

# The Volokh Conspiracy

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## Donald Trump Should be on the Ballot and Should Lose

STEVEN CALABRESI | 9.16.2023 2:08 AM

In a prior blog post, I argued that Donald Trump should be kept off the ballot for the 2024 presidential election because of the Insurrection Clause of Section 3 of the Fourteenth Amendment. I have now changed my mind and have concluded that since Trump was not "an officer of the United States" on January 6, 2021, the Insurrection Clause does not apply to Trump.

I am also much more doubtful than I was a week ago of the correctness of the **University of Pennsylvania Law Review** law review article by William Baude and Michael Paulsen, *The Sweep and Force of Section Three*, which argues that former President Trump is disqualified from running again for President. A draft law review article taking issue with Baude and Paulsen, co-written by Josh Blackman and Seth Barrett Tillman, entitled *Sweeping and Forcing the President into Section 3: A Response to William Baude and Michael Stokes Paulsen* makes a good case that what happened on January 6, 2021 was not an "insurrection" and that the Baude/Paulsen reading of Section 3 of the Fourteenth Amendment is wrong. I think Josh Blackman and Seth Tillman are more likely right than not. At a minimum, this is a very muddled area of constitutional law, and it would set a bad precedent for American politics to not list a former president's name on election ballots given the confused state of the law surrounding Section 3 of the Fourteenth Amendment.

Let me, however, be very clear about one thing. I am a Never Trumper. I will vote for any Republican in the primaries over Trump or, if necessary for the Democratic Party's nominee for President over Donald Trump. I am a Never Trumper because of the former President's behavior on January 6, 2021 when he stirred up a crowd, started a riot on Capitol Hill to disrupt the counting of electoral votes, and then declined to call off the riot either with a Tweet or by calling out the National Guard. Instead, Trump watched the riot unfold on television approvingly as the rioters called out "Hang, Mike Pence." At the time, he was still the nation's Law Enforcement Officer in Chief with a constitutional obligation to "take Care that the Laws be faithfully executed." Trump's failure to stop the riot and the efforts he knew of to hang his own Vice President was nothing less than a High Crime and Misdemeanor.

... for the commission of a High Crime and Misdemeanor. The Senate should make it crystal clear that I will vote for the Republican nominee for president.

Trump is loathsome, but because of a technicality in the drafting of the Disqualification Clause of Section 3 of the Fourteenth Amendment, the Clause does not apply to Trump. The Disqualification Clause applies to four categories of people who have previously taken an oath to uphold the Constitution and have given "aid or comfort" to an "insurrection": 1) officers of the United States; 2) members of Congress; 3) members of state legislatures; and 4) state "executive or judicial officers." On January 6, 2021, Trump was obviously not: 1) a member of Congress; 2) a member of a state legislature; or 3) a state executive or judicial official. That leaves only the question of whether former President Trump was "an officer of the United States."

This is a harder question than it may appear because the term "officer of the United States" seems colloquially to apply to the president. The presidency is an "office," and former president George Washington called himself an officer of the United States. The Senate in debating Section 3 of the 14th Amendment was of the view that the president is an officer of the United States. In my foolish youth, I once argued mistakenly in print that the President is an "Officer of the United States." See Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 **Stanford Law Review** 155-175 (1995). Thirty-three years of academic research and writing on the presidency has persuaded me that the words "officer of the United States" are a legal term of art, which does not apply to the President.

EXHIBIT


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The Commission Clause of Article II, Section 3 imposes a duty on the President: "he **"shall"** i.e. **must** "Commission **all** the Officers of the United States." (emphasis added). This is done by the President signing a document called a **commission** formally appointing executive and judicial branch officials to their offices. **No President has ever, either before or after, the ratification of the Fourteenth Amendment commissioned himself.** Why? Because the President is not technically "an officer of the United States."

Traditionally, the King in Great Britain commissioned all of that country's executive and judicial officers who were distinguished from Members of Parliament. See Generally Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 **Cornell Law Review** 1045-1157 (1994). To the Framers' ears, officers were always executive or judicial while Members of Parliament were elected to the House of Commons or inherited a seat in the House of Lords. Under the Constitution, the King is replaced by the President who has some but by no means all of the British King's powers and duties. **It is the President—who is elected, like members of Congress,—who the Constitution empowers to commission officers of the United States.** And, Presidents never commission themselves even though "shall" means "must" and "all" means "all" in the Commission Clause, just as Professor Akhil Reed Amar argues very powerfully and intratextually those words have that same meaning in Article III of the Constitution. "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction", 65 **Boston University Law Review** 205 (1985). I drank the Kool-Aid on "shall" meaning "must" and "all" meaning "all" from Professor Amar in my very first law review article. Steven G. Calabresi, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 **Harvard Law Review** 1153-1216 (1992) (with Kevin H. Rhodes). If "shall" means "must" and "all" means all in Article III, which I think it does, then those same words mean the same thing for intratextual reasons in the Commission Clause. Forty-six Presidents of the United States have construed the Commissions Clause as not obligating them to commission themselves because presidents are not technically "officers of the United States" all of whom are appointed not elected.

Which brings us to the Appointments Clause of Article II: "[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:". Here again the phrase: "Officer of the United States" is used to describe **appointed persons** and not **elected persons** like the Members of Congress or the President. The Appointments Clause thus bolsters the implication of the Commissions Clause. Presidents are not, technically, Officers of the United States" as that phrase is used as a legal term of art in the Constitution.

Finally, consider Article II, Section 4. It provides that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Note that the President and Vice President are mentioned –alone and separately from – "all civil Officers of the United States." That is in part to make clear that the President is impeachable, unlike the King of Great Britain, but it is also because the President and Vice President being elected like Members of Congress, are not technically "Officers of the United States "

line of succession to the  
 vacancy in the presidency and  
the vice presidency. William E. Shaughnessy, *What is the Presidential Succession Law Constitutional?*, 48 **Stanford Law Review** 113 (1995). The Presidential Succession Clause empowers Congress in the event of a vacancy in both the presidency and the vice presidency "to declare[] what Officer shall then act as President." The word "officer", read in the context of Article II, where the Clause appears, means "appointed Officer of the United States" and not elected Member of Congress or elected Speaker of the House of Representatives. The Amar brothers thus reach the correct conclusion that it is unconstitutional to put Members of Congress in the line of succession to the presidency. For one thing, doing that would allow for a change of party in the presidency in the event of a dual vacancy in both the presidency and the vice presidency. Are not the Amar brothers right that Secretary of State Antony Blinken is a more plausible successor to President Biden and Vice President Harris than is Speaker of the House of Representatives Kevin McCarthy?

At this point, I think I have clearly shown that the term "Officer of the United States" is a legal term of art in the Constitution whose meaning differs from the colloquial sense in which George Washington called himself an Officer of the United State or which members of the Senate relied on when they enacted Section 3, of the 14th Amendment. Is it possible that "Officer of the United States" means something different in the 14th Amendment than it meant in the original Constitution? The answer is "no" because the phrase is a legal term of art, and the drafters of Section 3 had the burden of specifying clearly that they meant for the President to be disqualified from office as well as appointed "Officers of the United States." When a draftsman uses a legal term of art like Bill of Attainder, Ex Post Facto Law, or Officer of the United States, a court should assume that it must engage in intratextualism, see Akhil Reed Amar, *Intratextualism*, 112 **Harvard Law Review**

747 (1999). A Clause appearing in Section 3 of the 14th Amendment presumptively means the same thing there that it means in the Commissions Clause of Article II, Section 3; in the Appointments Clause of Article II, Section 2; and in the Impeachment Clause of Article II, Section 4. Q.E.D.

So, Trump's name should appear on election ballots in the 2024 presidential election, but I strongly urge my fellow Americans to vote against Trump, almost no matter what else is the alternative.

[UPDATE from Eugene Volokh: Because of some technical problems, Steve Calabresi couldn't post this item himself, so it was originally posted for him by Jim Lindgren; I've since revised it to go under Steve's byline, but it was of course Steve's material all along.]

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**STEVEN CALABRESI** is the Clayton J. & Henry R. Barber Professor of Law at Northwestern Pritzker School of Law, where he specializes in constitutional law. He also teaches regularly at the Yale Law School. Before going into teaching, he worked in the Reagan White House, and was a Special Assistant for Attorney General Edwin Meese III.



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