



## Myths and Reality about the 14.3 Insurrectionist Disqualification Clause

### 1. Myth: January 6 wasn't an "insurrection"

#### 1.1. Myth: J6 wasn't an insurrection because it was smaller in scale than the Civil War

During the Civil War, the rebels never reached Washington D.C., let alone occupied the Capitol; the wartime presidential election of 1864 was orderly. On January 6, the insurrectionists achieved an armed takeover of the Capitol, nearly killed the Vice President and much of Congress, and blocked the essential constitutional function of certifying a presidential election.

Shortly before the Fourteenth Amendment was passed, the U.S. Supreme Court explained how insurrection, rebellion, and civil war lie on a continuum. *See The Amy Warwick (The Prize Cases)*, 67 U.S. 635, 666–68 (1862) (“Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government.”); *see also Home Ins. Co. of N.Y. v. Davila* 212 F.2d 731, 736 (1st Cir. 1954) (“An insurrection aimed to accomplish the overthrow of the constituted government is no less an insurrection because the chances of success are forlorn.”). The drafters of the Fourteenth Amendment argued that while the Civil War was the worst instance of insurrectionary violence, it was not the first, pointing to the Whiskey Rebellion and the Burr Expedition. 69 Cong. Globe, 39 Cong. 1<sup>st</sup> Sess. 2534 (statement of Rep. Eckley). The scale of devastation caused by the January 6 insurrection far exceeded that of the Burr Expedition, which was stymied before the perpetrators had a chance to actually commit a single act of violence.

#### 1.2. Myth: Congress hasn't declared J6 to be an insurrection

Bipartisan majorities of the House and Senate voted for articles of impeachment describing the attack as an “insurrection.” In the impeachment trial, President Trump’s own defense lawyer conceded this and stated that “the question before us is not whether there was a violent insurrection of [sic] the Capitol. On that point, everyone agrees.”

The Senate voted by unanimous consent to award a Congressional Gold Medal for Capitol Police officer Eugene Goodman via a bill that categorized the January 6

attackers as “insurrectionists.” Congress separately voted to award Congressional Gold Medals to other Capitol Police, using the same “insurrectionists” language.

**1.3. Myth: J6 wasn’t an insurrection because the president didn’t invoke the Insurrection Act**

The president has no role whatsoever under Section Three of the Fourteenth Amendment. Indeed, the entire Fourteenth Amendment does not assign any powers or responsibilities whatsoever to the president.

The historical reason for this is simple: the Republican Congress that passed the Fourteenth Amendment did not trust President Andrew Jackson, who continually undermined Reconstruction, and so it gave the president no role.

Here, where an insurrection’s goal is to (illegally) prolong the tenure of the president in office, it’s absurd to suggest that the only person who can decide whether it’s really an insurrection is the very president who benefits from it.

**1.4. Myth: J6 wasn’t an insurrection because no one has been convicted of the federal crime of “insurrection”**

This is largely due to the Department of Justice’s charging strategy, as explained by the Attorney General, to begin with the lowest-level offenders and then work up to the more serious offenders. But even during the Trump Administration, the U.S. Department of Justice characterized the attack on the Capitol in court filings as “an insurrection attempting to violently overthrow the United States Government.” And Judge Carl Nichols of the U.S. District Court for the District of Columbia, a Trump appointee, described the attack as an “uprising” that “target[ed] a proceeding prescribed by the Constitution and established to ensure a peaceful transition of power”--essentially the definition of insurrection.

**2. Myth: state election officials don’t have the power to exclude a congressional candidate from the ballot under the Insurrectionist Disqualification Clause**

**2.1. Myth: the Insurrectionist Disqualification Clause only applies to someone convicted of a crime**

During the Reconstruction years immediately after the passage of the Fourteenth Amendment, states, Congress, and the U.S. Department of Justice routinely applied the Insurrectionist Disqualification Clause to people who had not been convicted of any crime. For example, in *Worthy v. Barrett*, 63 N.C. 199 (1869), a board of county commissioners determined that a sheriff who had served as sheriff under the Confederacy (but was never charged with any crime) was disqualified under Section

Three. This was the rule, not the exception, as the vast majority of Confederate officials were never charged with crimes.

**2.2. Myth: the Insurrectionist Disqualification Clause only applies to someone whom Congress has formally declared to have engaged in insurrection**

Nothing in the Fourteenth Amendment says this. Furthermore, Congress specifically instructed states to implement the Insurrectionist Disqualification Clause on their own. For example, in the Omnibus Act of 1868, Congress readmitted six Confederate states (Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina) to the Union and, as a condition of statehood, required them to apply the Insurrectionist Disqualification Clause directly (“no person prohibited from holding office under the United States . . . by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in [any] of said States, unless relieved from disability as provided by said amendment”). In the years before Congress granted amnesty to most ex-Confederates, states applied Section Three without any further instruction from Congress. This provision of the Omnibus Act has not been repealed.

**2.3. Myth: states don’t have the power to decide the qualifications of federal candidates.**

States have the power to bar candidates from the ballot if they don’t meet the qualifications set forth by the U.S. Constitution. The Constitution says that federal elections are run by states unless Congress intervenes. U.S. Const. art. I, § 4, cl. 1. States are allowed, as part of that power, to decide who gets to be on the ballot. *Storer v. Brown*, 415 U.S. 724 (1974). Many states specifically require *all* candidates, state or federal, to be qualified for the offices they are running for in order to appear on the ballot.

Of course, states cannot impose *new* substantive qualifications for federal candidates. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). But, as confirmed by U.S. Supreme Court Justice Neil Gorsuch, they can and do exclude federal candidates from the ballot who don’t meet the criteria for offices set forth in the U.S. Constitution. *Hassan v. Colorado*, 495 Fed. App’x 947, 948 (10th Cir. 2012) (Gorsuch, J.); *see also Peace & Freedom Party v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

**2.4. Myth: states’ power to exclude *presidential* candidates from the ballot does not extend to *congressional* candidates, since these two types of elections have different structures.**

Their structures are parallel in the respects that matter here.

In both cases, the power to *run* elections, including to determine ballot access, is given to state legislatures. *See* U.S. Const. 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”) (Elections Clause); *id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”) (Presidential Electors Clause).

And in both cases, the final power to *confirm the final result* is given to Congress. *See* U.S. Const. art. I, § 5 cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members”) (Qualifications Clause); *id.* Art. II, § 1, cl. 3 (Article II Counting Clause), amend. XII (revising the Article II Counting Clause), 3 U.S.C. 15 (Electoral Count Act) (providing procedures for resolving disputes over returns).

In presidential elections, we know that (1) Congress has power (through the Article II Counting Clause and Twelfth Amendment) to reject electoral votes for a candidate who does not meet minimum constitutional qualifications, and (2) states have power (through the Presidential Electors Clause) to exclude unqualified candidates from the ballot. Congress’s power at the end of the process doesn’t eliminate states’ power at the beginning of the process.

The same logic applies to congressional elections.

**2.5. Myth: Congress’s power to judge the qualifications of its members means the state must put a candidate on the ballot even if they don’t meet the eligibility requirements set forth in the U.S. Constitution**

Each house of Congress is given the final decision on whether to admit or exclude the candidate who is declared the winner of the election. But Congress does not vote on who is printed on state ballots before elections even occur. In other words, the fact that Congress will eventually decide if the winning candidate meets the qualifications for the office doesn’t mean that states are helpless when ineligible candidates file candidacy paperwork.

For example, the Constitution requires that U.S. Representatives be 25 years old, and U.S. citizens for at least seven years. Imagine that an eighteen-year-old non-citizen files to run for Congress. Nothing in the Constitution requires the state to allow that

ineligible individual to waste time and space on the ballot. Indeed, because the Elections Clause power is shared between the states and Congress, this view would also prevent *Congress* from barring ineligible candidates from appearing on the ballot.

A state's power under the Elections Clause "embrace[s an] authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). In 1972, the Supreme Court held that Congress's power to judge the qualifications and returns of its members does not displace states' normal abilities to conduct elections, at least through the election itself (and to some extent afterwards). *See Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (rejecting an analogous argument regarding state power to conduct recounts). To be sure, a state cannot not "usurp" congressional power by trying to retract a Member that Congress has already seated, but state post-election recounts (and, even more so, pre-primary ballot eligibility determinations) do not usurp congressional power under the *Roudebush* standard.

**2.6. Myth: Congress has not used its power to expel members involved in Jan. 6, so states may not disqualify them.**

Congress' power to expel its members with a two-thirds vote is completely separate from the question of whether a candidate is qualified. The Insurrectionist Disqualification Clause precludes oath breaking insurrectionists from even holding federal office, while the Expulsion Clause applies to persons already holding office.

**2.7. Myth: Congress's ability to remove the insurrection disqualification by two-thirds amnesty vote means the decision must be left to Congress after the election is over**

The conjectural possibility of *later* congressional action cannot disempower the state now, in the absence of such action. The fact that Congress *could* take a vote to do something *later* doesn't preclude a state from taking action earlier. In a way this would be like arguing that a state law is preempted because Congress *might* pass a new federal statute that preempts it.

As an analogy, Congress has the power (and has used it) to retroactively confer citizenship. If someone who has only been a citizen for two years wishes to run for Congress, the fact that Congress *might* retroactively confer citizenship on him seven years ago does not make him eligible for Congress *now*, and does not disempower the state from rejecting him as a congressional candidate. Congress's theoretical power to later change someone's legal status and render them eligible for office doesn't mean that state officials have to allow presently ineligible candidates onto the

congressional ballot because of the possibility that Congress might later render them eligible.

**2.8. Myth: section 5 of the Fourteenth Amendment means that only Congress can enforce section 3.**

Section 5 of the Fourteenth Amendment says “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” This applies to the entire Fourteenth Amendment. However, it cannot mean that *only* Congress can enforce the provisions of the Fourteenth Amendment. For example, consider Section 1, which says that no state may “deny to any person within its jurisdiction the equal protection of the laws.” No one would seriously suggest that this means that state legislation banning units of state or local government from depriving people of the equal protection of the laws is preempted because only Congress can enforce that protection.

Congress *did* pass legislation in 1868, the Omnibus Act, which specifically required six former Confederate states (Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina) to apply the Insurrectionist Disqualification Clause directly (“no person prohibited from holding office under the United States . . . by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in [any] of said States, unless relieved from disability as provided by said amendment”). This provision of the Omnibus Act has not been repealed.

**2.9. Myth: the Reconstruction-era history demonstrates that Insurrectionist Disqualification Clause issues were only evaluated *after* the election**

It’s true that the Reconstruction cases (both in Congress and in state and federal courts) came after the election was over and the insurrectionist candidate wished to be seated, or had taken his office; we have no records of pre-election cases challenging candidates’ appearance on the ballot based on the Insurrectionist Disqualification Clause.

But that doesn’t mean much in a modern statutory election framework. In the mid-19th century, there were generally no state or local “election boards” of the sort that exist today; most races did not have pre-printed ballots; and in most places there wasn’t a mechanism, as there is today, to ensure qualifications are satisfied before allowing candidates to appear on the ballot.

Nowadays, we use standardized pre-printed ballots, prepared by the state, and the voter makes a selection from that ballot. But in the 19th century, voters in most places either wrote in ballots, or turned in ballots that had been privately pre-printed by parties or candidates. U.S. states moved to secret ballots starting in the mid-1880s, and did not complete the shift to modern government-printed ballots until 1950. Thus, the idea of a pre-election challenge to a candidate's ability to appear on "the ballot" for *any* reason did not exist until well after Reconstruction ended.

**2.10. Myth: disqualification under the Insurrectionist Disqualification Clause is a punishment, so it must be imposed by a court**

When Section Three was debated in Congress in 1868, its sponsors and advocates repeatedly emphasized that it was an eligibility requirement, not a punishment. For example, Senator John Henderson of Missouri declared, "this is an act fixing the qualifications of officers and not an act for the punishment of crime." Senator Lyman Trumbull of Illinois explicitly compared it to the natural-born citizenship requirement for the presidency, which is obviously not a punishment.

**2.11. Myth: evaluating whether a candidate engaged in insurrection through the framework of a state election-law eligibility challenge violates procedural fairness**

In a widely quoted dictum, U.S. Supreme Court Chief Justice Chase (acting as judge in a district court case) stated that Section Three requires "proceedings, evidence, decisions, and enforcements of decisions, more or less formal" to determine who is and is not covered. *In re Griffin*, 11 F. Cas. 7, 26–27 (C.C.D. Va. 1869). State candidacy challenge frameworks satisfy this standard. In some states, the entire process takes place in a court of law; in other states, the process begins with an administrative determination but the candidate has the right to seek judicial review.

**3. Myth: Only the people who stormed the Capitol "engaged" in the insurrection.**

**3.1. Myth: Engaging in an insurrection requires the person to have personally committed or ordered acts of violence.**

First, this definition would exclude Jefferson Davis and most of the leaders of the Confederacy. This is the opposite result of the intention of the drafters, who limited Section Three's scope to people who had *already* taken an oath of office at the time of the insurrection. The drafters were not concerned with ordinary citizens but (in the words of the North Carolina Supreme Court) "that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress."

The leading national case, *Worthy v. Barrett*, defines “engage” as “[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service.” 63 N.C. 199, 203 (1869). And in *United States v. Powell*, a federal circuit court in North Carolina held “engage” implied “a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from the insurrectionists’ perspective] termination.” 65 N.C. 709 (C.C.D.N.C. 1871). For example, in *Worthy*, the candidate was disqualified for having held the office of sheriff under a Confederate government.

**3.2. Myth: a member of Congress voting to object to the results of the presidential election cannot be the basis for an insurrection; if it were, then Members who objected to electoral votes in 2016 should be barred from office.**

This challenge is not being filed against a Member based solely on their votes to object to the results of a presidential election.

This challenge is being filed against a Member who, based on published reports and publicly available evidence, went further, by helping to plan and promote a demonstration and/or march with the purpose of intimidating the Vice President into illegally declaring Trump the winner of the 2020 election, and which the Member knew was substantially likely to lead to an insurrection.

**3.3. Myth: This violates the free speech rights of members of Congress.**

This is not about the right of members of Congress to espouse certain viewpoints. It is about the responsibility of members of Congress—and everyone who takes an oath to uphold the Constitution—not to betray that oath by aiding an insurrection.

By January 6, it was clear that there were not enough votes in Congress to overturn the results. It was also clear that Pence would not go along with the administration’s illegal plan to declare itself the winner. The purpose of gathering tens of thousands of people was not to engage in a peaceful protest but, as remarks before and during the rally make clear, to intimidate Pence into illegally declaring Trump the winner. Furthermore, as one reporter noted, “[a]nyone with a Twitter account and an hour of time to kill could have warned about the potential for violence on Jan. 6—and many did.” National reporting prior to January 6 warned that far-right groups had interpreted Trump’s rhetoric as a call to storm the Capitol.

Members of Congress have a constitutional right to espouse baseless conspiracy theories. Members of Congress do not have a constitutional right to plan a

demonstration and/or march to the Capitol whose sole purpose is to intimidate the Vice President into declaring their preferred candidate the winner, knowing that the demonstration/march will be used to stage an insurrection, and do nothing to mitigate it.

Even if it were true that the First Amendment (1791) provided such a right at some point, the passage of the Fourteenth Amendment (1868) makes such conduct disqualifying.

### **3.4. Myth: The Insurrectionist Disqualification Clause does not apply to the President of the United States.**

The clause reads: “No person shall be a[n] ... elector of President and Vice-President, or hold any office, civil or military, under the United States, ... who, having previously taken an oath, ... as an officer of the United States, ... to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same.”

As Professor Gerard Magliocca (a leading national expert on the Insurrectionist Disqualification Clause) has [explained](#), the original public meaning of the Clause would include the president. From 1865-68, prominent figures including President Andrew Johnson, key congressional leaders involved in drafting or advocating for the Fourteenth Amendment, and lawyers in formal papers all repeatedly referred to the president as an “officer of the United States” (often preceded by words such as “chief” and/or “civil”). This phrase was used in official proclamations (widely reprinted in newspapers), in papers presented to the U.S. Supreme Court, and on the House and Senate floor.

The only time the issue was raised during the debate on Section 3 in Congress, Senator Justin Morrill (one of the amendment’s drafters) stated that Section 3 applies to the presidency. As a practical matter, Magliocca notes, people in 1866 would probably have been perplexed if Jefferson Davis or Robert E. Lee could be elected President but could not hold any other office under the constitutional proposal. (See also [this response](#) by Professor Mark Graber.)

## **4. Myth: This is anti-democratic.**

### **4.1. Myth: applying the Insurrectionist Disqualification Clause is anti-democratic because voters should decide whether or not someone is fit for office.**

The Constitution sets forth a very small number of qualifications for office. For Congress, these include age (25), citizenship duration (7 years), residency in the state,

and not being disqualified by virtue of prior oathbreaking insurrection. For candidates who meet the constitutional minimum, voters may decide whether the candidate is fit for office. On the other hand, if someone does not meet those minimum standards (e.g., the person is 19 years old and not a U.S. citizen), then they are not qualified for office.

It is no more anti-democratic to say that an oathbreaking insurrectionist cannot run for Congress than it is to say that a non-natural-born citizen cannot run for president. In fact, during the congressional debates on the Fourteenth Amendment, a key advocate analogized the Insurrectionist Disqualification Clause to the natural-born citizen requirement for the presidency.

The Republican Congress that led the fight for the Insurrectionist Disqualification Clause knew that those who had helped facilitate a violent rebellion could not be trusted with future public office. Those who refused to accept the election results in 2020, and decided to turn to insurrection as a result, cannot be trusted in positions of power..

#### **4.2. Myth: This is a partisan ploy to disqualify Republicans ahead of the 2020 midterm elections.**

This is a non-partisan legal action to enforce a fundamental constitutional principle. Its goal is not to support or oppose any political party.

The Republican-led Congress that championed the Fourteenth Amendment understood that democracy cannot survive if insurrectionists are allowed into the halls of power.

If our challenge is successful, whoever wins the Republican primary will compete against whoever wins the Democratic primary, as well as any third party candidates, in the general election.

Our legal team in North Carolina includes a former Republican Justice of the North Carolina Supreme Court.