

New Article in NYUJLL: Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?: Seth Barrett Tillman and I discuss whether President Trump can be disqualified from a second term pursuant to Section 3.

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FULL TEXT

Seth Barrett Tillman and I have published an article in the New York Journal of Law & Liberty, titled *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?* Here, we answer an important question: can President Trump be disqualified from a second term pursuant to Section 3. This article builds on a blog post we wrote on January 20, 2020.

Here is the abstract:

Section 3 of the Fourteenth Amendment was ratified in 1868, in the wake of the Civil War. This provision bars certain people who "engaged in insurrection" from serving in certain federal and state positions. For a time, Section 3's meaning was a matter of substantial debate. And subsequently, during the twentieth century, this provision fell into desuetude.

Now, Section 3 occupies a critical place in constitutional discourse. On January 13, 2021, the House of Representative approved an article of impeachment against President Trump that invoked Section 3. And there is pending legislation that purports to put Section 3 into effect. Its sponsors contend that the bill could render Trump ineligible to serve a second term. Moreover, state election officials may rely on Section 3 to keep Trump off the ballot. All of these legal strategies, however, elide over a critical threshold question: Was Trump covered by Section 3?

The structure of Section 3 of the Fourteenth Amendment is a bit complicated. But for our purposes, the inquiry is narrow: When Trump took his Article II presidential oath, was he "an officer of the United States"? If the answer is "yes," then he is subject to Section 3, and potentially can be disqualified from serving a second term. If the answer is "no," then he is not subject to Section 3, and cannot be disqualified from serving a second term pursuant to Section 3. In our view, there is some substantial reason to think the President is not an "officer of the United States." It follows that President Trump, who swore only one constitutional oath, does not fall within the scope of Section 3. 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, which was ratified in 1868. Part III will show that the meaning of the phrase "officer of the United States" did not drift from 1788 through 1868. There is substantial evidence from both eras 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 academic arguments suggesting that the President is an "officer of the United States" for purposes of Section 3. Finally, 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.

If Trump runs for a second term—as looks increasingly likely—we hope our scholarship here will become useful for legal debates and election challenge.

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