

FOURTEENTH AMENDMENT DISQUALIFICATION CASES ARE NO LONGER HYPOTHETICAL

Donald Trump faces, as most know, a plethora of criminal indictments and civil lawsuits, but among the cascading sets of cases there lurks another set that election law experts and political commentators are only starting to digest. These cases will test whether Trump is disqualified from running for, or serving as, President of the United States by reason of Section 3 of the 14th Amendment. Monday marked the first day that this set of cases moved from debate among constitutional scholars to the courtroom. (I addressed the disqualification issue at length in my August 15 [briefing note](#).)

In early September, Six Republican and unaffiliated voters in Colorado brought a [lawsuit](#) with the [support](#) of Citizens for Responsibility and Ethics in Washington (“CREW”), arguing that Trump should be disqualified and struck from the 2024 primary ballot and any future election ballot in Colorado by reason of Section 3 of the 14th Amendment. The case, which is based on his involvement in the January 6th insurrection and related efforts to overturn the 2020 election, names Secretary of State Jena Griswold, in her official capacity, as the respondent, as well as Trump. Trump and the Colorado Republican State Central Committee also have been allowed to intervene. This is both a bench trial (so, no jury) and a civil case (so, the standard of evidence is lower than in a criminal proceeding).

District Court Judge Sarah Wallace has set out [nine topics](#) for the weeklong hearing in Colorado:

- How often and on what basis does the Secretary of State exclude candidates based on constitutional deficiencies?
- What is the process for drafting and approving the Major Party Candidate and Statement of Intent and who can revise or edit it?
- The meaning and historical application of Section 3 of the [20th Amendment](#) (addressing, among other circumstances, the elevation of the Vice President to President where the President is not chosen in time or fails to qualify, and the power of Congress when neither the President or the Vice President shall have qualified).
- The 2022 revisions to 3 U.S.C. § 15 (addressing the procedures for the counting of the Electoral College votes in the joint session of Congress on January 6; the Electoral Count Act was amended in 2022 by the [Electoral Count Reform Act](#)).
- The history and application of Section 3 of the 14th Amendment.
- Is Section 3 of the 14th Amendment self-executing?
- Does Section 3 of the 14th Amendment apply to Presidents?
- The meaning of “engaged” and “insurrection” as used in Section 3 of the 14th Amendment.
- Did Trump’s actions meet the standard set forth in Section 3 of the 14th Amendment?

The inclusion of Section 3 of the 20th Amendment and the Electoral Count Reform Act as topics prompted the petitioners to submit a [supplemental brief](#) last week.

Thus far, Trump has not fared well on multiple procedural motions he has filed in the Colorado case. On October 25, the Court denied Trump’s [motion to dismiss](#) the case, which was filed September 29. Among other rulings, the Court indicated that the issues of whether

Section 3 of the 14th Amendment applies or whether Trump engaged in an insurrection are to be addressed at this week’s hearing. As for the other grounds cited by Trump – that the question before the Court is a nonjusticiable political question, Section 3 is not self-executing, Congress has pre-empted states from governing ballot access for presidential elections and the action should be dismissed on *forum non conveniens* grounds, the Court dismissed the motion – the Court found them unpersuasive at this stage. The week before, the Court denied two Trump motions to dismiss (see [omnibus ruling](#) and [order](#)) filed on September 22, claiming that the suit was barred by Colorado’s anti-SLAPP law and raising various procedural claims.

Elsewhere in the Nation

Lawsuits based on Section 3 of the 14th Amendment also have been brought in, among other states, [Minnesota](#) (a state Supreme Court action brought in September by various petitioners including a six-term former Secretary of State and Associate Justice of the Minnesota Supreme Court, and led by [Free Speech for the People](#), against Minnesota Secretary of State Steve Simon) and [Michigan](#) (a state court action brought on Monday by [Free Speech for the People](#) against the Michigan Secretary of State Jocelyn Benson). Oral argument in the Minnesota case has been [scheduled](#) for November 2.

Last night, Trump [filed a lawsuit](#) against Secretary of State Benson seeking a declaratory judgment and permanent injunction to keep his name on the primary and general election ballots in Michigan. In [September](#), Benson had said that “[w]hether Trump is eligible to run for president again is a decision not for secretaries of state but for the courts.”¹ In his pleading, Trump takes issue with the fact that Benson had not responded to a request that she confirm that Trump will be on the list of candidates to be included on the 2024 ballots, and that such failure is creating “uncertainty.” Trump was denied the right to intervene in the Michigan case cited above, but the Court of Claims invited him to bring a separate action.

A list of pending (and dismissed) cases across the country, prepared by Lawfare, is available [here](#); it lists cases in 28 states, nine of which have been dismissed.

In the only recent case affirming disqualification under Section 3 of the 14th Amendment in over 100 years,² a New Mexico state court [ruled](#) in September 2022 that the founder of the “Cowboys for Trump” group must be removed as a county commissioner due to his participation in the January 6th insurrection. The court found that the January 6th attack and “the surrounding planning, mobilization and incitement” constituted an insurrection within the meaning of Section 3 of the 14th Amendment and that the defendant had engaged in the insurrection. The case was brought by a group of New Mexico residents represented by CREW.

Free Speech for People were unsuccessful in barring Reps. [Marjorie Taylor Greene](#) and [Madison Cawthorn](#) from running for re-election in the 2022 midterms; a state administrative law judge [found](#) in favor of Greene (as she only took the oath of office on January 3 and was

¹ Colorado Secretary of State Griswold is on [record](#) as saying the same thing – disqualification “needs to be decided by a court, I believe.” Minnesota Secretary of State Simon has also [made](#) the same point.

² See CREW’s overview of cases involving Section 3 of the 14th Amendment in “[The precedent for 14th amendment disqualification](#).”

not subject to Section 3 before then, and plaintiffs had failed to prove she had engaged in insurrection after January 3), and Cawthorn’s case was deemed moot after he lost his primary.

Concluding Thoughts

Admittedly Section 3 of the 14th Amendment is arcane, and not surprisingly constitutional scholars have [lined up](#) on both sides of the issue. (Others have as well, including Senator Tim Kaine, who [said](#) on ABC “This Week” that there is a “powerful argument to be made” for disqualification.)

As John Hendrickson noted in his article yesterday evening in The Atlantic, “[Could the Courts Actually Take Trump Off the Ballot](#),” the Colorado case highlights the complexities of these cases: left-leaning CREW is allied with a mix of Republican and non-aligned voters, Democrat Jena Griswold is a named defendant with Trump, and Trump’s lead lawyer used to be the Colorado Secretary of State. Then there are the elements of the case, including the question of whether Trump “engaged” in “insurrection,” and whether he would need to be convicted of insurrection to be disqualified. How does one square his status with the following: According to the Office of the US Attorney for the District of Columbia, [as of June 6, 2023](#), more than 1,043 defendants have been charged in connection with the attack on the Capitol, 587 have pleaded guilty to federal charges, including 155 who pleaded guilty to felony charges (four of whom pleaded guilty to seditious conspiracy), and 85 have been found guilty at contested trials. Approximately 524 have received sentences, including 310 sentenced to incarceration.

There is also the political angle to these cases, including the question of whether they will generate more sympathy for Trump. For others, there is the belief that sidelining a former president on a technicality (albeit one arising under the Constitution) would be anti-democratic, not to mention that it would feed into Trump’s longstanding narrative that the system is rigged against him. How will Trump supporters react to successful disqualification, or how would anti-Trump coalitions react to lower court disqualification that is overturned by the Supreme Court? How might potential convictions and custodial sentences on the criminal indictments impact the election?

While the facts surrounding the January 6th attack and related efforts to overturn the election are crystal clear, it bears mentioning that setting a precedent of disqualification runs its own risks. All that said, the same could be said of impeachment, and while both of Trump’s impeachments failed to lead to convictions, they were important milestones in the nation’s fight to retain its democracy, and disqualification, like impeachment, is rooted in the Constitution.

It is important to remember that the legal theories advanced in these cases vary significantly. It is likely that one or more of these cases will end up before the Supreme Court. Like so much of our politics since the emergence of Trump, we find ourselves in unprecedented circumstances – truly uncharted territory. Trump’s legal exposures are likely to figure prominently in the headlines for the coming months.

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