully cast; and fomenting and inciting the attack on the Capitol –

qualify as an "insurrection" and, potentially as a "rebellion" as well, within the meaning of Section Three. They reach this conclusion taking these events as a whole, the actions as well as the inactions.

Then applying the "engaged in" and "aid or comfort" prongs, Baude and Paulsen conclude that Donald Trump is "constitutionally disqualified from again being President (or holding any other covered office) because of his role in the attempted overthrow of the 2020 election and the events leading up to the January 6 attack." If the public record is accurate, the case that "Donald Trump 'engaged in' 'insurrection or rebellion' and gave 'aid or comfort' to others engaging in such conduct, within the original meaning of those terms as employed in Section Three of the Fourteenth Amendment" is "not even close."

Others, they posit, including "government lawyers, executive branch officials, state officeholders, and even members of Congress" could also be subject to Section Three disqualification.

And, finally, those "who possess the power and duty to apply and enforce Section Three have a constitutional responsibility to do so, fairly but vigorously. These would then include, in the case of a constitutionally disqualified candidate for President or already-elected President, state election officials, electors, Congress via the impeachment process, and the Vice President, cabinet and Congress in carrying out the Twenty-fifth Amendment.

In The ReidOut podcast with Joy Reid (August 11), Constitutional Law Professor Laurence Tribe, consistent with prior public positions he has taken, agrees with the Baude and Paulsen analysis, noting that one does not need to be an "originalist" (as the two professors are) to reach the same conclusion, as the language of Section Three is clear. Tribe states that this will be a "major issue overhanging any Trump presidency." An analysis by CREW (Citizens for Responsibility & Ethics in Washington) also sets out the predicates for the application of Section Three and concludes Trump has disqualified himself. Constitutional Law Professor, former official in the Reagan Administration and co-founder of the Federalist Society, Steven Calabresi, in a post on The Volokh Conspiracy (largely used by law professors), similarly reached the conclusion that Trump is disqualified under Section Three from appearing on any election ballots.

A Few Caveats

In their article, Baude and Paulsen, of necessity, address a case that they characterize as "simply wrong" and "unsustainable" in holding that Section Three is not self-executing. In *In re Griffin,* Chief Justice Salmon Chase, sitting as Circuit Justice in 1869 (shortly after the Fourteenth Amendment was enacted), concluded that Section Three was inoperative unless and until Congress passed implementing legislation to give it effect. Baude and Paulsen characterize *Griffin* as a "case study in how *not* to go about the enterprise of faithful constitutional interpretation." They conclude, after a detailed analysis, that "There is little to be said in defense of *Griffin's Case*, but much to be learned from it. The very weakness of its arguments; the obviously result-oriented nature of its legal analysis; and the inconsistency of its conclusion with Section Three's language, end up confirming the core conclusion in this section: Section Three's disqualification of designated persons from office is a self-executing constitutional command that requires nothing more to have immediate legal force."

In the Cawthorn case referred to above, a federal court judge concluded that in 1872 Congress had nullified Section Three. However, a three-judge panel in the Fourth Circuit

rejected that interpretation. The case was rendered moot when Cawthorn lost his GOP primary. Baude and Paulsen agreed with the Fourth Circuit that the intent of the 1872 act in question was to grant amnesty only to those who *theretofor* had been disqualified ("political disabilities imposed … are hereby removed"). The 1872 act had no prospective effect on Section Three. An 1898 act (disability "heretofore incurred") similarly had retrospective effect only. Baude and Paulsen note that Section Three could have provided for a "sunset" clause, but Congress did not so provide. Removal of the disability provided for in the second sentence of the Section can only be read to refer to removal of a disability actually imposed under the first sentence, meaning by reason of the language of Section Three, Congress lacks the power to "sunset" Section Three, even if it wanted to.

Concluding Thoughts

Undoubtedly, we are in for unprecedented chaos over the coming months. Back to my introduction – "unprecedented" no longer aptly describes the situation we face. The front-runner in the Republican Party is now the subject of four sets of criminal indictments. He faces, in total, 91 criminal charges across four jurisdictions – New York (34 felony counts), Florida (40 felony counts), Washington, DC (four felony counts) and now Georgia (13 felony counts). The outcome of these cases may or may not influence the outcome of the 2024 election, but they undoubtedly will reverberate for years to come.

Many posit that Trump has few viable legal or factual defenses to the indictments, hence his laser-like focus on his time-honored tactic of running out the clock - to delay beyond the election. That, however, would not preclude the Section Three disqualification, and as one commentator writing in the New Republic noted, "it will only take a single state or local election official's invocation of Section Three to make it a live controversy for the courts to resolve." Edward B. Foley, in his op-ed published today in the Washington Post, argues that, for the sake of our democracy, the Supreme Court should settle the question of disqualification at the latest before the Republican convention, preferably based on an administrative ruling by a state election official (after being empowered by a state legislature), followed by judicial confirmation in a state court and a potential appeal to the Supreme Court.

It is likely that we will hear plenty more about Section Three in the coming months – from both sides of the political divide.[3] Baude and Paulsen have set out a roadmap for the competing arguments as to whether or not Trump is disqualified, as well as their clear conclusions as to what the right answer is. This may well move sooner than later beyond a debate among scholars to the courts.

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[3] *See* Professor Michael McConnell's response taking issue with the conclusions reached by Baude, Paulsen and Calabresi.