

June 29, 2021

The Honorable Steve Barnett
Secretary of State
Capitol Building
500 East Capitol Avenue Ste. 204
Pierre, SD 57501-5070

Sent via Email: sdsos@state.sd.us

Dear Mister Secretary,

In the months leading up to the January 6, 2021 assault on the United States Capitol, and continuing through his urging and condoning his supporters in their attack on the Capitol, former President Donald J. Trump incited and facilitated an insurrection against the United States.¹

As you probably know, Mr. Trump has publicly flirted with running again in 2024. However, just like any other person (of any political background) who has previously sworn an oath to defend the Constitution and then engaged in insurrection or rebellion against the United States, Mr. Trump is constitutionally disqualified from federal office under the Fourteenth Amendment to the United States Constitution. We therefore write to request that you exercise your authority and obligation to exclude Mr. Trump from the ballot.

Trump is Constitutionally Ineligible for the Presidency

Section 3 of the Fourteenth Amendment provides:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath . . . as an officer of the United States . . .

¹ The facts underlying this misconduct are so well-known as not to require repetition here. The materials from Mr. Trump's second impeachment proceeding, for incitement of insurrection, are available at <https://www.govinfo.gov/collection/impeachment-related-publications>.

to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

You have the authority and responsibility to determine, as part of the state ballot qualification process, that Mr. Trump is ineligible to appear on a presidential ballot because, “having previously taken an oath . . . to support the Constitution of the United States,” he then proceeded to “engage[] in insurrection or rebellion against the same.”

There is no constitutional requirement that Congress, a court, or anyone else formally adjudicate this question before you may decide his eligibility for the ballot. Section 3 of the Fourteenth Amendment disqualifies officials who have engaged in insurrection from holding office without requiring any particular decisionmaker to make that determination, and “[c]onstitutional provisions are presumed to be self-executing.”²

The fact that the Senate failed to convict Mr. Trump in his impeachment trial is irrelevant. Fifty-seven senators voted to convict Mr. Trump of incitement to insurrection. Of the 43 senators who voted to acquit, 22 expressly based their vote on their belief that the Senate lacked jurisdiction to try a former official, and either criticized Mr. Trump or did not state any view on the merits.³ Thus, a clear majority, and a likely two-thirds majority, if not more, of senators agree that Mr. Trump is guilty of incitement to insurrection.

But even if not, nothing in section 3 of the Fourteenth Amendment says that two-thirds of the U.S. Senate must first render a preliminary determination. To the contrary, section 3 provides that a two-thirds of the Senate is needed to *remove* the disability. Even if all 43 senators who voted not to convict Mr. Trump voted to remove the disability under section 3, that would fall well short even of a majority, let alone the two thirds needed to remove the disqualification.

² 16 Am. Jur. 2d Constitutional Law § 103.

³ See Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans’ Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (Feb. 15, 2021), <https://bit.ly/3uUZA1A>.

The Role of States in Protecting the Ballot

This situation is not like other cases where courts have rejected state efforts to impose *additional* ballot access qualifications beyond those found in the Constitution.⁴ Here, the eligibility criterion is imposed by the Constitution itself. Section 3 of the 14th amendment added an additional qualification for presidential eligibility beyond those first imposed in 1787. In other words, since 1868, the qualifications for eligibility for the presidency—in addition to natural born citizenship, 35 years of age, and so forth—have also included *not* having engaged in insurrection against the United States after having taken an oath to support the Constitution.⁵

States may require presidential candidates to demonstrate that they meet these qualifications, and exclude them if they do not. As then-Judge (now U.S. Supreme Court Justice) Gorsuch “expressly reaffirm[ed]” in 2012, “a state’s legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.”⁶ Just as states are permitted (if not required) to exclude from the presidential ballot a candidate who is not a natural born citizen,⁷ who is underage,⁸ or who has previously been elected twice as president,⁹ so too states should exclude from the ballot a

⁴ See, e.g., *Griffin v. Padilla*, 408 F. Supp. 3d 1169 (E.D. Cal. 2019) (invalidating state ballot access law excluding presidential candidates who had not disclosed past federal tax returns), *appeal dismissed as moot and remanded*, 2019 WL 7557783 (9th Cir. Dec. 16, 2019), *vacated*, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020).

⁵ See *Powell v. McCormack*, 395 U.S. 486, 521 n.41 (1969) (noting in dictum that section 3 arguably imposes a “qualification” for office).

⁶ *Hassan v. Colorado*, 495 Fed. App’x 947, 948 (10th Cir. 2012) (Gorsuch, J.), *aff’g* 870 F. Supp. 2d 1192 (D. Colo. 2012) (upholding state requirement that presidential candidates affirm that they meet constitutional qualifications for office, including natural-born citizen requirement).

⁷ See Derek T. Muller, “Natural Born” Disputes in the 2016 Presidential Election, 85 *Fordham L. Rev.* 1097, 1110 (2016) (noting that “[w]hen election administrators heard [such] eligibility challenges, they often asserted jurisdiction,” though in the 2016 election, administrators rejected those challenges on the merits).

⁸ See *Peace & Freedom Party v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (upholding state officials’ rejection of underage candidate); *Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109, 112 (N.D. Ill. 1972) (same).

⁹ See U.S. Const. amend. XXII, § 1.

candidate, such as Mr. Trump, who previously swore to support the Constitution, but then engaged in insurrection.

Your Authority and Responsibility to Address this Issue

Fundamentally, your authority and responsibility to exclude an ineligible candidate from the presidential ballot inheres in the interaction between the roles of Congress and the states in the presidential selection process. The states play a critical role in that process, but cannot act inconsistently with the U.S. Constitution.¹⁰ Even in a state *without* specific legislation devoted to section 3 of the 14th Amendment, officials may not use their official powers to take any action—including approving, certifying, or implementing a ballot placement—to facilitate an insurrectionist’s attempt to obtain office.¹¹

The Constitution is “the supreme Law of the Land,” which you have taken an oath to support.¹² No further state implementing legislation is needed to confirm (nor could state legislation eliminate) your duty to act consistently with the Fourteenth Amendment. And allowing a known insurrectionist to appear on the ballot is inconsistent with your obligation and oath of office to support the U.S. Constitution.¹³

There is no risk of deprivation of due process of law from your determination. Mr. Trump can later challenge an adverse determination in court.

Rather than wait until the urgency of an impending election, we urge you to address this critical issue now. Mr. Trump’s conduct encouraging

¹⁰ See *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

¹¹ See *Ex parte Virginia*, 100 U.S. 339, 347 (1879) (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.”).

¹² U.S. Const., art. VI, cl. 2-3.

¹³ In fact, notwithstanding any contrary statement of state law, the U.S.

Constitution trumps any state law that would ostensibly require you to approve or certify an insurrectionist as a valid candidate for federal office. No state authority, including the state legislature or even the state constitution, could compel a state official to violate the U.S. Constitution. “[A]ny conflicting obligations” of state law “must give way” to federal law when there is a conflict. *Washington v. Wash. State Comm’l Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 691–92 (1979). Any state law that purports to require you to misuse your official powers to aid a constitutionally ineligible insurrectionist in obtaining office must give way to the 14th Amendment.

the “Big Lie” of a stolen election, encouraging and inciting an insurrection, and facilitating that insurrection by refusing to intervene to stop it despite urgent requests that he do so and by supervising subordinates who actively blocked the National Guard from assisting the besieged Capitol Police, renders him ineligible for any federal office, including that of president.

Sincerely,

Ron Fein, Legal Director

Gillian Cassell-Stiga, Special Counsel

John Bonifaz, President

Ben Clements, Chair and Senior Legal Advisor