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IS THE PRESIDENT AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF SECTION 3 OF THE FOURTEENTH AMENDMENT?

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INTRODUCTION

On January 13, 2021, the House of Representatives voted to impeach then-President Donald J. Trump for inciting an insurrection.[1] The sole impeachment article invoked Section 3 of the Fourteenth Amendment.[2] But the House's impeachment article

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[1] H.R. Res. 24, 117th Cong. (2021) (as introduced in the House on Jan. 1, 2021) [https://perma.cc/DS5F-SCQD].

[2] *Id.*

elided over a critical threshold question: Was Trump covered by Section 3? The structure of Section 3 of the Fourteenth Amendment is a bit complicated. To assist our analysis, we distinguish the four elements with different typefaces (underline, **bold**, *italics*, and SMALL CAPS), and number them out of order:

> [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, [1] **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**, [2] *shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof*. [4] BUT CONGRESS MAY BY A VOTE OF TWO-THIRDS OF EACH HOUSE, REMOVE SUCH DISABILITY.[3]

First, the jurisdictional element, [1], specifies which positions are subject to Section 3: 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."[4]

Second, the offense element, [2], defines the conduct prohibited by Section 3. It regulates the conduct of a person satisfying the jurisdictional element who "shall have engaged in insurrection or rebellion against the same [the United States], or given aid or comfort to the enemies thereof."[5]

Third, the disqualification element, [3], defines the legal consequences or punishment that Section 3 provides. A person who

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[3] U.S. CONST. amend. XIV, § 3.
[4] *Id.*
[5] *Id.*

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."[6] The phrase "office . . . under the United States" in the disqualification element is distinguishable from the phrase "officer of the united States" in the jurisdictional element.

FOURTH, the amnesty element, [4], allows Congress to terminate the disqualification or disability: "Congress may by a vote of two-thirds of each House, remove such disability."[7]

This article does not focus on the offense element [2] and the amnesty element [4]. Rather, to determine whether former-President Trump was disqualified pursuant to Section 3, we will focus on the jurisdictional element [1] and the disqualification element [3].

Section 3's jurisdictional element applies to exactly four defined categories of state and federal positions. President Trump clearly does not fit into three of these categories. Trump never swore an oath as a "member of Congress," "a member of any state legislature," or an "executive or judicial officer of any state."[8] Indeed, Trump was the only President in American history to have never held prior state or federal, civilian or military, public office. Therefore, the only way for Section 3's jurisdictional element to cover President Trump would be if he falls into the fourth category: he took an oath to support the Constitution as an "officer of the United States." Trump only swore one constitutional oath: as President of the United States.[9] In short, for President Trump to be subject to Section 3 disqualification, he must have violated the offense element *and* fit within the jurisdictional element. And in order to fit within the

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[6] *Id.*

[7] *Id.*

[8] *Donald Trump*, THE WHITE HOUSE [https://perma.cc/BHR3-DZ3M].

[9] U.S. CONST. art. II, § 1, cl. 8 (the presidential oath). *See, e.g.*, Brian Duignan, *Donald Trump/president of the United States*, ENCYCLOPEDIA BRITANNICA (Aug. 17, 2021) [https://perma.cc/2X7V-K8RN].

jurisdictional element, the President must be an "officer of the United States" for purposes of Section 3.

The House's impeachment article, however, did not address this threshold issue. It stated:

> [S]ection 3 of the 14th Amendment to the Constitution prohibits *any person* who has "engaged in insurrection or rebellion against" the United States from "hold[ing] any office . . . under the United States."[10]

In fact, Section 3 does not apply to "any person" or even "any person" who committed the conduct provided for in the offense element. Here, the House seemed to assume that the phrase "officer of the United States" was equivalent to the phrase "any person." Perhaps the House assumed that a President is an "officer of the United States." Still, the House's position was not entirely clear.

After the Senate trial, Trump was not convicted. Therefore, he could not be disqualified from holding future office pursuant to the Impeachment Disqualification Clause.[11] But even after Trump's acquittal, efforts to disqualify the former President based on Section 3 continue. For example, there is a pending concurrent resolution that would find "President Donald J. Trump 'as an *officer of the United States* . . . engaged in insurrection or rebellion against the [United States], or g[ave] aid or comfort to the enemies thereof,' making him ineligible for future office . . . ."[12] This resolution assumed that the President is an "officer of the United States."

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[10] *See* H.R. Res. 24, *supra* note 1, at 3:2-6 (emphasis added).

[11] U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment 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 . . . .").

[12] H.R. Con. Res. 3, 117th Cong. (2021) (emphasis added), https://www.congress.gov/bill/117th-congress/house-concurrent-resolution/3/text [https://perma.cc/7JZP-E23D] ("Censuring President Donald J. Trump for attempting to overturn the results of the 2020 Presidential election through unlawful means and for inciting insurrection").

We disagree. There is some good reason to think the President is not an "officer of the United States." President Trump, who swore only one constitutional oath, does not fall within Section 3's jurisdictional element. Therefore, he cannot be disqualified pursuant to this provision.

This article will proceed in six parts. Part I will contend that the phrases "officer of the United States" and "office . . . under the United States" in Section 3 refer to different categories of positions. Part II will analyze the phrase "officer of the United States," which is used in the Constitution of 1788 and in Section 3 of the Fourteenth Amendment. Part III will show that the meaning of the phrase "officer of the United States" did not drift from 1788 through 1868. In both eras, there is substantial evidence that the President was not considered an "officer of the United States." Part IV will recount longstanding Executive Branch opinions, which affirmed that elected officials like the President are not "officers of the United States." Part V will respond to recent arguments suggesting that the President is an "officer of the United States" for purposes of Section 3. Part VI will chart how the courts, and not Congress, will likely have the final say about whether President Trump is subject to Section 3 of the Fourteenth Amendment.

I. THE PHRASES "OFFICER OF THE UNITED STATES" AND "OFFICE … UNDER THE UNITED STATES" IN SECTION 3 REFER TO DIFFERENT CATEGORIES OF POSITIONS

Section 3 of the Fourteenth Amendment refers to two textually distinct groups of officers and offices: an "officer of the United States" and an "Office . . . under the United States." These phrases also appear in the Constitution of 1788. The Oath or Affirmation Clause refers to "officers of the United States." And the phrase "Office . . . under the United States" appears in the Elector Incompatibility Clause and Impeachment Disqualification Clause. We have long argued that these two phrases, which appear in the

Constitution of 1788, have distinct, albeit related meanings.[13] We also think these two phrases, as used in Section 3, have different meanings. Indeed, the very fact that Section 3's text uses both of these phrases, and does so in the very same sentence, provides some substantial evidence that the two phrases do not have identical meanings. Moreover, there is some textual overlap between the Constitution of 1788 and Section 3. We draw three inferences from this textual overlap. First, we think the better view is that the jurisdictional element of Section 3 was modeled after the structure and language of the Oath or Affirmation Clause. Second, we think the better view is that the disqualification element of Section 3 was modeled after the structure and language of the Elector Incompatibility Clause, the Incompatibility Clause, and the Impeachment Disqualification Clause. Third, we think the better view is that the Framers imported the meaning of "officer of the United States" and "office . . . under the United States" from the Constitution of 1788 to Section 3's jurisdictional element and disqualification element, respectively.

A. WE SHOULD PRESUME THAT THE DIFFERENT TYPES OF OFFICES REFERENCED IN THE SAME SENTENCE OF SECTION 3 HAVE DIFFERENT MEANINGS

The scope of Section 3 is complicated. Specifically, the jurisdictional element and the disqualification element, which appear in the same sentence, refer to different types of officers and offices. First, the jurisdictional element applies to a person who took an oath as an "officer of the United States." Second, the

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[13] *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. (forthcoming 2021) [hereinafter Tillman & Blackman, *Offices*] [https://perma.cc/B7AM-E83B] (discussing taxonomy); Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses litigation, Part 1: The Constitution's taxonomy of officers and offices*, WASH. POST (Sept. 25, 2017) [hereinafter Blackman & Tillman, *Emoluments*] [https://perma.cc/7K3C-ANSM].

disqualification element mandates that disqualification extends to "any office . . . under the United States."[14] Had the framers used the same phrase twice in the same sentence—for example, both elements applied to "officer[s] of the United States"—we would reasonably conclude that those phrases have the same meaning. This reasoning follows from the presumption of *intrasentence uniformity*: where the same language is used in the same sentence, we presume that language is used uniformly.[15]

However, Section 3 uses different phrases in the same sentence. Here, the presumption should be the converse. The better conclusion is that when the same sentence in the Constitution uses two different phrases—here, referring to different categories of offices and officers—we should presume that the Framers intended to convey two different meanings.[16] This latter principle can be called the presumption of *intrasentence non-uniformity*: where different language is used in the same sentence, we presume that the language is not used uniformly. Given this presumption, the phrases "officer of the United States" and "office . . . under the United States" would have different meanings.

The Constitution of 1788 also juxtaposes these same two categories of officers in the same sentence. Consider the third paragraph of Article VI:

> [1] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial *Officers*, both *of the United States* and of

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[14] The ellipses refer to three words the Framers placed after *office* but before *under*: "civil or military."

[15] *See, e.g.*, Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2002) (defending "a presumption of intrasentence uniformity in constitutional, statutory, and regulatory interpretation").

[16] *See*, *e.g.*, *id*. at 1172 ("It is far better to use two different words in a sentence when we mean to convey two different meanings."); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) ("It is hardly to be presumed that the variation in the [Constitution's] language could have been accidental.").

> the several States, shall be bound by Oath or Affirmation, to support this Constitution; [2] but no religious Test shall ever be required as a Qualification to any *Office or public Trust under the United States*.[17]

First, the Oath or Affirmation Clause, which appears before the semicolon, applies to "all executive and judicial Officers . . . of the United States." Second, the Religious Test Clause, which appears after the semicolon, refers to "any Office . . . under the United States." [18] The same sentence references two textually distinct categories of officers and offices.

There is some evidence that the two types of "officers" and "offices" in Article VI refer to different categories of positions. During the drafting process, the Framers revised the Religious Test Clause to clarify what type of offices it applied to. Earlier, a draft provision referred to "any office or public trust under *the authority of* the United States."[19] Later, the Committee of Style revised that draft to "any office or public trust under the United States." [20] The committee removed the phrase "the authority of." [21] This revision provides some evidence that the Framers in 1787 paid reasonably careful attention to the way the Constitution used "office"- and

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[17] U.S. CONST. art. VI (emphasis added).

[18] The Religious Test Clause also applies to a "public trust under the United States." U.S. CONST. art. VI, cl. 3. *See* Tillman & Blackman, *Offices*, *supra* note 13, at 1 (finding that the phrase "public trust under the United States" includes "federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties"—a category that would include presidential electors).

[19] PETER K. ROFES, THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 12 (2005) (noting that "[t]he Committee of Style rephrased the language by eliminating the words 'the authority of'" from the draft Religious Test Clause).

[20] *Id. See generally* William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 47 n.275, 87 n.492 (2021) (discussing revisions made to "office"- and "officer"-language in the Succession Clause, Impeachment Clause, and Religious Test Clause).

[21] *See* ROFES, *supra* note 19.

"officer"-language. One cannot presume that the various phrases using "office" and "officer" were used indiscriminately. There is no record of commensurate efforts by the Committee of Style or the Committee of Detail to textually align or harmonize the phrases "Officer[] . . . of the United States" and "Office . . . under the United State" which both appear in the same sentence of Article VI. Given the Framers' careful attention to such details, we conclude that the two different phrases were used to refer to different types of offices.[22]

We think the same presumption of *intrasentence non-uniformity* should likewise extend to Section 3. The phrase "officer of the United States" in the jurisdictional element has a different meaning from the phrase "office . . . under the United States" in the disqualification element. Our position regarding Section 3 is supported by the similar usage in Article VI. Both the text of Section 3 and Article VI use textually distinct language: "officer of the United States" and "office . . . under the United States." And we should presume these phrases referred to different positions.

The Framers of the Constitution of 1788 made many other changes to "office"- and "officer"-language in provisions of the draft constitution. For example, in the Succession Clause, the phrase "officer of the United States" was changed to "officer."[23] In the Impeachment Clause, the phrase "[President, Vice President,] and *other* Civil officers of the U.S." was changed to "President, Vice President, and Civil Officers of the U.S."[24] And in its final form, the Impeachment Clause became: "President, Vice President, and *all* civil Officers of the United States." The Framers changed the word that preceded "Civil Officers of the United States" from "other" to "all." This and other similar alterations to the draft constitution's "office"- and "officer"-language were significant. First, these revisions show

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[22] Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

[23] *Compare* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 532 and 535 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS], *with id*. at 573 and 599. *See generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 116 nn.16–18 (1995).

[24] *Compare* 2 FARRAND'S RECORDS, *supra* note 23, at 545 & 552, *with id*. at 600.

that this language was not modified indiscriminately. The Framers paid careful attention to the words they chose. Second, the use of "other" in the draft constitution shows that at a preliminary stage, the Framers used language affirmatively stating that the President and Vice President were "Officers of the United States." But the draft constitution's use of "other" was, in fact, rejected in favor of "all." The better inference, arising in connection with the actual Constitution of 1788, is that the President and Vice President are not "Officers of the United States." Joseph Story stated this position in his *Commentaries on the Constitution*.[25] The Framers also made complex changes to the "officer"-language in the Appointments Clause.[26]

These precise, surgical textual changes cannot be described as random. All available evidence suggests that the Framers were deliberate. The ratifiers and their contemporaries would have understood how these alterations modified the meaning of these provisions. The different "office"- and "officer"-language presumptively had different meanings. And, we think, the Framers of 1868 also took reasonable care when using the coordinate phrases "officers of the United States" and "office . . . under the United States" in Section 3 of the Fourteenth Amendment.

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[25] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791, at 260 (Boston, Hilliard, Gray, and Co. 1833) ("[The Impeachment Clause] says, 'the president, vice-president, and *all civil officers* (not all *other* civil officers) shall be removed,' &c. The language of the clause, therefore, would rather lead to the conclusion, that the[] [President and Vice President] were enumerated, as *contradistinguished* from, rather than as included in the description of, civil officers *of* the United States." (latter two emphases added)).

[26] 2 FARRAND'S RECORDS, *supra* note 23, at 177, 181–82; Jennifer L. Mascott, *Who are "Officers of the United States"?*, 70 STAN. L. REV. 443, 472 (2018) (citing 1 FARRAND'S RECORDS, *supra* note 23, at 20–22, 20 n.10); 2 FARRAND'S RECORDS, *supra* note 23, at 614.

B. THERE IS SOME TEXTUAL OVERLAP BETWEEN THE JURISDICTIONAL ELEMENT OF SECTION 3 AND THE OATH OR AFFIRMATION CLAUSE

We do not think that the language used in Section 3 was drafted from a blank slate. Indeed, there is some overlap between Section 3 and provisions from the Constitution of 1788. The Framers of Section 3's jurisdictional element likely drew its language from the text of the 1788 Oath or Affirmation Clause in Article VI. Therefore, the meaning of the phrase "Officers of the United States" in Article VI should inform the meaning of "officer of the United States" in Section 3's jurisdictional element.

Compare these two provisions, which each refer to four types of positions. Once again, we have used different typefaces (underline, **bold**, *italics*, and SMALL CAPS) to distinguish the four categories.

Oath or Affirmation Clause (1788)	Jurisdictional Element of Section 3 (1868)
"[1] The Senators and Representatives before mentioned, and the [2] **Members of the several State Legislatures**, and [3] *all executive and judicial Officers, both of the United States* and [4] OF THE SEVERAL STATES, shall be bound by Oath or Affirmation, to support this Constitution"	"No person . . . who having previously taken an oath, [1] as a member of Congress, or as [3] *an officer of the United States*, or as a [2] **member of any state legislature**, or as [4] AN EXECUTIVE OR JUDICIAL OFFICER OF ANY STATE, to support the Constitution of the United States. . . . "

Both provisions reference the same four categories of office holders who swore an oath to support the Constitution: [1] Senators and Representatives, [2] **members of the state legislatures**, [3] *executive and judicial officers of the United States*, and [4] EXECUTIVE AND JUDICIAL OFFICERS OF THE STATES.

There are substantial similarities between the Oath or Affirmation Clause and Section 3's jurisdictional element. This overlap is not surprising. Article VI already imposed an oath on

many positions in the federal and state governments. It would make sense for the Framers of the Fourteenth Amendment to use that same grouping of people to identify those subject to disqualification. We think it reasonable to infer that the jurisdictional element of Section 3 was modeled after the Oath or Affirmation Clause of Article VI.

There are slight variations between the Oath or Affirmation Clause and Section 3's jurisdictional element. And these alterations support our position that the Framers took care when writing "office"- and "officer"-language. They did not simply copy the language in its entirety, but instead made careful revisions.

The first category was changed from "the Senators and Representatives before mentioned" to "member of Congress." These phrases are not identical. The category of "member[s] of Congress" is narrower than the category of "Senators and Representatives." Not all Senators and Representatives become members. Senators and Representatives begin their terms as *members-elect* from the date of the start of their two-year or six-year constitutional terms. Customarily, prior to the start of their terms, a Senator or Representative—that is, a member-elect—travels to the Capitol and presents bona fide credentials or a certificate of election. But such a member-elect does not become a member until his house organizes and accepts him as a member.[27]

The distinction between a member-elect and a member affects the timing of when officer-holders in the Executive Branch or Judicial Branch transition to Congress. For example, the Incompatibility Clause bars "a member of either House" from holding "any Office under the United States." But this restriction only applies to actual *members*, and not *members-elect*. Therefore, when a member-elect begins the two-year or six-year constitutional term to which he was

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[27] U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); *id.* art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

elected, but before he is accepted as a member, he could *still* hold a position in the Executive Branch or Judicial Branch. But in order to be accepted as a member, the member-elect must resign his executive-branch or judicial-branch office. These sorts of disputes are not hypothetical. In 1818, the House of Representatives drew this distinction when it accepted the credentials of a federal-office holder who simultaneously served as member-elect, but had not yet become a member.[28] In 1788, 1818, and 1868, and today, the Constitution's "office"- and "officer"-language mattered and continues to matter.

The **second category** was tweaked from "Members of the several State Legislatures" to "member of any state legislature." Here, we do not see any material change. There may have been some linguistic preference for the phrase "any state" over the phrase "several states" followed by a plural noun. The Framers of Section 3 likewise changed the phrase "executive and judicial Officers . . . of the *several states*" to "an executive or judicial officer of *any state*." The Constitution of 1788 used the phrase "several states" in seven clauses,[29] and the phrase

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[28] *See, e.g.*, 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 499, at 624–27 (1907) [https://perma.cc/B5V8-XFD6] ("After a careful consideration of the status of a Member-elect the House decided that such an one was not affected by the constitutional requirement that an officer . . . shall not be a Member.").

[29] U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the *several States*." (emphasis added)); *id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the *several States* . . . ." (emphasis added)); *id.* art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the *several States*, and with the Indian Tribes" (emphasis added)); *id.* art. 2, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the *several States* . . . ." (emphasis added)); *id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the *several States*." (emphasis added)); *id.* art. V ("The Congress . . . on the Application of the Legislatures of two thirds of the *several States*, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the *several States* . . . ." (emphasis added)); *id.* art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the *several State* Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." (emphasis added)).

"any state" in six provisions.[30] It may be that the phrase "any state" referred to specific conduct that occurred in only one state. And the phrase "several states" referred to general conduct that could recur in multiple states. The Framers also used the phrase "each state" in eight provisions to similar effect as "any state."[31] The Privileges and Immunities Clause of Article VI, which refers to both "each state" and "several states," illustrates this usage: "The Citizens of *each State* shall be entitled to all Privileges and Immunities of Citizens in the

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[30] U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from *any State*, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." (emphasis added)); *id.* art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from *any State*." (emphasis added)); *id.* art. I, § 10, cl. 2 ("[T]he net Produce of all Duties and Imposts, laid by *any State* on Imports or Exports, shall be for the Use of the Treasury of the United States . . . . " (emphasis added)); *id.* art. III, § 2, cl. 3 ("[B]ut when not committed within *any State*, the Trial shall be at such Place or Places as the Congress may by Law have directed." (emphasis added)); *id.* art. IV, § 2, cl. 3 ("A Person charged in *any State* with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State . . . ." (emphasis added)); *id.* art. IV, § 3, cl. 1 ("[N]or *any State* be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." (emphasis added)).

[31] U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors in *each State* shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." (emphasis added)); *id.* art. I, § 2, cl. 3 ("The Number of Representatives shall not exceed one for every thirty Thousand, but *each State* shall have at Least one Representative." (emphasis added)); *id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years."); *id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in *each State* by the Legislature thereof." (emphasis added)); *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."); *id.* art. II, § 1, cl. 3 ("But in chusing the President, the Votes shall be taken by States, the Representation from *each State* having one Vote." (emphasis added)); *id.* art. IV, § 1, ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *id.* art. IV, § 2 ("The Citizens of *each State* shall be entitled to all Privileges and Immunities of Citizens in the several States." (emphasis added)).

several States."[32] It appears that the Fourteenth Amendment used "any state" and "several states" to the same effect.[33]

The *third category* was changed from "all executive and judicial Officers . . . of the United States" to "an officer of the United States."

The FOURTH ELEMENT was changed from "all executive and judicial Officers . . . of the several States" to "an executive or judicial officer of any state."

These third and fourth revisions show the care with which the Framers approached the "officer"-language in Section 3. Article VI of the 1788 Constitution refers broadly to "all executive and judicial Officers, both of the United States and of the several States." In a single clause, the Framers lumped together a wide variety of federal and state offices. This clause applied to "all executive and judicial Officers . . . of the United States" and "all executive and judicial Officers . . . of the several states."

In our view, it was unnecessary to specify that the "Officers of the United States" had to be "executive and judicial" officers. In light of the Appointments Clause, "Officers of the United States" could *only* be appointed to the executive and judicial branches. Appointed positions in the legislative branch—such as the Clerk of the House of Representatives and the Secretary of the Senate—are not appointed pursuant to the Appointments Clause. They are not "Officers of the United States." And they do not take an oath pursuant to Article VI.[34] However, Article VI also provided the oath for state officeholders. And each state had different governmental structures, which could change. It would have been arduous to draft a single federal constitutional provision that could reflect the varied state

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[32] U.S. CONST. art. IV, § 2, cl. 1 (emphasis added).

[33] *Compare* U.S. CONST. amend. XIV, § 1 ("[N]or shall *any State* deprive any person of life, liberty, or property, without due process of law . . . ." (emphasis added)), *with id.* § 2 ("Representatives shall be apportioned among the several States according to their respective numbers . . . .").

[34] *See also* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 (1995) ("No constitutional oath is required of legislative officers, like the Clerk of the House or the Secretary of the Senate . . . .").

constitutional structures regarding offices and officers. To provide some guidance to the state, Article VI clarified which types of state officers were covered: executive officers and judicial officers. Members of state legislatures are expressly covered by the Article VI oath requirement, but appointed positions in state legislatures are not covered.

In 1868, the Framers of Section 3's jurisdictional element departed from the structure of Article VI: they decoupled the state officers from the federal officers. Section 3 still specifies the types of state officers covered: "an executive or judicial officer of any state." Again, this provision accounts for the wide range of state government officeholders. And, now that state and federal provisions were textually decoupled, there was no need to specify that "Officers of the United States" had to be in the executive and judicial branches. Rather, the Appointments Clause defines the scope of the "Officers of the United States": appointed positions in the executive and judicial branches.[35]

This history supports a reasonable inference: the 1788 and 1868 Framers took some care when drafting "office"- and "officer"-language. These phrases were not used indiscriminately. Rather, in 1868, there was some deliberate effort to modify the extant 1788 language.

C. THERE IS SOME TEXTUAL OVERLAP BETWEEN THE DISQUALIFICATION ELEMENT OF SECTION 3 AND THE ELECTOR INCOMPATIBILITY CLAUSE, THE INCOMPATIBILITY CLAUSE, AND THE IMPEACHMENT DISQUALIFICATION CLAUSE

In the Constitution of 1788, the phrase "Office . . . under the United States" is used in four provisions: the Elector Incompatibility

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[35] *See* Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

Clause, the Incompatibility Clause, the Impeachment Disqualification Clause, and the Foreign Emoluments Clause. In our view, the phrase "Office . . . under the United States" in each of these four provisions refers to appointed positions in the Executive and Judicial Branches, as well as non-apex appointed positions in the Legislative Branch.[36] The phrase "office . . . under the United States" also appears in Section 3's disqualification element. In this Article, we take no position as to the meaning or scope of "office . . . under the United States" in Section 3, or whether that phrase in Section 3 included the President and Vice President. Instead, we use the Constitution of 1788 for a different purpose. The 1868 Framers of Section 3's disqualification element, who used the phrase "office . . . under the United States," were likely to have drawn that language from the similar language in the 1788 Constitution. Specifically, three of the four 1788 provisions share a similar structure with Section 3's disqualification element: holders of an "office . . . under the United States" are barred from some other position. The fourth provision, the Foreign Emoluments Clause, is structurally different; it does not impose any disqualifications.

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[36] *See id.*

Compare the disqualification element of Section 3 with the Elector Incompatibility Clause, the Incompatibility Clause, and the Impeachment Disqualification Clause:

Elector Incompatibility Clause (1788)	Incompatibility Clause (1788)	Impeachment Disqualification Clause (1788)	Disqualification Element of Section 3 (1868)
"no [1] Senator or Representative, or [2] **Person holding an Office of Trust or Profit under the United States**, shall be appointed an Elector."	"no [2] **Person holding any Office under the United States**, shall be a Member of either House during his Continuance in Office."	"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to [2] **hold and enjoy any Office of honor, Trust or Profit under the United States**"	"No person shall be a [1] Senator or Representative in Congress, or [3] *elector of President and Vice President*, or [2] **hold any office, civil or military, under the United States**, or [4] UNDER ANY STATE . . . ."

The disqualification element of Section 3, like the Elector Incompatibility clause, applies to Senators and Representatives. To be precise, Section 3 extends disqualification to "a Senator or Representative *in Congress*." The phrase "in Congress" may have been added to clarify that disqualification did not extend to state legislators, who may have the same formal title: senators and representatives. In 1878, a prominent commentator observed, without equivocation, that members of state legislatures are not "officers under any State" for purposes of Section 3's disqualification element.[37] This subtle addition, "in Congress," demonstrates that the

[37] *See* John Randolph Tucker, *General Amnesty*, 106 N. AM. REV. 53, 55 (1878) ("[I]t is clear that a member of a State Legislature is not a civil or military officer under any State, any more than a member of Congress is a civil or military officer under the United States . . . .") [https://perma.cc/JJM6-PBQG].

Framers of Section 3 took care with respect to "office"-language. They did not use these terms indiscriminately.

The Elector Incompatibility Clause, the Incompatibility Clause, the Impeachment Disqualification Clause, and the disqualification element of Section 3 all apply to any "office . . . under the United States."[38] The Impeachment Disqualification Clause empowered the Senate to disqualify a person from "hold[ing] and enjoy[ing] any Office of honor, Trust or Profit under the United States." The Incompatibility Clause bars a "person holding any Office under the United States" from serving as a member of Congress. And the Elector Incompatibility Clause bars members of Congress, as well as a "Person holding an Office of Trust or Profit under the United States" from serving as presidential electors. In light of these textual overlaps, it is reasonable to infer that the Framers of Section 3's disqualification element may have relied on the three provisions of the 1788 Constitution that barred certain officials from holding certain positions. And it is also reasonable to infer that the Framers of Section 3 used the phrase "office . . . under the United States" to have a different meaning than the phrase "officers of the United States."

The disqualification element of Section 3 departs from the provisions of the 1788 Constitution that use the phrase "office . . . under the United States" in two regards. First, the disqualification element of section 3 refers to an "elector of President and Vice President." This category of position does not appear in the Elector Incompatibility Clause—with good reason. It would be nonsensical to bar an elector from serving as an elector. But it would make sense to disqualify former confederates from serving as presidential electors. The Incompatibility Clause, which governs members of

[38] Here, the ellipses refer to different words placed after *office* but before *under*: i.e., "of Trust or Profit" in the Elector Incompatibility Clause; "of honor, Trust or Profit" in the Impeachment Disqualification Clause; and "civil or military" in Section 3 of the Fourteenth Amendment. By contrast, no ellipsis is necessary for the Incompatibility Clause, which simply uses "office under the United States."

Congress, also does not refer to electors. There was no need to list electors in the Incompatibility Clause because the Elector Incompatibility Clause already expressly barred Senators and Representatives from serving as electors. We think that a person disqualified under the Impeachment Disqualification Clause could serve as an elector. In our view, an elector is a "public trust under the United States," as that phrase is used in the Religious Test Clause, but does not hold an "Office . . . under the United States."[39]

Second, Section 3's disqualification element extends to "any office . . . under any state." The Elector Incompatibility Clause does not bar state officeholders from serving as electors. Indeed, to this day, it is common for state officeholders to serve as electors. Likewise, the Impeachment Disqualification Clause does not bar a disqualified person from holding state office. And the text of the Incompatibility Clause does not expressly bar a person who holds a state position from also serving in Congress. Indeed, a Governor could appoint himself to fill a Senate vacancy, and concurrently serve as both Governor and Senator without violating the plain text of the Incompatibility Clause.[40] The Fourteenth Amendment was novel in that the *national* constitution disqualified former confederates from serving in *state* governments. However, the disqualification element does not specify whether Section 3 disqualification extends to state legislative, executive, or judicial positions. Nonetheless, in 1878 John Randolph Tucker stated that members of the state legislature are *not*

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[39] Josh Blackman & Seth Barrett Tillman, *What are Presidential Electors?*, REASON—VOLOKH CONSPIRACY (May 21, 2020) [https://perma.cc/66HF-YBBM].

[40] Several Governors appointed themselves to fill Senate vacancies, but they resigned their state positions. Ken Rudin, *When Governors Appoint Themselves To The Senate*, POLITICAL JUNKIE (Sept. 8, 2009) [https://perma.cc/H4YL-3S2A]. *See generally* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 219 & n.277 (2008) (affirming that joint member of congress and state officeholding is not regulated by the Constitution's Incompatibility Clause).

covered by Section 3's disqualification element.[41] By contrast, the jurisdictional element, like the Oath or Affirmation Clause, does provide such specificity: both provisions refer to "executive or judicial officer of any state" as well as "a member of any state legislature." The disqualification element simply refers to "any office . . . under any state."

We are not aware of any legislative debates that explain why the Framers chose the precise words they did for the jurisdictional and disqualification elements of Section 3. But we can reasonably presume that these two elements were drawn from very similarly-worded provisions from the Constitution of 1788. And if the phrases "Officers of the United States" and "Office . . . under the United States" had different meanings in the Constitution of 1788, we can reasonably presume that the Framers of Section 3 also understood these phrases to have different meanings. Here, we take no position on what the phrase "office . . . under the United States" meant in the disqualification element of Section 3, and whether that phrase as used in Section 3 includes the President and Vice President. Rather, we focus on the meaning of the phrase "officer of the United States" in Section 3's jurisdictional element.

II. THE PRESIDENT IS NOT AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF THE 1788 CONSTITUTION OR FOR SECTION 3 OF THE FOURTEENTH AMENDMENT

The phrase "Officers of the United States" is used in four provisions of the Constitution of 1788: the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.[42] (We discussed the fourth provision in Part I). In our view, the President is not an "officer of the United States" for

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[41] *See* Tucker, *supra* note 37.

[42] U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3; *id.* art. II, § 4; *id.* art. VI, cl. 3.

purposes of these four provisions.[43] We discussed this taxonomy in September 2017:

> First, the Appointments Clause spells out with clarity that the president can nominate "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*." . . . Second, the Impeachment Clause expressly provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment. …" Story explained that the president and vice president's [express] enumeration in the Impeachment Clause in addition to "all civil Officers of the United States" shows that the president and vice president are not deemed "officers of the United States" themselves. Otherwise, the Framers would have stated that "all *other* civil officers" were subject to impeachment. [Third], the oaths clause specifically enumerates that "Senators and Representatives, and the Members of the several State Legislatures," as well as "all *executive and judicial* Officers, both of the United States and of the several States of the United States" were required to be "bound by Oath or Affirmation to, support this Constitution." . . . [Fourth], the commission clause provides that "*all* the officers of the United States" receive presidential commissions. *All* means *all*. This structure explains why appointed executive-branch and judicial-branch officers receive commissions, but there is no record of any elected official, whether a president, vice president or a member of Congress, ever receiving a [presidential] commission. The

[43] *See* Tillman & Blackman, *Offices*, *supra* note 13 (discussing taxonomy).

> reason is simple: Elected officials like the president are not "Officers of the United States."[44]

Our position is consistent with recent Supreme Court precedent. In *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'"[45] Rather, "Officers of the United States" are appointed exclusively pursuant to Article II, Section 2 procedures.[46] It follows from these premises that the President, who is an elected official, is not an "officer of the United States."

Of these four provisions, only the Impeachment Clause expressly applies to the President. However, by contrast, the jurisdictional element of Section 3 does not specifically mention the presidency. Instead of using express language akin to the Impeachment Clause, the jurisdictional element of Section 3 applies 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."[47]

We think Section 3's "officer of the United States"-language was imported from the Oath or Affirmation Clause.[48] By using this phrasing, the Framers of Section 3 likely intended to import or adopt the settled meanings from that provision, whether or not they had given concrete thought to what that meaning was. "[W]hen 'a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'"[49] Here, Section 3's jurisdictional element was "quite obviously

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[44] *See* Blackman & Tillman, *Emoluments*, *supra* note 13.

[45] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010).

[46] *Id.* at 497.

[47] U.S. CONST. amend. XIV, § 3 (emphasis added).

[48] *See supra* Part I.B.

[49] United States v. Castleman, 572 U.S. 157, 176–77 (2014) (Scalia, J., concurring) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

modeled" on the Oath or Affirmation Clause.[50] The soil was transplanted, along with the tree's roots and branches.

The President is not expressly listed in the Oath or Affirmation Clause. Why? Because the President does not recite an oath pursuant to Article VI. Rather, the President recites an oath pursuant to the Presidential Oath Clause in Article II.[51] The fact that the President does not take his oath pursuant to Article VI provides further evidence that he is not an "officer[] . . . of the United States" as that phrase is used in the Oath or Affirmation Clause. And if the President is not covered by the Oath or Affirmation Clause of 1788, then the presumption should be that he is not covered by the substantially similar phrase "officer of the United States" used in the jurisdictional element of Section 3.

In 1788, the President was not an "officer of the United States." We contend that the phrase "officer of the United States" has the same meaning in Section 3 as it does in the Constitution of 1788: the elected President is not an "officer of the United States." And we have seen no substantial evidence showing that the meaning of "officer of the United States" drifted from 1788 to 1868.

III. THERE IS NO DIRECT, CLEAR, OR COMPELLING EVIDENCE THAT THE MEANING OF "OFFICER OF THE UNITED STATES" DRIFTED FROM 1788 TO 1868

Critics may argue that the meaning of the phrase "officer of the United States" in Section 3 is different from the meaning of the phrase "Officers of the United States" in the Constitution's original seven articles. In other words, there was some linguistic drift or slippage between the 1788 ratification of the Constitution and the 1868 ratification of the Fourteenth Amendment. Let's assume that the President is not an "officer[] of the United States" for purposes of the

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[50] *Id.*

[51] U.S. CONST. art. II, § 1, cl. 8 (the presidential oath).

1788 Constitution. Under that assumption, it is still possible that the President might be an "officer of the United States" for purposes of Section 3. Thus, a reader might take the limited position that the President is an "officer of the United States" for the purposes of Section 3's jurisdictional element.

This position is conceivable. Indeed, more than a decade ago, Tillman suggested that linguistic drift may have occurred with respect to this phrase between 1788 and 1868.[52] He wrote that "[t]he stretch of time between the two events [1788 and 1868] was more than half a century. . . . It is hardly surprising that in the post-bellum epoch new meanings *might* have accrued to older language. Such linguistic slippage is common."[53] Again, in this Article, we take no position on whether the President and Vice President hold an "office . . . under the United States" for the purposes of the disqualification element of Section 3 of the Fourteenth Amendment. But we do not think linguistic drift occurred with respect to the phrase "officer of the United States."[54]

Absent contrary evidence, the default presumption should be one of linguistic continuity, rather than a presumption of linguistic drift. In other words, the proponents of the view that Section 3's jurisdictional element applies to the presidency have the burden to prove two propositions. First, proponents must show that the particular linguistic drift involving the Constitution's "officer of the United States"-language had actually occurred. And second, proponents must show that Section 3's "officer of the United States"-language, in fact, drifted to include the presidency. In other words, even if the meaning shifted over time, it is not self-evident that the

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[52] *See* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 265 (2019) (discussing linguistic drift); *see also* James C. Phillips & Josh Blackman, *Corpus Linguistics &* Heller, 56 WAKE FOREST L. REV. 609, 622 (2021).

[53] Seth Barrett Tillman, Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar—Contradictions and Suggested Reconciliation 70 n.119 (Feb. 1, 2012) [https://perma.cc/5CSU-66A2] (unpublished manuscript) (emphasis added) (citing Jack Tsen-Ta Lee, *The Text Through Time*, 31 STATUTE L. REV. 217 (2010)).

[54] *See infra* Part III.

shift would embrace the presidency. Both propositions must be proven.

We do not think either proposition can be proven. Rather, there is some good authority to reject the position that Section 3's "officer of the United States"-language extends to the presidency. First, *United States v. Mouat* (1888) strongly suggested that officers are appointed, and not elected. Second, *United States v. Hartwell* (1867) strongly suggested that officers are appointed, and not elected. Third, other contemporary sources—such as a treatise on election law and proceedings from an 1867 impeachment trial—further rebut arguments in favor of linguistic drift. In light of this evidence, the strongest position is that the meaning of "officer of the United States" did not drift between 1788 and 1868. The President was not an "officer of the United States" in 1788, and the President was not an "officer of the United States" in 1868.

A. *UNITED STATES V. MOUAT* REBUTS ARGUMENTS IN FAVOR OF LINGUISTIC DRIFT

The Supreme Court decided *United States v. Mouat* in 1888, two decades after the ratification of the Fourteenth Amendment.[55] *Mouat* interpreted a statute that used the phrase "officers of the United States."[56] It provided, in part, that "no credit shall be allowed to any of the disbursing *officers of the United States* for payment or allowances in violation of this provision."[57] This statute was enacted in June 1873, five years after the Fourteenth Amendment was ratified in 1868.

Justice Samuel Miller, who served on the Supreme Court during the ratification of the Fourteenth Amendment, wrote the majority opinion in *Mouat*. He grounded his understanding of the statutory

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[55] United States v. Mouat, 124 U.S. 303 (1888).
[56] *Id.* at 307.
[57] *Id.* at 305 (citing 18 Stat. 72) (emphasis added).

phrase "Officers of the United States" in the Appointments Clause. Article II, Section 2 of the Constitution provides:

> 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[58]

Justice Miller concluded, "[u]nless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not strictly speaking, an *officer of the United States*."[59] In other words, if a person was not appointed pursuant to the paths identified in Article II, Section 2, then he is likely not an "officer of the United States." Moreover, the discussion in *Mouat* was not limited to appointed officers. Rather, the *Mouat* test governs all persons in "the service of the government." The President is in "the service of the government," but he is not appointed by a President, a court of law, or a department head; indeed, he is not appointed at all. Notwithstanding the process followed by presidential electors, the Constitution expressly states that the President "shall . . . be elected."[60] Under the rule in *Mouat*, the President is not "strictly speaking" an "officer of the United States." Here, *Mouat* strongly

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[58] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

[59] *Mouat*, 124 U.S. at 307 (emphasis added).

[60] U.S. CONST. art. II, § 1, cl. 1; *see also id.* art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which *he shall have been elected*, and he shall not receive within that Period any other Emolument from the United States, or any of them." (emphasis added)).

suggests that the meaning of the phrase "officers of the United States" remained stable from 1788 through 1868.

Mouat provides some probative evidence of the original public meaning of Section 3's "officer of the United States"-language. Justice Miller's opinion also provides some evidence rebutting any presumption of post-1788 linguistic drift with respect to the phrase "officer of the United States." Finally, *Mouat* rebuts the position that, circa 1868, the president was obviously, plainly, or clearly an "officer of the United States."

In short, *Mouat* makes the linguistic drift view very difficult to defend. For this argument to work, the meaning of "officer of the United States" must have drifted back and forth: (1) in 1788, the phrase did not include the presidency; (2) in 1868, the phrase did include the presidency; (3) but during the five year span between 1868 and 1873, the meaning of that phrase drifted back to its original 1788 meaning, such that the President was not an "officer of the United States." We find that proposed chronology implausible.

B. *UNITED STATE V. HARTWELL* REBUTS ARGUMENTS IN FAVOR OF LINGUISTIC DRIFT

United States v. Hartwell was decided contemporaneously with the ratification of the Fourteenth Amendment.[61] This case further refutes the possibility of linguistic drift. In *Hartwell*, a clerk in the Treasury Department was charged with embezzlement. The relevant 1846 statute applied to an "officer" who was "charged with the safe-keeping of the public money."[62] The defendant claimed that because he was not an "officer," the indictment was defective. The Supreme Court disagreed and found that he was an "officer." Justice Noah Swayne wrote the majority opinion. He offered a two-part definition of an office. First, "[a]n office is a public station, or employment,

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[61] United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867).
[62] *Id*. at 392 (citing 9 Stat. 59).

conferred by the appointment of government."[63] Second, "[t]he term [office] embraces the ideas of tenure, duration, emolument, and duties."[64]

In *Hartwell*, the clerk "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power."[65] The court did not expressly connect the term "officer" in the embezzlement statute with the phrase "officer of the United States" in the Appointments Clause. However, the court's discussion of the appointment being made by the head of the department suggests the two concepts were closely related—rightly so, in our view. *Hartwell*, like *Mouat*, understood officers to be appointed, and not elected. Eleven years later, the Court decided *United States v. Germaine*.[66] And the *Germaine* Court repeated *Hartwell*'s four-factor test.[67]

In the modern era, the Supreme Court has cited the second part of *Hartwell*'s test, as repeated in *Germaine*, to determine whether a position is a principal or inferior "officer of the United States."[68] But this second part of *Hartwell* was premised on the first part: an officer is "conferred by the appointment of government." Presidents are not

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[63] *Id.* at 393 (emphasis added).

[64] *Id*.

[65] *Id.* at 393–94.

[66] United States v. Germaine, 99 U.S. 508 (1878).

[67] *Id.*

[68] Morrison v. Olson, 487 U.S. 654, 672 (1988) ("In our view, these factors relating to the 'ideas of tenure, duration . . . and duties' of the independent counsel, are sufficient to establish that appellant is an 'inferior' officer in the constitutional sense." (citing *Germaine*, 99 U.S. at 511–12)); *cf. Morrison*, 487 U.S. at 718 (Scalia, J., dissenting) (noting that the four-factor test from *Germaine* "was dictum in a case where the distinguishing characteristics of inferior officers versus superior officers were in no way relevant, but rather only the distinguishing characteristics of an 'officer of the United States' (to which the criminal statute at issue applied) as opposed to a mere employee."). We agree with Justice Scalia. *See also* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018), [hereinafter Tillman & Blackman, *Mueller*] [https://perma.cc/XK32-Q3JW] ("*Germaine*'s four-factor test had nothing to do with whether a position was held by an . . . 'inferior' or 'principal' officer. *Germaine* concerned the distinction between an 'officer of the United States' and an 'employee of the United States.'").

"appointed" by the "government." Presidents are "elected" by the people.[69] Chief Justice Roberts announced the same view in *Free Enterprise Fund*: "[t]he people do not vote for the 'Officers of the United States.'"[70]

From *Hartwell* to the present, the Supreme Court has consistently understood that "offices" and "officers" refer to appointed positions. These authorities place the President outside the scope of the phrase "officer of the United States" in Section 3.

C. OTHER CONTEMPORARY AUTHORITIES FURTHER REBUT ARGUMENTS IN FAVOR OF LINGUISTIC DRIFT

There is additional evidence that the phrase "officer of the United States" in Section 3 does not extend to the presidency. Furthermore, this evidence is roughly contemporaneous with the 1868 ratification of the Fourteenth Amendment. In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States."[71] Instead, Booth stated, the President is "part of the Government."[72]

Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one

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[69] *See supra* note 51 and accompany text (discussing the elected President).

[70] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497 (2010).

[71] CONGRESSIONAL RECORD CONTAINING THE PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP, LATE SECRETARY OF WAR, ON THE ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES 145 (Washington, Government Printing Office 1876) (reproducing May 27, 1876 statement of Newton Booth, Senator from California); *see also id*. at 130 (reproducing May 25, 1876 statement of George Sewell Boutwell, Senator from Massachusetts, who stated: "[F]or according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers.").

[72] *Id.* at 145.

branch of 'the Government.'"[73] In 1866, the Supreme Court observed that "the President is the executive department."[74] And more recently, the Supreme Court described the presidency in the same fashion: "The President is the only person who alone composes a branch of government."[75]

These sources tend to rebut any argument in favor of post-1788 linguistic drift with respect to the phrase "officer of the United States." Likewise, these sources provide some evidence that in the period following the Civil War, the phrase "officer of the United States" did not extend to elected positions, including the presidency. We do not suggest that there is no counter-authority. But until proponents of the view that Section 3's "officer of the United States"-language includes the presidency put forward evidence as probative as *Mouat* and *Hartwell*, we will maintain that the original public meaning did not shift between 1788 and 1868. The President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.

IV. CONSISTENT WITH SUPREME COURT PRECEDENT, THE EXECUTIVE BRANCH HAS LONG CONTENDED THAT ELECTED OFFICIALS, LIKE THE PRESIDENT, ARE NOT "OFFICERS OF THE UNITED STATES"

The Executive Branch has long relied on Justice Miller's discussion of "Officers of the United States" in *Mouat*. In 1918, Attorney General Thomas Watt Gregory concluded that "[a]n assistant United States district attorney is not an employee of the United States within the meaning of the Federal Employees'

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[73] DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT 346 (Philadelphia, J.B. Lippincott & Co. 1878).

[74] Mississippi v. Johnson, 71 U.S. 475, 500 (1866).

[75] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020).

Compensation Act."[76] Citing *Mouat*, he assumed that if a "person in the service of the Government [is] not appointed by the President, a court, or a head of a department, *and not elect[ed]*," then he is not an officer, but "is an employee."[77] The Executive Branch has long taken the position that the phrase "Officers of the United States" does not extend beyond persons appointed pursuant to Article II, Section 2 procedures.

In 1943, Attorney General Francis Biddle cited *Mouat* for the proposition that "under the *Constitution* of the United States, *all* its officers were appointed by the President . . . or by a court of law, or the head of a department."[78] Biddle's reading of *Mouat* did not distinguish "officers of the United States" as used in the statute from "Officers of the United States" as used in the Constitution. And, Biddle reasoned that "all" officers must be *appointed*—not *elected*.

In 2007, an Office of Legal Counsel (OLC) memorandum echoed this position. Citing *Mouat*, the memorandum stated, "[i]t is true that an individual not properly appointed under the Appointments Clause cannot *technically* be an officer of the United States."[79] The modifier "technically" is significant. Here, OLC suggests that the Constitution uses the phrase "officer of the United States" in a technical sense. The Constitution does not use the phrase "officer of the United States" as a colloquialism. In other words, the Framers did not use the phrase "officer of the United States" as it is used in

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[76] Employee Compensation Act—Assistant United States Attorney, 31 U.S. Op. Atty. Gen. 201, 202 (1918) (citing United States v. Mouat, 124 U.S. 303, 307 (1888)) (emphasis added).

[77] *Id.* (emphasis added). *Buckley v. Valeo* also distinguished between an "officer of the United States" and an "employee of the United States." *See* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976). *See also* Tillman & Blackman, *Mueller*, *supra* note 68 (concluding that under *Buckley v. Valeo*, Special Counsel Mueller was not an "officer of the United States," but a mere "employee of the United States").

[78] Prosecution of Claims by Members of War Price and Rationing Boards, 40 U.S. Op. Atty. Gen. 294, 296 (1943) (Biddle, A.G.) (emphasis added).

[79] Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007) (emphasis added).

common parlance—a position that performs services for the United States of America. Rather, the phrase "officer of the United States" was used in a technical fashion to refer to specific positions.

Indeed, *Mouat* recognized that the phrase "officer of the United States" was a technical term. The *Mouat* Court found that a "person in the service of the Government" "is not, *strictly speaking*, an officer of the United States" unless he "holds his place by virtue of an appointment. . . ."[80] This 2007 OLC opinion strongly supports our position: the President, who is elected and not appointed, cannot be an officer of the United States.

Other executive-branch opinions have reached a similar conclusion when interpreting "officer"-language in statutes or regulations. Future-Chief Justice William H. Rehnquist observed that federal courts do not extend general "officer"-language in statutes to the President, "unless there is a specific indication that Congress intended to cover the Chief Executive."[81] Future-Justice Antonin Scalia also embraced this position in an OLC opinion. He wrote, "when the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or Vice President."[82] These authorities, which are consistent with *Mouat*, *Hartwell*, and *Free Enterprise Fund*, provide further support for our position: the elected President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.

V. ADVOCATES WHO ARGUE THAT THE PRESIDENT IS AN "OFFICER OF THE UNITED STATES" FOR PURPOSES OF

[80] *Mouat*, 124 U.S. at 307 (emphasis added).

[81] Memorandum from William H. Rehnquist, Asst. Att'y Gen., to the Honorable Egil Krogh, Re: Closing of Government Offices in Memory of Former President Eisenhower, OLC, at 3 (Apr. 1, 1969) [https://perma.cc/P229-BAKL].

[82] Memorandum from Antonin Scalia, Asst. Att'y Gen, to Honorable Kenneth A. Lazarus, Re: Applicability of 3 C.F.R. Part 100 to the Pres. and V.P., OLC, at 2 (Dec. 19, 1974) [https://perma.cc/GQA4-PJNN].

SECTION 3 HAVE FAILED TO MEET THEIR BURDEN OF PERSUASION

Professor Gerard Magliocca wrote an analysis of Section 3 of the Fourteenth Amendment.[83] He cited our prior work suggesting that the President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.[84] Magliocca did not reach a firm position on this issue. But he acknowledged that "[i]f there is an attempt to apply Section Three to former President Trump for his role in the events of January 6, 2021, the issue of whether Section Three applies to him or to the presidency itself will surely be part of any ensuing litigation."[85]

Magliocca cited congressional debates about draft versions of the Fourteenth Amendment. These records suggest that some members of Congress thought the presidency was an "office . . . under the United States" for purposes of Section 3's disqualification element.[86] Other scholars reached similar conclusions. [87] This evidence, however, does not clearly control the threshold question presented by the jurisdictional element: is the President an "officer of the United States."

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[83] Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMM. 87, 93 n.29 (2021).

[84] *Id*. (citing Josh Blackman & Seth Barrett Tillman, *Is the President an 'Officer of the United States' for Purposes of Section Three of the Fourteenth Amendment*, REASON-VOLOKH CONSPIRACY (Jan. 20, 2021) [https://perma.cc/A45G-PCQJ]).

[85] *Id*.

[86] *Id*. at 93–94 (discussing, for example, statements of Rep. Morrill and Rep. Bingham).

[87] *See* Mark Graber, *Their Fourteenth Amendment, Section 3 and Ours*, JUST SECURITY (Feb. 16, 2021) [https://perma.cc/26BG-W7Q7] ("In the absence of any statement even hinting the contrary, no Republican could have believed that traitors should not become members of Congress, but ought to be allowed to be President of the United States."); Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021) [https://perma.cc/FBS4-HFYN] ("But the framers of the 14th Amendment clearly thought that Section 3 covered the president."). Hemel seems to have conflated Section 3's jurisdictional and disqualification elements.

Magliocca also made a purposivist argument. He wrote that "Congress did not intend (nor would the public have understood) that Jefferson Davis could not be a Representative or a Senator but could be President."[88] In 2009, Professor Saikrishna Prakash made this same argument in response to an article by Tillman.[89] But these intuitions also concern the scope of Section 3's disqualification element. These intuitions do not squarely resolve the issue of whether a President was an "officer of the United States" for purposes of Section 3's jurisdictional element.

Advocates who argue that the President is an "officer of the United States" for purposes of the jurisdictional element have presented three broad arguments. First, advocates cite scattered sources that refer to the President as an "officer" or an "officer of the United States." Second, advocates hypothesize that the Framers of the Fourteenth Amendment may have feared a former President, who took one constitutional oath and later supported the Confederacy, being re-elected to the presidency. Third, advocates argue that Section 3's jurisdictional element should be read to cover as many positions as possible, and not exclude the presidency. In our view, these arguments fail to meet the burden of persuasion. Finally, if any doubt remains, the democracy canon supports excluding the president from the scope of Section 3's jurisdictional element. Let the people, and not partisan state election boards decide who can be the next President.

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[88] Magliocca, *supra* note 83, at 93–94.

[89] Saikrishna B. Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 DUKE J. CONST. L. & PUB. POL'Y 143, 161 (2009) ("Jefferson Davis and Robert E. Lee could have served as President of the United States without a congressional waiver of the bar against oath-breaking confederates. Reading this Amendment to require a congressional waiver for former confederates serving as postmasters or corporals but to not require such a waiver when a turncoat wished to serve as President would be rather strange."). Prakash was responding to Tillman's argument that a sitting President could serve in the Senate. *See* Seth Barrett Tillman, *Why Our Next President May Keep His or her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107 (2009).

A. SCATTERED REFERENCES TO THE PRESIDENT AS AN "OFFICER" ARE NOT SUFFICIENT TO OVERCOME THE EVIDENCE IN SUPPORT OF OUR READING OF SECTION 3'S JURISDICTIONAL ELEMENT

Myles S. Lynch wrote an article about Section 3 of the Fourteenth Amendment. He rejected the distinction we draw between an "office . . . under the United States" and an "officer of the United States."[90] And he contended that the President is *both* an "office . . . under the United States" and an "officer of the United States."[91] To support his thesis, Lynch cites three categories of evidence. First, he looks to language used in the 1862 loyalty oath statute. Second, he cited a circuit court decision from 1837. Third, he cites scattered references that the President is an "officer of the United States." These sources provide only minimal support for Lynch's position, and are not sufficient to overcome the evidence in support of our reading of Section 3's jurisdictional element.

1. The 1862 Loyalty Oath statute does not support the argument that the Presidency holds an "Office … under the United States" for purposes of Section 3's jurisdictional element

Lynch cited the 1862 loyalty oath statute to support his reading of Section 3.[92] The law required certain federal positions to swear they did not support people "engaged in armed hostility" against the

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[90] Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL OF RTS. J. (forthcoming 2021) (manuscript at 11) [https://perma.cc/6EYJ-TMQ2]. At present, Lynch has only posted a draft of his article to the Social Science Research Network. In this Article, we respond to what Lynch has posted online and to other materials he has cooperatively made available to us.

[91] *Id.* at 7.

[92] Act to Prescribe an Oath of Office, and for other Purposes, ch. 127, Pub. L. No. 37-127, 12 Stat. 502 (1862) (repealed 1868).

United States.[93] Specifically, the law imposed an additional oath requirement on "every person elected or appointed to any *office of honor or profit under the government of the United States*, either in the civil, military or naval departments of the public service, *excepting the President of the United States*."[94] The statute used the phrase "office . . . under the government of the United States," which is similar, but not identical to the phrase "office . . . under the United States." Lynch drew an inference from this statute: if the President did not hold an "office . . . under the United States," then there would be no need to expressly exempt him. Therefore, Lynch reasoned, the presidency would be considered an "office . . . under the United States."

This inference might have some bearing on Section 3's disqualification element, which uses the phrase "office . . . under the United States." But this inference does not plainly affect the meaning of Article 3's jurisdictional element, which refers to an "officer of the United States." If "officer of the United States" has a different meaning than "office . . . under the United States"—the central thesis of this Article—then the 1862 oath statute does not shed much light on Section 3's jurisdictional element.

Even if you disagree with our thesis, there are other reasons to express caution about relying on the 1862 loyalty statute. This bill was very controversial. There was a vigorous congressional debate about the scope of the law's statutory language. In 1863, Senator Charles Sumner of Massachusetts put forward a resolution requiring all Senators to take the newly-prescribed loyalty oath.[95] Senator James Asheton Bayard, Jr. of Delaware, however, objected to the constitutionality of this resolution. Bayard, a former United States Attorney for Delaware, had authored an antebellum treatise on the

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[93] *Id.*

[94] *Id.* (emphasis added).

[95] CONG. GLOBE, 38th Cong., 1st Sess. 31, 37 (1864) (statement of Sen. Bayard) [https://perma.cc/UD62-KPJ4]; Seth Barrett Tillman, *The Foreign Emoluments Clause – Where the Bodies are Buried: "Idiosyncratic" Legal Positions*, 59 S. TEX. L. REV. 237, 260 (2017) [hereinafter Tillman, *Bodies*].

Constitution,[96] and chaired the Judiciary Committee in the 35th and 36th Congresses.[97] He questioned whether the statute's "office . . . under the United States"-language could reach members of Congress. Congress can mandate that *appointed* officers take an additional oath, beyond the ordinary oath prescribed by the Article VI Oath or Affirmation Clause, because Congress created those positions by statute. But in Bayard's view, Congress should not be able to add additional qualifications for *elected* positions that are created by the Constitution, such as members of Congress.[98] Bayard concluded that members of Congress did not hold an "Office . . . under the United States."[99] Bayard based his conclusion, in part, on a report prepared in 1793 by Secretary of the Treasury Alexander Hamilton.[100] After the debate, a majority of Senators disagreed with Bayard. Senator Sumner's resolution passed.[101] And Bayard, a three-term Senator, resigned in protest on a point of principle.[102] The loyalty oath would not last long. Congress repealed the statute in 1868, the same year the Fourteenth Amendment was ratified.[103]

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[96] *See* JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (Philadelphia, Hogan & Thompson 1833). Bayard's treatise continues to be cited by the Supreme Court and in modern scholarship. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 981 (1991) (quoting BAYARD); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 486 & n.263 (2017) (quoting BAYARD).

[97] *See Bayard, James Asheton, Jr. (1799–1880)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–PRESENT [https://perma.cc/NW8G-FYMR]; *History of the District of Delaware*, UNITED STATES DEPARTMENT OF JUSTICE [https://perma.cc/NC5W-UZJZ].

[98] CONG. GLOBE, 38th Cong., 1st Sess. 31, 37 (1864) (statement of Sen. Bayard) [https://perma.cc/UD62-KPJ4].

[99] *Id.*

[100] For the relevance of Bayard's speech and Hamilton's report, *see* Tillman, *Bodies*, *supra* note 95, at 259. Bayard was relying on an edited reproduction of Hamilton's original document—the reproduction was prepared in the 1830s.

[101] Tillman, *Bodies*, *supra* note 95, at 261.

[102] *Id.*

[103] *See generally The Senate's First Act—The Oath Act*, UNITED STATES SENATE [https://perma.cc/V9B7-A6VY] (discussing 1862 Ironclad Oath, and 1868 and 1884 repeal of that oath).

There is one final reason why the loyalty oath poses special difficulties for Lynch. In his view, members of Congress do not hold "office[s] . . . under the United States."[104] But the 1862 statute, as understood by Senator Sumner, applied to members of Congress. In other words, Sumner viewed members of Congress as "office[s] . . . under the United States." This understanding of the statute undermines Lynch's position in regard to Section 3's jurisdictional element. Ultimately, Lynch may find himself in agreement with Bayard, who argued that members of Congress do not hold "office . . . under the United States." We think the better position is to look to other, and more on-point, sources to understand Section 3's jurisdictional element.[105]

2. Stokes v. Kendall *does not shed light on the meaning of Section 3's jurisdictional element*

Lynch cited a second source of authority to support his position that the President is an "officer of the United States" for purposes of Section 3's jurisdictional element: *United States ex rel. Stokes v. Kendall*, a circuit court decision from 1837.[106] This dispute led to the Supreme Court's definitive statement of the president's duty to oversee his principal officers.[107]

During the John Quincy Adams administration, Stockton & Stokes received important carrier contracts to assist the Postal Service. That firm was loyal to Adams. Upon taking office in 1829, President Jackson refused any service from the firm. Amos Kendall was appointed postmaster general in 1835. He found that the Adams administration overpaid Stockton & Stokes in credits. Kendall sought to correct that error by eliminating the credits. Kendall wrote in his autobiography that when he raised the issue with President Jackson,

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[104] Lynch, *supra* note 90.

[105] *See supra* Parts II, III, and IV.

[106] United States *ex rel.* Stokes v. Kendall, 26 F. Cas. 702, 752 (C.C.D.C. 1837) (No. 15,517).

[107] Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).

Old Hickory "remitted the matter to [his] discretion."[108] Kendall knew what had to be done, and removed the credits from the ledgers.

Congress did not approve of the nonpayment. Rather, Congress passed a law requiring the solicitor of the Treasury Department to review the accounts, settle the differences, and order the postmaster general to apply the credits. After receiving the solicitor's judgment, Kendall paid out most of the credits, but withheld some that he believed to be outside the congressional edict. This act of defiance was purportedly done "by President Jackson's order."[109]

Stockton & Stokes continued to press its claims after President Martin Van Buren succeeded Jackson in 1837. The firm "called on the President, under his constitutional power to take care that the laws were faithfully executed, to require the postmaster general to execute this law, by giving them the further credit" to which they claimed entitlement.[110] The circuit court, per Chief Judge Cranch, issued a writ of mandamus compelling the postmaster general to apply the credits in full.[111] On appeal, the Supreme Court agreed, and held that the postmaster general must comply with positive congressional edicts, lest the duty to take care that the laws be faithfully executed become a "dispensing power."[112] On appeal, Chief Justice Taney wrote the majority opinion. The Court stated, "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution."[113] The Supreme Court has reiterated *Kendall*'s reasoning. The principles from that case are

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[108] AMOS KENDALL, AUTOBIOGRAPHY OF AMOS KENDALL 350 (William Sitckney, ed., Boston, Lee & Shepard Publishers 1872).

[109] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY: 1836–1918, at 44 (1926).

[110] *Kendall*, 37 U.S. at 538.

[111] *United States ex rel. Stokes*, 26 F. Cas. at 702.

[112] *Kendall*, 37 U.S. at 608 (citing the Take Care Clause).

[113] *Id.* at 613.

"fundamental and essential," and without them, "the administration of the government would be impracticable."[114]

Lynch cited a single sentence from Chief Judge Cranch's circuit court decision that used the phrase "officer of the United States." Lynch used that sentence to interpret the phrase "officer of the United States" in Section 3's jurisdictional element. But we think Lynch read *Kendall* out of context.

In his opinion, Cranch described the nature of the Postmaster General's role. He explained that the Postmaster General does not work at the President's absolute command. Rather, the Postmaster General "is responsible to the United States, and not to the president." [115] The President can only command the Postmaster General when, "express law, authorized to assign [to the President] duties over and above those specially prescribed by the legislature." [116] The Postmaster General is not an officer of the President. Rather, he is "the officer of the United States, and so called in the constitution, and in all the acts of congress which relate to such officers."[117]

Here, Cranch was not interpreting the phrase "officer of the United States" as used in the Appointments Clause or in any other constitutional provision. Cranch also was not interpreting how the phrase "officer of the United States" was used in any statute or other positive law. Rather, Cranch was making a broader point about our system of government: officers are responsible to the nation and its laws, and not to the President. Cranch explained, "the postmaster-general must judge for himself, and upon his own responsibility, not

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[114] United States *ex rel.* Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 304 (1854). *See also* United States v. Midwest Oil Co., 236 U.S. 459, 505 (1915); Texas v. United States, No. 6:21-CV-00016, 2021 WL 3683913, at *37 (S.D. Tex. Aug. 19, 2021) (citing Brief for the Cato Institute, Professor Randy E. Barnett & Professor Jeremy Rabkin as *Amici Curiae* Supporting Respondents at 5–6, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) [https://perma.cc/DXM2-VHJH]).

[115] *United States ex rel. Stokes*, 26 F. Cas. at 752.

[116] *Id.*

[117] *Id.*

to the president, but to the United States, whose officer he is."[118] The Constitution "does not authorize the president to direct [the Postmaster] how he shall discharge"[119] his duties. In the very next sentence, Cranch wrote:

> The president himself, although called by the postmaster-general, in his answer, 'the highest representative of the majesty of the people, in this government,' is but an *officer of the United States*, the head of one of the departments into which the sovereign power of the nation is divided; and, as that is the executive department, he may, with propriety, be called the chief magistrate *of the United States*.[120]

Lynch cited this sentence as evidence that the President is an "officer of the United States" for purposes of Section 3's jurisdictional element. We disagree. Cranch used the phrase "of the United States" here in the same way that he did with respect to the Postmaster General: The President is responsible to the nation and its laws. In using "officer of the United States"-language, Cranch was not interpreting either a statute or a constitutional provision. He was using this same language in a more colloquial, or even a philosophical sense.

Cranch was not making a precise statement about what constitutional language governs or includes the President. Rather, he juxtaposed "officer of the United States" and "chief magistrate of the United States." Cranch made a broader point about constitutional governance—with some well-positioned jabs at President Jackson.

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[118] *Id.*
[119] *Id.*
[120] *Id.*

(Cranch, a Federalist, was the nephew of President John Adams, and was also President John Quincy Adams's cousin.[121])

This brief aside from a circuit court decision is a very thin reed on which to place the construction of Section 3, which was ratified three decades later. Indeed, no comparable language appears in Chief Justice Taney's Supreme Court decision. By contrast, *Free Enterprise Fund* was an Appointments Clause case where the scope of the Constitution's "Officers of the United States"-language was a live issue. Chief Justice Roberts wrote, "[t]he people do not vote for the 'Officers of the United States.'" [122] Moreover, *Mouat* and *Hartwell* provide far more authoritative support for the proposition that the President is not an "officer of the United States." We do not put much weight on this aside from *Kendall*.

3. Scattered references that suggest the President is an "officer of the United States" or an "officer" cannot establish the precise meaning of a phrase used in Section 3's jurisdictional element

Finally, Lynch cited scattered sources in which the President was referred to as an "officer of the United States." For example, in 1824, President James Monroe sent a communication to the Senate and House.[123] Monroe recounted an incident in which the Massachusetts Governor refused to call forth the state militia. The state executive argued that the state executive must consent to that request. Moreover, according to Monroe, the Governor argued that the militia

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[121] *See John Quincy Adams to Lucy Cranch, June 1, 1778*, FOUNDERS ONLINE (last visited Dec. 8, 2021) [https://perma.cc/E83G-8N6] ("Late in 1800 President John Adams, the husband of Cranch's aunt Abigail Smith Adams, appointed [William Cranch] a commissioner of the federal district, and early the next year he made him an assistant judge for the United States Circuit Court for the District of Columbia. . . . Despite Cranch's Federalist views, [Thomas Jefferson] named him chief justice for the circuit court, in which capacity he served until his death."); *id.* ("Only the immediately preceding letter from [John Quincy Adams] to his cousin William Cranch, Lucy's brother, has been found.").

[122] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010).

[123] S. JOURNAL, 24th Cong., 1st Sess. 190 (1824) [https://perma.cc/CYY9-3WYC].

"could not be commanded by a *regular officer of the United States*, or other officer than of the militia, *except by the President*, in person." In the very next sentence, Monroe wrote "this decision of the Executive of Massachusetts was repugnant to the constitution of the United States, and of dangerous tendency."

Lynch read this correspondence to suggest that the President is an "officer of the United States." That conclusion is not obvious, particularly because Monroe's statement was awkward. The construction of the sentence can be read in two different ways. First, that the President is an officer of the United States who can command the militia. Second, that the militia could be commanded by militia officers who are not "regular officers of the United States," but the President is a militia officer and not an "officer of the United States." This second reading is consistent with the Constitution's militia clause, which puts the state militias under presidential control in certain circumstances.[124]

We are not sure which reading is correct. We should be hesitant to put much weight on a poorly-crafted comment from President Monroe, which he used to assail the allegedly unconstitutional viewpoint of the Massachusetts Governor. And even if Lynch's reading were correct, Monroe was not interpreting how the phrase "officer of the United States" was used in Section 3 or any then-extant constitutional provision.

Lynch also cited an 1865 proclamation by President Andrew Johnson. It stated, "the President of the United States is, by the constitution, made commander-in-chief of the army and navy, as well as the chief civil officer."[125] Here, the phrase "chief civil officer"

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[124] U.S. CONST. art. 2, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

[125] *After Slavery: Educator Resources, 3. President Andrew Johnson Appoints William W. Holden Provisional Governor of North Carolina*, LOWCOUNTRY DIGIT. HIST. INITIATIVE [https://perma.cc/9Z63-9K8B].

is distinct from the language used in Section 3's jurisdictional element: "officer of the United States."

There may be other scattered statements in records of congressional debates that refer to the President as an "officer of the United States." We don't doubt it. People in government and academics may use imprecise language to describe different types of offices and officers. And in everyday parlance, the President is an officer of the United States of America.[126] We have never said otherwise. We have never suggested that authority is not divided. However, these scattered references cannot establish the precise meaning of a phrase used in Section 3 and elsewhere in the Constitution.

B. FEARS OF A FORMER CONFEDERATE BECOMING PRESIDENT WOULD NOT CONTROL WHETHER A FORMER PRESIDENT, WHO TOOK ONLY THE PRESIDENTIAL OATH, COULD BE DISQUALIFIED

We acknowledge that there is a purposivist argument supporting the view that the President is an "officer of the United States" with respect to Section 3's jurisdictional element. Could it really be, the argument goes, that virtually every elected and appointed position in the federal and state governments would be encompassed by Section 3's jurisdictional element, but not the presidency? After all, a former President of the United States—John Tyler—actually was elected to the Confederate congress![127] Would the Framers really have exempted Tyler (or men like him) from disqualification? Professor Magliocca, citing the Tyler hypothetical, suggested that "the idea of an insurrectionist President was real, not

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[126] *See supra* Part IV (discussing Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007)).

[127] *Tyler, John*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/Y6F5-SWCE].

a far-fetched hypothetical."[128] And John Breckinridge, who had served as Vice President of the United States under President Buchanan, later served as a general in the Confederate army.[129]

There is a pragmatic rationale that explains why the presidency was excluded from the jurisdictional element of Section 3. By the time the Fourteenth Amendment was ratified in 1868, there were no living Presidents that had supported the Confederacy. Tyler died in 1862.[130] Moreover, Tyler had served as Senator from Virginia. Had Tyler still been alive, he was unquestionably covered by Section 3's jurisdictional element.

The other four living former Presidents—Fillmore, Pierce, Buchanan, and Johnson—had not supported the Confederacy. And each of those four officials had previously served in Congress, so they were unquestionably covered by Section 3's jurisdictional element. Moreover, Breckinridge, the former Vice President of the United States who joined the Confederacy, had previously served as a U.S. Senator.[131] Therefore, he was already expressly covered by Section 3's jurisdictional element.

At the time the Fourteenth Amendment was ratified, there were zero former living U.S. Presidents and Vice Presidents who supported the Confederacy, and who would not otherwise fit within the express language used in Section 3's jurisdictional element. Thus, the Framers of the Fourteenth Amendment—whose focus was on past wrongdoing during the Civil War—had no pressing reason to draft Section 3's jurisdictional element to cover presidents. And we are not aware of any evidence that Section 3 was forward-looking,

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[128] Gerard N. Magliocca, *Section Three Questions Answered*, BALKINIZATION (Jan. 17, 2021, 7:19 PM) [https://perma.cc/Z4PE-Q8WJ].

[129] *Breckinridge, John Cabell*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/BDK8-JTZ7].

[130] *Tyler, John*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/Y6F5-SWCE].

[131] *Breckinridge, John Cabell*, HISTORY, ART & ARCHIVES: U.S. H.R. (last visited Aug. 3, 2021) [https://perma.cc/BDK8-JTZ7].

and was drafted to disqualify future presidents who might participate in future insurrections.

We think the democracy canon provides further support for our position.[132] Professor Richard L. Hasen explains that under this canon, a provision of the Constitution that might be read to "limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor."[133] This presumption equally applies to the political candidate who wishes to run for an elected position. Given two reasonable readings of the phrase "officer of the United States" in Section 3, the democracy canon favors the reading that expands democratic choice. Under our approach, voters and electors can select the President of their choice. Under Lynch's reading of Section 3, voters and electors nationwide are permanently disenfranchised from selecting a presidential candidate. Indeed, they are disenfranchised from selecting a person who was already elected as President who seeks a second term. We should prefer the former reading, which is consistent with the democracy canon.

Even in the wake of January 6, 2021, we should not read Section 3's text through the lens of the transitory and felt needs of the moment. The original public meaning of the Fourteenth Amendment, including Section 3's jurisdictional element, was fixed more than 150 years ago.

Finally, from 1789 through 2016, all of the presidents and vice Presidents had previously taken a constitutional oath in some other government position. We do not think this pattern was coincidental. Historically, a person could only rise to the level of presidency following prior public service in state or federal governments. The only President who never held any other public office, and thus did not take any other constitutional oath prior to his inauguration, was Donald Trump. The question this article seeks to answer—is the President an "officer of the United States" for purposes of Section 3's

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[132] Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).
[133] *Id.* at 71.

jurisdictional element—is relevant for only one President in American history: Donald Trump.

C. SECTION 3'S JURISDICTIONAL ELEMENTS, WHICH EXCLUDES CERTAIN STATE AND FEDERAL POSITIONS, SHOULD NOT BE VIEWED AS A CATCHALL PROVISION

Section 3's jurisdictional element is not a catchall. It does not cover *all* state and federal positions. There are gaps in coverage. For example, the jurisdictional element extends to a "member of any state legislature," as well as "an executive or judicial officer of any state." But Section 3's jurisdictional element does not extend to *appointed* positions in the state legislature. For examples, clerks and secretaries of state legislatures, who later served in the Confederate government, could not be subject to disqualification.

The same analysis would likely extend to appointed congressional positions in the federal government, like the Clerk of the House of Representatives and the Secretary of the Senate. Section 3's jurisdictional element extends to an "officer of the United States." Appointed legislative positions do not fall in this category.

We find support for our position based on the Oath or Affirmation Clause, which in our view served as a model for Section 3's jurisdictional element.[134] The Oath or Affirmation Clause provides the oath for "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States."[135] Appointed congressional positions are not expressly referenced in Article VI.

If Section 3's jurisdictional element was modeled after the Oath or Affirmation Clause, we can presume that appointed congressional positions are not covered by Section 3. As a result, a House Clerk or

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[134] *See supra* Part I.B.
[135] U.S. CONST. art. VI, cl. 3.

Secretary of the Senate, who took only one constitutional oath, and later joined the Confederate government, could not be disqualified. Section 3's jurisdictional element was not a catchall.

Likewise, Section 3's disqualification element is not a catchall. It did not bar a disqualified person from serving in state legislatures.[136] This omission was significant. After all, state legislators were central players as southern states declared their secession. Moreover, prior to the ratification of the Seventeenth Amendment, members of state legislatures chose their state's U.S. Senators.[137] The state legislatures also "prescribed" the rules for the "Times, Places and Manner of holding Elections for Senators and Representatives."[138] The decision to exclude state legislatures from Section 3's disqualification element had the potential to undermine Reconstruction.

Section 3, as a whole, had other glaring omissions. Disqualified persons could: (1) serve on state or federal juries; (2) serve as elected territorial officers; (3) serve as enlisted federal military or state militia personnel; (4) participate as national or state convention members under Article V; and many other positions. Section 3's jurisdictional and disqualification elements did not universally apply to every person who had supported the Confederacy.

None of the advocates for Section 3 disqualification of President Trump have advanced comprehensive arguments or marshaled systematic evidence that the President is an "officer of the United States." This position cannot simply be asserted or presumed, absent evidence. Advocates for Section 3 disqualification of President Trump have the burden of persuasion. They should rebut the evidence we have put forward in this article, and elsewhere.[139] And they must explain why the arguments and evidence they put forward

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[136] Tucker, *supra* note 37, at 54–56.

[137] U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years.").

[138] U.S. CONST. art. I, § 4, cl. 1.

[139] *See* Josh Blackman & Seth Barrett Tillman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, 2021 U. ILL. L. REV. ONLINE 190 (2021) (discussing scope of disqualification element).

carries the burden of persuasion notwithstanding contrary argument and evidence, and notwithstanding the democracy canon. And the evidence should be something more than personal intuitions or citations to the conclusory statements of other modern commentators asserting how the 1868 public *must* have understood the language of Section 3. Critically, these issues should be resolved before the next presidential election.

VI. THE COURTS, AND NOT CONGRESS, WILL LIKELY HAVE THE FINAL SAY OVER WHETHER PRESIDENT TRUMP CAN BE DISQUALIFIED UNDER SECTION 3 OF THE FOURTEENTH AMENDMENT

In 2021, the Senate did not convict President Trump based on the sole article of impeachment. Therefore, the Senate had no need to squarely face the question of whether a Section 3 disqualification against Trump would bar him from holding the presidency in the future. Similarly, even if the Senate had convicted President Trump in impeachment proceedings, and voted to disqualify him under the Impeachment Disqualification Clause, the Senate would not finally resolve the scope of that disqualification. To be sure, had the Senate tried, convicted, and disqualified President Trump, members of Congress could have stated on the record that they were barring Trump from ever serving again as President.

Those statements, however, would not be dispositive of the constitutional issue. Rather, the situation would arise in a different context. Imagine that Trump seeks re-election in the future. Trump would submit a ballot petition to state and territorial boards of election. But that submission could be contested in adversarial proceedings. County-wide, multi-country, and state-wide boards of elections regularly hear challenges to candidates' ballot petitions. These suits are brought by voters or candidates seeking to keep a rival candidate off the ballot. In such circumstances, the candidate seeking his place on the ballot is the defendant.

In certain circumstances, a board of election might strike a candidate's ballot petition *sua sponte*. However, we think that a board

would only do so where the petition is facially defective. For example, where a required document is entirely missing, or where the candidate's signature is missing, or where all required notarizations are absent, or where the petition itself makes admissions establishing that it is defective. We do not think a board *sua sponte* striking a ballot based on a novel reading of Section 3 would be consistent with established law. Nevertheless, it is also conceivable that a board of election might act *sua sponte* in making a Section 3 determination.[140]

It is also feasible that Congress will pass a concurrent or joint resolution to disqualify Trump under Section 3. At that juncture, boards of election would hear arguments presented through adversarial litigation. And the boards would be in a position to determine the effect (if any) of a Section 3 concurrent or joint resolution against President Trump's holding an "office . . . under the United States." Such a concurrent resolution is currently pending before the House.[141]

All of these determinations by election boards could be appealed to the courts. In all likelihood, it is not Congress, but the courts that would have the final say in resolving the scope—if any—of Section 3 disqualification imposed by the Senate or by both houses of Congress.

The courts may also be asked to resolve an appeal of a decision by an elections board in regard to a ballot-access dispute, which may involve these same issues. Additionally, even in the absence of any disqualification decision by the Senate or by Congress, an elections board might decide a Section 3-related ballot challenge. Specifically,

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[140] *See* Gerard Magliocca, *State Law and Section Three of the Fourteenth Amendment*, PRAWFSBLAWG (Aug. 26, 2021, 2:00 PM) [https://perma.cc/T2W9-5GYT] ("One possible scenario in 2023 goes something like this: Donald Trump declares that he is a candidate for President. Some state election officials rule that he is ineligible to run under Section 3. He sues and the constitutional issue is litigated. . . . . Of course, some states might decide to amend their election law to include Section 3 and thus eliminate the problem I've just described prior to 2023.").

[141] *See* H.R. Con. Res. 3, *supra* note 12.

if a voter or rival candidate brings a ballot access challenge, the board may conclude that President Trump is *already* disqualified to serve as President. Likewise, in the absence of any disqualification decision by the Senate or by Congress, the courts may be asked to decide, in the first instance, whether President Trump was disqualified for purposes of Section 3.

There are many possible routes through which these issues might be litigated before boards of election, the courts, or both. Still, there is a common thread: If the President is not an "officer of the United States" as that phrase was used in Section 3's jurisdictional element, then President Trump cannot be disqualified pursuant to Section 3.

Finally, it was not clear that the House managers actually sought to disqualify Trump under the Impeachment Disqualification Clause, *as well as* under Section 3. During the 2021 proceedings the sole article of impeachment was opaque on this point. This lack of clarity was perhaps intentional. Or the imprecision could be attributed to the House's rushed drafting. We think the article of impeachment only referenced Section 3, in the context of efforts to define a substantive impeachable offense. We expected that President Trump's counsel would have argued that the text of the House's single article of impeachment did not give him fair notice that he faced Section 3 disqualification. But because Trump was never convicted by the Senate, the disqualification issue was never discussed in any detail.

CONCLUSION

The issue presented in this Article is not merely a theoretical one. There is a real chance that the fate of the 2024 presidential election could turn on whether President Trump is disqualified under Section 3.

Imagine that Donald Trump runs for re-election. Soon, election boards throughout the country hear ballot challenges. However, the rulings are inconsistent. Some boards may even conclude that Trump is already disqualified based on Section 3 of the Fourteenth

Amendment, even absent any congressional or Senate resolution so deciding. Candidate Trump would be forced to take urgent appeals to the courts. And, in short order, the judiciary would have to resolve three pivotal questions. First, does President Trump fit within the jurisdictional element of Section 3: was he an "officer of the United States"? Second, does President Trump's conduct fit within the offense element: did he "engage[] in insurrection"? Third, does the disqualification element extend to the presidency: is the presidency an "office . . . under the United States"? And these questions would be promptly appealed to the Supreme Court.

If the Supreme Court agrees with us, and concludes that the President is not an "officer of the United States," then the case is over. Election boards that deemed Trump disqualified would be reversed. Trump could be listed on the ballot. The people, and not partisan election boards would select the next President.

However, if the Supreme Court disagrees with us, it would need to decide several other thorny issues. The Justices would be drawn into the maelstrom of January 6, 2021, and have to decide, as a matter of law, whether the President "engaged in insurrection." Here, abstention would not be a viable option. If the Court dismisses the case as a political question, election boards, and not the people, would decide the next presidency. States would face chaos if local election boards make different decisions. It is possible that within a given state, some counties would list Trump on the ballot and other counties would not. State supreme courts may not enforce uniform ballot procedures. This fragmented patchwork approach would be far more problematic than the selective recounts at issue in *Bush v. Gore*.

Perhaps the Supreme Court would leapfrog the offense element, and jump right to the disqualification element. If the presidency is not an "office . . . under the United States," then Trump could not be disqualified from the presidency. Thus, there is no need to decide if Trump "engaged in insurrection." In this article, we have made the case that the President is not an "officer of the United States" for purposes of Section 3's jurisdictional element. But we have been very careful to avoid resolving the scope of the phrase "office . . . under the United States" in the disqualification element. Suffice to say, in

light of the possibility of linguistic drift from 1788 till 1868, we think this issue is contestable. And in the end, the Supreme Court would decide whether President Trump remains on the ballot.

In 2020, the U.S. Supreme Court was able to avoid resolving any of the major election disputes. But 2024 may be different. A Supreme Court ruling on this issue could make *Bush v. Gore* seem mild by comparison. There are many prudential reasons for the Court to avoid deciding whether Trump engaged in insurrection, or whether Trump can be—or perhaps was already—disqualified. The Court should can stay out of that MAGA thicket. A narrow finding that the President is not an "officer of the United States" ends the case. That opinion would be entirely consistent with Supreme Court authority from *Mouat* to *Free Enterprise Fund*. It would track the text of Section 3. It would be consistent with the Constitution of 1788. And, most importantly, it allows the people to elect the next President, and not the courts, much less partisan election boards.

We conclude that the President is not a Section 3 "officer of the United States." Donald Trump is not disqualified by Section 3, and can run for re-election.