

Trump's 2024 Eligibility Ignites Debate—and Litigation

The 14th Amendment's insurrectionist disqualification clause is a new flashpoint in the presidential race

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Since the day [Donald Trump](#) supporters [rampaged through the Capitol](#) in 2021, legal scholars have pondered whether a post-Civil War clause in the Constitution that disqualifies insurrectionists from public office can prevent him from ever reclaiming the presidency.

As polls [show Trump surging](#) toward another Republican presidential nomination, the question of his eligibility under the 14th Amendment is no longer merely academic.

A left-leaning legal watchdog on Wednesday filed suit in Denver demanding that Trump be excluded from Colorado's primary ballot, the first of an expected barrage of challenges, petitions and lawsuits seeking to disqualify the former president across the electoral map.

And in recent days, state officials responsible for running elections in Michigan and New Hampshire say they are examining the 14th Amendment's potential as a barrier to Trump.

Under the spotlight is Section 3 of the 14th Amendment, which disqualifies from public office those who swore to defend the Constitution and then "engaged in insurrection or rebellion" against the U.S. or aided its enemies. Lawmakers drafted the section during Reconstruction to prevent Confederates who rose up in arms against the Union from seizing back power through the ballot box.

Until Jan. 6, 2021, Section 3 was regarded as a Civil War remnant, largely forgotten and seldom litigated. After the Capitol riot, it got a fresh look from constitutional scholars, including some prominent conservative legal academics who have concluded that Section 3 can and should be enforced against Trump.

The argument—fleshed out most fully in a 126-page [forthcoming law review article](#) by William Baude of the University of Chicago and Michael Stokes Paulsen of the University of St. Thomas—posits that Trump assembled and whipped up a massive mob with incendiary claims about a stolen election, called for urgent action

to stop Congress from certifying [Joe Biden](#)'s election and failed to intervene to stop the riot.

His conduct, they say, should disqualify him from the race. They say courts or state election officials can make determinations about Trump's eligibility under Section 3 and deny him a path forward without impeachment proceedings, congressional action or [criminal convictions](#).

No state election authority has declared Trump ineligible. New Hampshire's Republican secretary of state has [asked](#) the state attorney general to advise him on potential applicability of Section 3 to the coming presidential election cycle. Maine's secretary of state and attorney general also [have said](#) they are analyzing the legal requirements for presidential ballot access.

Michigan's secretary of state, Democrat Jocelyn Benson, said in a [podcast interview](#) last week there were "valid legal arguments" for keeping Trump off the primary ballot, but that it is "far too soon to really assess the likelihood of that." She said she was having discussions with other secretaries of state, including her counterparts in Nevada, Maine and Pennsylvania, about Trump's eligibility.

Trump, in a Truth Social [post](#) Monday, called the disqualification effort against him a trick to steal the coming election and that "almost all legal scholars" doubt its legal basis. Trump's Republican primary opponents have stayed largely quiet on the issue, with the exception of former Arkansas Gov. Asa Hutchinson, who said during the first GOP debate last month that Trump's actions on Jan. 6 "could disqualify him."

Trump isn't alone in pushing back. Other legal scholars, including Harvard law professor [Noah Feldman](#) and Stanford law professor and former federal appeals court judge [Michael McConnell](#), say they are dubious about the eligibility case against him.

Far from clear, some legal thinkers say, is whether state election authorities are empowered to enforce Section 3 against a presidential candidate and make constitutional determinations about his eligibility.

They point to an 1869 circuit court opinion by Chief Justice Salmon Chase involving a freed slave who challenged the validity of his felony conviction on the grounds that the judge who found him guilty was a secessionist who should have been disqualified under Section 3.

Chase upheld the conviction and set a precedent that litigants couldn't challenge a candidate's eligibility under Section 3 without legislation from Congress authorizing

such lawsuits. No such federal legislation exists today, a potential complication for any litigants trying to eject Trump.

Another unsettled question is whether Section 3 can be applied to a former president. Its text refers to the disqualification of insurrectionists who violated their oaths they swore as “an officer of the United States,” and there is some debate about whether that encompasses the presidency.

Then there is the issue of whether Trump actually violated Section 3.

Democratic Sen. Tim Kaine of Virginia said on ABC’s “This Week” on Sunday that “there’s a powerful argument to be made” that Section 3 bars a second Trump term.

“The language is specific: If you give aid and comfort to those who engage in an insurrection against the Constitution of the United States,” he said.

Seth Barrett Tillman, a U.S. constitutional scholar at Maynooth University in Ireland, says that is a misreading of the Section 3 text.

It must be shown that Trump engaged in the attack, not just encouraged or aided it, Tillman said. And an enemy, he said, “has to be someone you’re at war with.”

Others, including Stanford’s McConnell, cautioned that invoking Section 3 against the former president would set a precedent that risks opening the door to partisan abuse. Georgia Secretary of State Brad Raffensperger, who resisted Trump’s efforts to overturn the state’s election result in 2020, [wrote in a](#) Wall Street Journal opinion piece published Wednesday that wielding Section 3 against Trump would be “un-American” by denying Americans the right to choose their next president.

Since 2021, courts and state election boards have heard a number Section 3 eligibility challenges brought against Republican congressional and local candidates related to Jan. 6. The cases were largely unsuccessful.

One exception was a [September 2022 ruling](#) by a New Mexico judge ousting Otero County Commissioner Couy Griffin from office. A group of New Mexico residents represented by Citizens for Responsibility and Ethics in Washington alleged that Griffin, who was convicted of misdemeanor trespassing during the attack, helped incite the Jan. 6 mob, a charge he denied. The New Mexico Supreme Court rejected his appeal on technical grounds.

The same group launched the lawsuit against Trump’s eligibility in Colorado. [Their case](#), filed on behalf of several Republican and unregistered voters, is asking for a court to declare Trump constitutionally disqualified from public office, and bar Colorado’s secretary of state from “taking any action to grant Trump access to the

ballot.” Colorado’s Democratic Secretary of State Jena Griswold, [tweeting](#) Wednesday in response to the CREW lawsuit, said she is “hopeful that this case will provide guidance to election officials on Trump’s eligibility as a candidate for office.”