REPORT BY THE TASK FORCE ON THE RULE OF LAW ON SECTION 3 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATE CONSTITUTION – THE DISQUALIFICATION CLAUSE

HISTORICAL CONTEXT, CURRENT CHALLENGES, AND RECOMMENDATIONS REGARDING FEDERAL LEGISLATION TO ENSURE UNIFORM AND EFFECTIVE APPLICATION

I. INTRODUCTION

In the wake of the events of January 6, 2021, including the breach of the United States Capitol, the loss of life and severe injury to U.S. Capitol Police officers and others, and the attempted disruption of the election of the President ("January 6 Events"), renewed attention is being paid to Section 3 of the Fourteenth Amendment to the United States Constitution, also known as the Disqualification Clause. The basic precept of Section 3 is to ensure that any officeholder who violates an oath to uphold the Constitution by participating in an insurrection is barred from seeking public office again. As discussed in sections II and III of this report, issued on behalf of the New York City Bar Association ("the City Bar") by its Task Force on the Rule of Law,[1] the Disqualification Clause was enacted as a direct response to the actions of Confederate officials during the Civil War; there were related subsequent events and acts of Congress in the decades that followed, but then the Disqualification Clause remained largely dormant throughout the 20th Century and the first two decades of the 21st century.

As detailed in section IV, however, the January 6 Events prompted renewed interest in the Disqualification Clause, as public officials who participated in the attack on the Capitol and in efforts to disrupt the count of the Electoral College vote have declared their candidacy for election for federal or state office. To date, Section 3 challenges (and counterchallenges) have been brought in six states - in administrative proceedings and in state and federal courts, by voters and by candidates, asserting a wide variety of legal arguments and yielding disparate results. Congressional proposals have been advanced with the goal of creating clear and uniform standards

[1] The Task Force on the Rule of Law is comprised of members of diverse professional backgrounds in government, civil and criminal private practice, academia, non-governmental organizations and the judiciary, having a wealth of experience in promoting the rule of law domestically and internationally. The Task Force focuses on the framework for decision-making in a constitutional democracy that encompasses, among other things, due process of law, adherence to separation of powers and a system of checks and balances, the protection of fundamental rights, and the fair and equal administration of justice by an independent judiciary.

governing Section 3 challenges and avoiding chaos and, potentially, a constitutional crisis in the next cycle of elections. Section V of this report discusses the different Congressional proposals, presents the City Bar's recommendations, and concludes with the strong recommendation that Congress debate, deliberate and enact Section 3 enforcement legislation. The challenges being brought, and the decisions being rendered, are a cautionary tale. Congress must enact Section 3 enforcement legislation now to eliminate ambiguity and enable the uniform and effective invocation of this constitutional disqualification provision across the country, in order to ensure that any officeholder who violates an oath to uphold the Constitution by engaging in an insurrection be barred from again seeking public office.

II. EARLY HISTORY OF SECTION 3

Section 3 of the Fourteenth Amendment reads as follows:

> 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 a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, 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.[2]

Ratified in the aftermath of the Civil War in 1868, the Disqualification Clause was intended to be applied immediately in order to exclude former Confederate officials from federal or state office.[3]

The Section 3 framers contemplated enforcement of that provision by legislation in at least one instance,[4] but in 1868, Chief Justice Salmon P. Chase, as a circuit judge in Virginia, opined that Section 3 was intended by Congress to be an exclusive punishment for participating in an insurrection or rebellion, did not require a separate act of Congress to enforce it, and thereby barred Jefferson Davis' treason prosecution as violative of the principle of double jeopardy.[5]

Shortly thereafter, however, Chief Justice Chase issued the United States Supreme Court's

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[2] US Const., amend. XIV, sec. 3.

[3] Magliocca, Gerard N., *Amnesty and Section Three of the Fourteenth Amendment* (Dec. 14, 2020), 36 Constitutional Commentary 87 (2021), SSRN: https://ssrn.com/abstract=3748639 or http://dx.doi.org/10.2139/ssrn.3748639. (All websites last visited Sept. 26, 2022.)

[4] *See* Graber, Marc A., *Their Fourteenth Amendment, Section 3 and Ours* (Feb. 16, 2021), Just Security, https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/ (discussion of congressional legislation establishing a registry of persons ineligible to vote).

[5] *See Case of Davis*, 7 F. Cas. 63, 90, 92–94, (C.C.D. Va. 1867) (No. 3,621a) (describing Davis's argument and the Government's response); *id.* at 102 (noting the Chief Justice's view).

first opinion on Section 3, holding that the text of Section 3 was not self-executing in Virginia and, in the absence of Congressional legislation, did not disqualify from office the state court judge who tried and sentenced one Caesar Griffin, an African-American criminal defendant there.[6]

In 1870, following these inconsistent rulings, Congress enacted a Section 3 enforcement statute. Sections 14 and 15 of the Enforcement Act of 1870, also known as the First Ku Klux Klan Act ("1870 Act"), enabled federal prosecutors to use a writ of *quo warranto* to remove people from government offices who were disqualified by Section 3. These portions of the 1870 Act were repealed in 1948 as part of a major revision to the federal judicial code, however.[7]

III. SUBSEQUENT HISTORY

The history of enforceability of Section 3 after 1870 offers little precedential guidance. In 1871, yielding to political pressure for national reconciliation, President Ulysses S. Grant asked Congress to remove the Section 3 disabilities imposed on former Confederate officials. In response, Congress enacted the Amnesty Act of 1872 ("1872 Act"), which removed disabilities from approximately 150,000 of the former Confederates previously found to be ineligible to hold office by virtue of Section 3.[8]

Following the Spanish-American War and a renewed desire for national harmony, Congress enacted the Amnesty Act of 1898 ("1898 Act"), which removed the disabilities of the approximately 750 remaining former Confederate officeholders who had been subject to Section 3 disqualification.[9]

Aside from the 1872 Act and the 1898 Act, the only Congressional action taken with respect to Section 3 before the 1970s involved Victor Berger, a member of the House of Representatives who, in 1919, was excluded from office by that body after criticizing American involvement in World War I. The ground for his exclusion was "giv[ing] aid or comfort to the enemies" of the United States. The 1870 Act, although still in effect at the time, was not invoked.[10]

The most recent Congressional measures involving Section 3 were taken in 1975 and 1978,

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[6] *See Griffin's Case*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (reversing a grant of habeas corpus).

[7] Hemel, Daniel J., *Disqualify Insurrectionists and Rebels: A How-To Guide*, Lawfare (Jan. 19, 2021), https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide (noting that the *quo warranto* procedure set forth in Section 14 of the Enforcement Act of 1870 "didn't get much use" since the time that the 1872 Act "lift[ed] the Section 3 ban for all ex-Confederates who had held state-level triggering offices"); Lynch, Myles, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 206 n. 365 (2021), https://scholarship.law.wm.edu/wmborj/vol30/iss1/5/.

[8] *See* Act of 1872, ch. 194, 17 Stat. 142 (removing all political disabilities imposed by Section 3 from approximately 150,000 former Confederate officeholders); Heritage Library Foundation, *Amnesty Act of 1872*, https://heritagelib.org/amnesty-act-of-1872.

[9] *See* Act of June 6, 1898, ch. 389, 30 Stat. 432 ("[T]he disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed."); Magliocca, *supra* at n. 3, 63 at n. 213.

[10] Four years later, after he had been reelected, the Supreme Court vacated Berger's conviction for violating the Espionage Act, and the House reseated him. *See* Hemel, *supra*, n. 7.

when Congress, in an effort to promote national unity in the post-Watergate era, passed joint resolutions posthumously granting amnesty to Robert E. Lee ("Lee") and Jefferson Davis ("Davis"), respectively, from Section 3 disabilities.[11] Thus, while Section 3 has only been invoked in limited instances, it continues to have potential application.

IV. EXPERIENCE POST-JANUARY 6, 2021

The Disqualification Clause remained dormant for more than four decades after the posthumous grant of amnesty to Lee and Davis. The January 6 Events, however, have prompted renewed interest in the provision, as public officials who participated in the attack on the Capitol and in efforts to disrupt the count of the Electoral College vote have declared their candidacy for election to federal or state office. This section describes the Section 3 challenges that have been brought, to date, in six states – Indiana, Wisconsin, North Carolina, Georgia, Arizona and New Mexico. As discussed below, these challenges originated in state administrative bodies, state courts and federal courts, with some initiated by voters and some by opposing candidates – with contested offices ranging from County Commissioner to U.S. Senator. The legal arguments advanced, the courts' willingness to entertain the legal arguments presented, and the decisions rendered show a significant and unsettling divergence of views. Issues that have emerged include, whether Section 3 has been repealed; whether Congress has sole power to disqualify its members; whether voters have standing to challenge under Section 3; and questions of subject matter jurisdiction and federalism. In addition to identifying and commenting on existing Congressional proposals that would create a Section 3 enforcement mechanism, this section concludes with the strong recommendation that Congress engage promptly in the debate and deliberation necessary to develop a uniform federal standard governing Section 3 challenges.

A. State Administrative Proceedings

With scant precedent upon which to draw, challenges to such candidates and to their ability to hold office have proceeded in disparate ways.

In Indiana, a candidate ("Challenger") brought a Section 3 challenge to the reelection of a member of Congress, Jim Banks, before the state's Election Commission. Challenger alleged that Representative Banks had participated in the violent insurrection on January 6 by seeking to join the *amicus curiae* brief sought to be filed by members of the House of Representatives in an action brought by Texas in the Supreme Court challenging the results of the Presidential election in Pennsylvania and other states,[12] and by voting on January 6 not to certify the election results for Joe Biden, and that those actions disqualified him from holding the office of Representative.[13] Banks argued that the Commission could not exclude him under Section 3. In an oral ruling, the Commission found insufficient evidence that Banks had engaged in insurrection and unanimously

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[11] *See* S.J. Res. 23, 94th Cong. (1975) (Robert E. Lee); S.J. Res. 16, 95th Cong. (1978) (Jefferson Davis).

[12] *Texas v Pennsylvania*, 141 S.Ct 1230, 208 L.Ed.2d 487 (Dec. 11, 2020).

[13] Davies, Tom, *Indiana Rep. Banks Facing 'Insurrection' Ballot Challenge*, U.S. News (Feb. 16, 2022), https://www.usnews.com/news/politics/articles/2022-02-16/indiana-rep-banks-facing-insurrection-ballot-challenge; Shelley, Jonathan, *State commission rejects challenge to Rep. Banks, who will remain on the ballot* (Feb. 18, 2022), https://www.wpta21.com/2022/02/18/state-commission-rejects-challenge-rep-banks-who-will-remain-on-ballot.

dismissed the challenge.[14]

B. State Administrative Proceedings Challenged in Federal Courts

In other states where voters have brought Section 3 challenges through state administrative proceedings of candidates running for reelection to Congress, those candidates have sought to enjoin such proceedings through actions in federal court.[15]

1. *North Carolina*

In administrative proceedings before the North Carolina Board of Elections ("NC BOE"), voters in Representative Madison Cawthorn's district invoked the state's challenge law,[16] asserting that his encouragement of the violent mob that overran the Capitol on January 6 to prevent the peaceful transition of power constituted "insurrection," disqualifying him from running for reelection. Representative Cawthorn, in *Cawthorn v. Circosta*, a proceeding in federal district court, sought to enjoin the NC BOE from entertaining the challenge, arguing that determining qualifications of members of Congress was exclusively the province of Congress under Article I, section 5 of the U.S. Constitution[17], that the 1872 Act effectively "repealed" Section 3, and that the First and Fourteenth Amendments additionally prohibited any Section 3 challenge to his candidacy. The District Court denied intervention to the voters, and over the objection of the NC BOE defendants, granted permanent injunctive relief[18] to Representative Cawthorn solely on the ground that the 1872 Act granted amnesty to *all* insurrectionists, not only Civil War Confederates (that is, it "removed 'all political disabilities imposed by the third section of the fourteenth amendment of the Constitution of the United States from all persons whomsoever'")[19], both

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[14] *Id.;* Essex, Richard, *US Rep. Jim Banks survives 14th Amendment challenge, stays on Indiana ballot* (Feb. 18, 2022), https://www.wishtv.com/news/i-team-8/us-rep-jim-banks-survives-14th-amendment-challenge-stays-on-indiana-ballot/.

[15] *See Madison Cawthorn v. Damon Circosta, et al.,* No. 5:22-cv-00050-M, –F.Supp.3d–, 2022 WL 738073, slip op. (E.D.N.C. Mar. 10, 2022) (*Cawthorn v. Circosta*), *rev'd sub nom, Madison Cawthorn v. Barbara Lynn Amalfi, et al.*, No. 22-1251, --F.4th--, 2022 WL 1635116, slip op. (4th Cir. May 24, 2022) (*Cawthorn v. Amalfi*) (candidate sued NC BOE members to enjoin administrative proceedings; voters unsuccessfully sought to intervene in District Court, were granted intervention by Court of Appeals), *on remand,* Order of Dismissal issued on stipulation due to mootness (E.D.N.C July 1, 2022); *Marjorie Taylor Greene v. Brad Raffensperger*, No. 22-cv-1294-AT, --F.Supp.3d--, 2022 WL 1136729, slip op. (D.D.C. Apr. 18, 2022) (candidate sued secretary of state; voters who brought administrative challenge to her candidacy successfully intervened).

[16] N.C. Gen. Stat. §§ 163-127.1 and 163-127.2 provide that any qualified voter registered in the same district as a candidate may file a challenge with the NC BOE contending that the candidate does not meet the constitutional or statutory qualifications for the office.

[17] Article I, section 5 provides in pertinent part: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."

[18] Although the parties had briefed and argued the issue as one for preliminary injunctive relief, the District Court *sua sponte* issued a permanent injunction. *Cawthorn v. Circosta, supra* n. 15, slip op. at 26 (limiting its ruling to unavailability of any Section 3 challenge under the state challenge law due to the prospective bar created by the 1872 Act).

[19] *Cawthorn v. Circosta, supra* n. 15, slip op. at 20-22, quoting the Amnesty Act of 1872, Pub.L.No.42-193, 17 Stat. 142.

retrospectively and prospectively, permanently ending any application of Section 3. The District Court declined to consider any other grounds raised in the complaint and did not opine on Representative Cawthorn's qualifications as a candidate.

After wading through a thicket of procedural issues, Judge Toby J. Heytens, writing for the majority of the Fourth Circuit Court of Appeals, rejected Representative Cawthorn's argument that, under Article I, section 5 of the U.S. Constitution, the matter was a non-justiciable political question. Judge Heytens reasoned that the question was instead whether the 1872 Act permits Representative Cawthorn to serve in Congress, even if Section 3 would disqualify him.[20]

Judge Heytens first examined the text of the 1872 Act, noting that its use of the past tense ("political disabilities *imposed* [by Section 3]. . . are hereby *removed*" (emphasis supplied)) demonstrated textually that the 1872 Act was "backward-looking."[21] Next, Judge Heytens reviewed the legislative history of the 1872 Act, agreeing with the leading commentator that the rationale for its enactment was that large numbers of Confederates were petitioning for amnesty and that, by creating a general amnesty for all but the most culpable rebels, Congress could avoid having to consider private bills for hordes of applicants.[22] He further noted that the analogous instrument of a Presidential pardon was generally understood to be available only *after* the commission of the offense, that Section 3 spoke in terms of disqualification of persons who had "engaged in insurrection," and that, by creating the opportunity for removal of "such disability," the provision made retrospective application of both Section 3 and the 1872 Act the more plausible interpretations.[23]

The Fourth Circuit concluded that the 1872 Act did not categorically exempt all future insurrectionists from Section 3 disabilities, vacated the permanent injunction, and remanded the case to the District Court for further proceedings. The majority expressed no opinion on whether Article I, section 5 of the U.S. Constitution reserves exclusively to the Congress determinations of Section 3 disqualification of its members, or whether Article I, section 4, in ceding the time, place and manner of elections for Senators and Representatives generally to the states, would afford them a role in making such determinations.[24]

The other two members of the Fourth Circuit panel wrote concurring opinions. Judge James A. Wynn, Jr. joined fully in the majority opinion by Judge Heytens. Judge Julius N. Richardson concurred only in the judgment, finding that the District Court lacked jurisdiction to consider Representative Cawthorn's claim under the 1872 Act, opining that Article I, section 5 of

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[20] *Cawthorn v. Amalfi*, slip op. at 20.

[21] *Id.* at 22-23, *citation omitted, emphasis added*.

[22] *Id.* at 24, *citing* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 *Constit. Comment.* 87, 111-121 (July 2021). *See also* Professor Magliocca's comments at *Ensuring Accountability for Political Violence: Lessons from January 6*, presentation by New York City Bar Association Rule of Law Task Force (May 25, 2022), https://bit.ly/3NgHkZv.

[23] *Id*. at 26. The Fourth Circuit rejected the argument that the 1898 Act clarified that its predecessor amnesty statute absolved plaintiff from scrutiny under Section 3, noting that the House had rejected that very argument in the *Berger* proceedings, recognizing that Congress did not have the power to remove future disabilities.

[24] *Id.*

the U.S. Constitution textually makes Congress the sole judge of the qualifications of its members.[25] By ruling on the effect of the 1872 Act, his concurrence explained, the District Court implicitly judged plaintiff's qualifications, in violation of Article I, section 5 of the U.S. Constitution.[26] Noting that no prior court had purported to determine Section 3 qualifications of a member of Congress, and suggesting that separation of powers issues also loomed, Judge Richardson concluded that the matter was a political question beyond the jurisdiction of the judicial branch.[27]

Judge Wynn wrote separately in order to oppose the view of the Richardson concurrence that Article I, section 5 bars any state from regulating ballot access or candidates for federal office. Basing his view on the Elections Clause of Article I, section 4 of the U.S. Constitution, he noted that the Supreme Court has long upheld ballot access restrictions to protect the reliability of the electoral process,[28] and has interpreted the Elections Clause to give states the power to protect the integrity of their political processes from frivolous or fraudulent candidacies, prevent confusion, and minimize the need for successive and runoff elections.[29] Were Article I, section 5 of the U.S. Constitution a grant of exclusive power to Congress, Judge Wynn observed, only Congress could invalidate the congressional candidacies of twelve year-olds and foreign nationals–-and then, only after they had been elected and become "Members," resulting in chaos.[30] Additionally, Article I, section 5 established Congress's power to review the qualification of "Members," not of "candidates." The constitutional text, he explained, did not create an exclusive power of Congress to judge candidate qualifications, in abrogation of the broad power states enjoy under the Elections Clause to regulate ballot access and candidacies of those who seek to represent their citizens.[31]

2. *Georgia*

In *Greene v Raffensperger*,[32] Marjorie Taylor Greene, a candidate seeking reelection to Congress brought an injunction action in federal court[33] against the Georgia Secretary of State to prevent his consideration of the Section 3 challenge by voters in her district under the Georgia

[25] Judge Richardson found no basis for distinguishing between Congressional responsibilities as to "Members," the term used in Article I, section 5, and "candidates." *See id.* at 40.

[26] *Id.* at 67.

[27] *Id.* at 66.

[28] *Id.* at 35, *citing Anderson v. Celebrezze*, 460 US 780, 788 n.9 (1983).

[29] *Id.* at 36, *citing Bullock v. Carter*, 405 US 134, 145 (1972).

[30] *Id*. at 39.

[31] *Id.*

[32] *See* n. 15, *supra*.

[33] The same counsel represented the plaintiffs in both actions, raising the same argument as to the blanket prospective amnesty allegedly flowing from the 1872 Act, and relying on the then-prevailing acceptance of it by the District Court in *Cawthorn.*

challenge statute,[34] and the voters sought to intervene.

In its initial decision,[35] the District Court granted the voters intervention as of right, first reasoning that the voters, although not named in the action, could have their rights under the Georgia challenge law extinguished if their interests were not represented. In *Greene*, the District Court declared the ruling of the District Court in *Cawthorn* denying intervention to the voters "unpersuasive," as it was based upon a heightened presumption of adequacy of representation by governmental entities under Fourth Circuit case law, which was not binding upon the *Greene* Court under the more relaxed Supreme Court and Eleventh Circuit intervention standards.[36]

In its ruling on the merits of Representative Greene's injunction motion,[37] the *Greene* Court rejected the claim that the 1872 Act effectively repealed Section 3, providing amnesty both retrospectively and prospectively, as such direction was both entirely absent from the text of the statute and unsupported by its legislative history.[38] The *Greene* Court explained that the intent of Congress in drafting Section 3 was to exclude Senators and Representatives from the former Confederate states who sought to resume their seats when Congress convened after the conclusion of the Civil War in December 1865.[39] The provision was subsequently used to exclude both state and federal officials from office.[40] The surge in individual applications to Congress for amnesty, however, was overwhelming, prompting Congress to enact the 1872 Act.

The *Greene* Court again rejected the reasoning of the District Court in *Cawthorn*, noting the Congressional committee's express rejection of the argument of the 1872 Act's prospective application in the Berger proceedings as being beyond the scope of the powers of Congress.[41] The *Greene* Court's analysis included the observation that the Berger proceedings demonstrated that Congress itself did not view the 1872 Act or the 1898 Act as repealing Section 3, even if Congress

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[34] The Georgia challenge statute requires that every candidate seeking federal or state office in the state "shall meet the statutory and constitutional qualifications for holding the office being sought" and that any qualified elector eligible to vote for that candidate "may challenge the qualifications of the candidate by filing a written complaint with the Secretary of State giving the reasons why the elector believes the candidate is not qualified." O.C.Ga. §212-2-5(a),(b).

[35] *Greene v. Raffensperger*, No. 22-cv-1294-AT, –F.Supp.3d–, 2022 WL 1045967 (Apr. 7, 2022).

[36] *Id.*, slip op. at 3.

[37] *Greene v. Raffensperger*, No. 22-cv-1294-AT, –F.Supp.3d–, 2022 WL 1136729 (Apr. 18, 2022). The court also found that the voters' challenge created no burden on the plaintiff's First or Fourteenth Amendment rights. *Id., slip op.* at 15-20. And the court rejected plaintiff's claim based on Article I, section 5, noting that Article I, section 4 has been interpreted to grant states broad powers to regulate the time, place, and manner of elections for members of the House of Representatives, and that the state has a legitimate interest in assuring that constitutional requirements are met prior to the election to avoid subsequent disqualification and the need for new elections.

[38] *Id.* at 23.

[39] *Id.* at 23-24, *citing* Magliocca, *op cit*, at 112-113.

[40] *Id.*

[41] *Id.* at 23-24.

were empowered to repeal Section 3.[42] The *Greene* Court added that the Supreme Court's subsequent recognition of the effect of Section 3 further demonstrated that the 1872 Act did not grant amnesty prospectively and thereby effectively repealed Section 3.[43] The Court concluded that Representative Greene was not entitled to enjoin the administrative proceedings before the Secretary of State's office, and that the Administrative Law Judge ("ALJ") could proceed with the hearing sought by the challengers on the Section 3 issue.

The ALJ then conducted the disqualification hearing pursuant to the Georgia challenge statute.[44] It was the first fact-finding hearing under Section 3 to be conducted since the January 6 Events.[45] After taking testimony, reviewing videos and documents, and receiving briefing, the ALJ issued a 19-page opinion, finding insufficient evidence that the candidate had "engaged in" an insurrection to trigger Section 3 disqualification, and allowing her candidacy to proceed.[46] The Secretary of State adopted the opinion of the ALJ the same day, finding the candidate was qualified to run for reelection.[47]

C. Direct Actions

1. *State Court Challenges*

a. Arizona

In other states, voters have brought direct court challenges under Section 3 to the allegedly offending candidates. In Arizona, voters represented by the same counsel involved in the *Cawthorn* and *Greene* cases filed separate actions in state court challenging the candidacies for reelection of Congress members Paul Anthony Gosar and Andrew Steven Biggs and of State Representative Mark W. Finchem, who is running for Secretary of State.[48] The Secretary of State

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[42] Although generally, Congress may not amend a provision of the Constitution by passage of a statute, with respect to section 5 of the Fourteenth Amendment, some ambiguity may arguably be found in its authorization that "Congress shall have the power to enforce this article by appropriate legislation."

[43] *Id.* at 25, *citing Powell v. McCormack*, 395 US 486, 520 n. 41 (1969) and *U. S. Term Limits, Inc. v. Thornton*, 514 US 779, 787 n.2 (1995).

[44] O.C.G.A. §21-2-5.

[45] *See* Roger Parloff, *After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the Fourteenth Amendment?* Lawfare Blog (June 7, 2022), https://www.lawfareblog.com/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment ("Parloff").

[46] *David Rowan, et al v. Marjorie Taylor Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, Initial Decision (May 6, 2022); *see* Parloff, *id*. The ALJ found, *inter alia*, that only the candidate's conduct after having taken the oath would be dispositive in determining Section 3 disqualification. The court declined to address either the 1872 Amnesty Act, because of its finding that Section 3 did not apply, or the candidate's constitutional objections.

[47] *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, Final Decision (May 6, 2022); *see* Parloff, *supra*, n. 45.

[48] *Costello v. Gosar*, No. CV2022-004325, Super. Ct., Maricopa Co. (filed Apr. 7, 2022); *Goode v. Biggs*, No. CV2022-004327, Super. Ct., Maricopa Co. (filed Apr. 7, 2022); *Hansen v. Finchem*, No. CV2022-004321, Super.

and various county officials were joined as parties defendant, as required by the Arizona challenge statute.[49] In each case, the plaintiff-voters invoked the challenge statute to seek a declaration that the candidate was constitutionally disqualified from public office under Section 3 based on reasonable suspicion that he had helped facilitate the January 6 Events, and also sought injunctive relief requiring the state and county officials to exclude the candidate's name from the primary election ballot. Each complaint detailed the alleged actions of the candidate before, during and after the January 6 Events, based upon publicly available information, and relied on the findings by the District Court in *Eastman v. Thompson*[50] that it was "more likely than not" that an overall scheme of which the candidate was allegedly a part constituted conspiracy to defraud the United States by interfering in the election certification process, as well as obstruction of an official proceeding of Congress. Each of the candidate-defendants moved to dismiss on various grounds.

The Superior Court, consolidating the three actions for disposition of the motions, held 1) that Congress failed to create an enforcement mechanism for Section 3 giving rise to a civil cause of action to enforce its terms; 2) that the Arizona challenge statute did not provide any private right of action to enforce Section 3, as it was limited to the "prescribed" qualifications for the particular office, and did not encompass "proscribed" actions which might be disqualifying under Section 3; 3) that Article I, section 5 of the U.S. Constitution reserved exclusively to Congress the judgment of qualifications of its members; and 4) that the Superior Court's considering claims as to disqualification would raise separation of powers concerns.[51] The Court did not address the argument by candidate-defendants that the 1872 Act effectively repealed Section 3. The court denied the injunctive relief sought by the voters, citing the District Court rulings in *Cawthorn* and *Greene*.[52]

On appeal, the Arizona Supreme Court, ruling *en banc*, unanimously affirmed the Superior Court's dismissal of the three cases for failure to state claims for which relief could be granted. While suggesting that the lower court's views on Article I, section 5 of the U.S. Constitution, might have merit, the Arizona Supreme Court declined to decide the constitutional issue and based its ruling entirely on the limitation on rights of action under the Arizona challenge law as set forth by

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Ct., Maricopa Co. (filed Apr. 7, 2022); *see* https://freespeechforpeople.org/challenges-to-paul-gosar-andy-biggs-and-mark-finchem-under-14-3-insurrectionist-disqualification-clause/.

[49] The Arizona challenge law provides in relevant part that all candidates must file with the Secretary of State declaring that they "will be qualified at the time of election to hold the office the person seeks." The statute further provides that "any elector" may challenge a nomination "for any reason relating to qualifications for the office sought as prescribed by law." Ariz. Rev. Stat. §16-351.

[50] *Eastman v. Thompson*, –F.Supp.3d–, No. 8:22-cv-00099-DOC-DFM, 2022 WL 894256 (Mar. 28, 2022), slip op. at 28-31.

[51] *Hansen v. Finchem*, No. CV2022-00431, Super. Ct. Maricopa Co. (Apr. 22, 2022) *remanded after removal by defendant*, No. 22-cv-284, -F.Supp3d-, 2022 WL 1707187 (D.N.M. May 27, 2022). The District Court held that it was without subject matter jurisdiction over the *quo warranto* claims and granted plaintiffs' motion to remand the proceeding to state court.

[52] The Superior Court cited both rulings' findings of complex constitutional issues and an absence of a supportive legal theory in denying the injunction to the respective plaintiff-voters before it. *Hansen v. Finchem*, *supra* n.48, *slip op.* at 17-18. Neither case dealt with injunctions sought by the voters, however. The *Cawthorn* District Court had granted an injunction to the plaintiff-candidate (which ruling was later reversed), while the *Greene* Court had denied the injunction to the plaintiff-candidate.

the lower court.[53]

b. New Mexico

New Mexico voters have brought a *quo warranto* action in state court for a declaration that a county commissioner is disqualified from holding his office or from running for future office by virtue of his participation in the January 6 Events.[54] The candidate was subsequently convicted of a misdemeanor for such conduct.[55] The *quo warranto* case proceeded to a bench trial on August 15, 2022. The court heard testimony from live witnesses, including the defendant, and considered testimony from defendant's criminal trial, as well as substantial documentary and video evidence about the January 6 Events. On September 6, 2022, Judge Francis J. Mathew of the New Mexico First Judicial District Court issued a verdict in an order ruling that "effective January 6, 2021" the candidate "became disqualified under [Section 3] from serving" in office and would immediately forfeit both his right to serve out his term of office and any right to seek future public office. Importantly, the District Court noted that Section 3 "imposes a qualification for public office, much like an age or residency requirement . . . [and] is not a criminal penalty." The District Court further stated that not only the "January 6 Attack," but also the "surrounding planning, mobilization and incitement" that resulted in that Attack, constituted an "insurrection," and that the defendant by his conduct had "engaged in" that insurrection, without regard to whether or not he personally committed acts of violence or entered the Capitol building.[56]

2. *Federal Court Challenges*

a. Wisconsin

In Wisconsin, ten voters brought suit in federal district court against Senator Ronald Johnson and two members of the House of Representatives from Wisconsin seeking a declaratory judgment that they were all barred from seeking reelection under Section 3. Their complaint

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[53] *Hansen v. Finchem*, No. CV-22-0099-AP/EL, --Pac.Rptr--, 2022 WL 1468157 (Ariz. May 9, 2022).

[54] *State ex rel. Marco White et al. v. Couy Griffin*, No. D-101-CV-202200473, Santa Fe District Ct. (filed Mar. 21, 2022), *remanded after removal by defendant; White v. Griffin*, No. 22-cv-284 –FSupp3d–, 2022 WL 1707187 (D.N.M. May 27, 2022). The federal District Court held that it was without subject matter jurisdiction over the *quo warranto* claims and granted plaintiffs' motion to remand the proceeding to state court. *See also Griffin v. White*, Civ. No. 22-0362 KG/GTF, --FSupp3d--, 2022 WL 2132042 (D.N.M. June 14, 2022), which, in an action commenced by the official, denied his motion for a preliminary injunction, which had been based on the District Court decision in *Cawthorn v. Circosta*. The court cited the Fourth Circuit's reversal of that decision in *Cawthorn v. Amalfi*, similarly rejecting his claim that the 1872 Act granted amnesty to him prospectively.

[55] Parloff, *supra*, n. 45. At a bench trial, defendant was convicted of entering and remaining on restricted grounds in violation of 18 USC 1752(a)(1) and was acquitted of disruptive conduct in a restricted building under 18 USC 1752(a)(2). He was sentenced to 14 days' time served, $500 in restitution, a $3000 fine, community service and one year of supervised release. Nicole Maxwell, *Bench Trial Ends in Couy Griffin Removal Case, Ruling to Be Delivered at a Later Date*, Alamogordo News (Aug. 17, 2022), https://www.alamogordonews.com/story/news/2022/08/17/bench-trial-ends-in-couy-griffin-removal-case/65404750007.

[56] *State of New Mexico ex rel Marco White et al. v. Cuoy Griffin*, No. D-101-CV-2022-00473, filed Sept. 6, 2022, at 26, 27, 29-36 (Hon. Francis J. Mathew, District Court Judge). Counsel for the state citizen plaintiffs included Citizens for Responsibility and Ethics in Washington. Defendant Griffin proceeded to trial *pro se.*

alleged that defendants had engaged in insurrection and efforts to overturn the results of the Presidential election by, among other actions, attempting to file a false slate of electors favoring then-President Donald Trump to be counted by the Vice President on January 6.[57] On defendants' motions to dismiss, the District Court dismissed the action, holding that the plaintiffs lacked standing to sue the candidates directly, as they lacked any particularized grievance against them, and distinguished the *Greene* and *Cawthorn* cases as having been brought against state election officials. The District Court also held that it lacked subject matter jurisdiction, as state law required that any complaints about the qualification of candidates must be filed with the Wisconsin Election Commission and investigated by that agency in the first instance; to address them in federal court would frustrate the fact-finding function of the state agency and violate principles of federalism.[58] The court did not reach defendants' claims that the case was precluded by Article I, section 5 of the U.S. Constitution or the 1872 Act.

D. The Consequence of These Disparate Results

Legal approaches to enforcement of Section 3 disqualification and their outcomes vary dramatically. If such efforts were to be invoked as to a candidate running in multiple states (for example, should former President Trump seek reelection in 2024), it is highly likely that the ensuing disparate results would create confusion, chaos and a constitutional crisis. Even as to candidates seeking office in a single state, however, results could vary among states under their local challenge law jurisprudence. Issues on which various states could disagree include, among others:

i. whether the 1872 Act or the 1898 Act effectively repealed Section 3;

ii. whether Article I, section 5 of the U.S. Constitution reserves to Congress exclusively the power to disqualify Congressional candidates, as opposed to members, on the basis of Section 3;[59]

iii. whether Section 3 modifies the Qualification Clause of Article I, section 5 of the U.S. Constitution;

iv. whether the Election Clause of Article I, section 4 of the U.S. Constitution grants to the states the authority to regulate ballot access of constitutionally unqualified candidates for Congress;

v. whether enforcement legislation is necessary to permit individuals to raise challenges to candidates under Section 3; and

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[57] *Nancy A. Stencil et al. v. Ronald H. Johnson et al.*, No. 2:22-cv-00305-LA, --FSupp3d--, 2022 WL 1956999 (E.D. Wi. June 3, 2022).

[58] *Id.*

[59] Even if Article I, section 5 is determined to be the exclusive vehicle for challenge of congressional candidates, it would not bear on Section 3 insurrectionist challenges to candidates for other offices, such as state offices, or the U.S. presidency.

vi. if Article I, section 5 of the U.S. Constitution precludes state disqualification of Congressional candidates, whether individual voters could initiate disqualification proceedings before Congress.

As shown by the disparate results, and differing types of proceedings, in the six states that thus far considered application of Section 3 to disqualify candidates and public officials based upon their alleged involvement in the January 6 Events, a uniform federal standard for application of Section 3 is sorely needed.

V. ENFORCEMENT OF SECTION 3

A. Proposals for Enforcing the Disqualification Clause of Section 3

Although the authorities summarized above indicate that the framers of Section 3 intended for it to apply in circumstances of "insurrection or rebellion" beyond the actions of former Confederates during the Civil War, the subsequent judicial interpretation of Section 3 offers no certainty as to whether it is enforceable without additional legislation and as to whom. Section 5 of the Fourteenth Amendment expressly authorizes Congress to "enforce, by appropriate legislation, the provisions of [Section 3]."[60] Enactment of enforcement legislation as to all officeholders covered by Section 3 would clarify its scope and avoid conflicting rulings, already erupting in the few instances in which Section 3 was invoked since January 6, 2021 and likely to continue.

1. *H.R. 1405*

H.R. 1405, introduced by Representative Steve Cohen in 2021, offers a good beginning to crafting the kind of enforcement legislation needed. Among other things, the Cohen bill:

i. Defines "insurrection or rebellion" as "any violent act, or act supported by a threat of violence, intended to impede any constitutional function of the United States;" and "any attempt or conspiracy to commit, or incitement of [such an act];"

ii. Defines "Officeholder" as including "any individual who . . . holds or previously held a Federal or State office[,]" including the "office[s] of the President" and "Vice President[,]" as well as "position[s] in state government" that meet certain clearly defined criteria;

iii. Empowers the U.S. Attorney General to bring civil actions for declaratory and injunctive relief, including removal from office, against officeholders who engage in an insurrection or rebellion, and provides for a three-judge United States District Court panel in the appropriate Circuit to hear and determine such actions on an expedited basis, utilizing a "clear and convincing evidence" standard, with an immediate and direct review by the U.S. Supreme Court; and

iv. Prohibits any disqualified Officeholder or any survivor or beneficiary of such

[60] US Const., amend. XIV, sec.5.

person from receiving federal benefits or payments by virtue of the disqualified Officeholder having previously held a federal office.

2. *H.R. 7906*

Another approach to federal enforcement legislation is found in H.R. 7906, introduced by Representatives Debbie Wasserman Schultz and Jamie Raskin in May 2022. Their bill, like H.R. 1405, empowers the Attorney General to investigate and commence civil actions pursuant to Section 3 for declaratory and injunctive relief before a three-judge federal district court panel with direct appeal to the United States Supreme Court on an expedited basis to disqualify any individual who has engaged in insurrection and is a "candidate" for federal or state office, including President and Vice President of the United States. H.R. 7906 differs from H.R. 1405 in a number of material respects, including that it:

i. Requires the judicial proceeding to be commenced in the United States District Court for the District of Columbia;

ii. Permits such action to be brought by an individual "who is eligible to vote in an election in which the candidate is seeking office and is harmed by the individual's candidacy" on notice to the Government, which has 60 days in which it may elect to intervene and proceed with the action, unless granted additional time by the court;

iii. Permits the court to stay discovery in the case, whether or not the Government elects to proceed with the case, for a period of 60 days unless extended, if proposed discovery will interfere with any ongoing civil or criminal proceeding;

iv. Declares that "the January 6, 2021 attack on the United States Capitol Buildings constitutes an insurrection against the United States," as does any "attempt to bypass constitutional order and obstruct through corrupt means the counting of certified electoral votes" on January 6, 2021 "with intent to displace the lawfully elected President of the United States or thwart the will of the majority of electors;"

v. Declares that any person who was a "participant" in that attack, defined, inter alia, as having been "physically present within the Capitol Buildings on January 6, 2021 without authorization, who knew or reasonably should have known" that their actions would disrupt Congress' proceedings or intimidating Members of Congress, the Vice President or congressional staff, or who "gave direction, information, funding, or otherwise provided aid to facilitate access to the Capitol Buildings on January 6, 2021" knowing that a reasonable likelihood existed that the recipient of same would so enter for that purpose, or who "conspired or attempted to bypass constitutional order and obstruct through corrupt means the counting of certified electoral votes "is deemed to have engaged in insurrection;"

vi. Sets a standard of proof of a preponderance of the evidence; and

vii. Creates criminal penalties for any chief state election official who has placed on the

ballot an individual who has been found disqualified pursuant to the provisions of this law.

3. *Our Recommendations and Proposal*

We believe that enactment of a federal enforcement statute is the best approach to ensuring that the original intent of Section 3 is realized.[61] A federal statute would ensure uniform application of the provision nationally and avoid a constitutional crisis arising from disparate results of different types of proceedings in 51 jurisdictions. That eventuality is not fanciful, and could arise, most particularly should former President Trump decide to run for reelection in 2024. Although Congress has various options available to it in shaping enforcement legislation for Section 3,[62] we offer the following suggestions for its consideration.

i. **Venue in Federal Courts.** We recommend that the disqualification determination for all federal and state officers be done in the federal courts. Fact finding there would establish the reach of Section 3 to all state and federal officeholders and candidates, and for all federal and state offices, through a singular, uniform, established procedure, based upon due process. Placing the Attorney General in charge of initiating the judicial proceedings before a District Court in which all related cases in the Circuit would be consolidated,[63] and adding the requirement of an expedited appellate review by the Court of Appeals (and regular certiorari procedures) would prevent unnecessary delays impacting election schedules, while discouraging frivolous Section 3 challenges.

ii. **Civil Proceedings.** We recommend that the proceeding be civil in nature. It would not foreclose criminal prosecution for the same conduct, but would not require it. When Section 3 was adopted, creating a separate disqualification provision for officeholders and candidates who had engaged in, or had provided support for, an insurrection, criminal penalties already existed for insurrection under the

[61] This report does not take a position on whether Section 3 is enforceable in the absence of additional enforcement legislation.

[62] Among the legislative choices are: 1) whether the enforcement proceeding law would apply to all officeholders, state and federal, preempting local law for purposes of Section 3 disqualification; 2) who should be able to initiate the enforcement proceeding; 3) whether the proceeding should be civil or criminal in nature; 4) what type of judicial review and which court(s) would address these claims; 5) whether a jury trial would be required; 6) what standard of proof should be applied in the proceeding; 7) whether any such measure should be solely prospective upon its enactment; 8) whether a prior criminal conviction should be required as a prerequisite to the filing of a disqualification proceeding; 9) how "insurrection" should be defined in the statute; and 10) whether any special due process safeguards should be established for the conduct of such proceedings.

[63] Any citizen should be eligible to petition the Attorney General to commence a Section 3 proceeding against an officeholder or a candidate by filing a sworn complaint with the Department of Justice alleging that the person had engaged in prohibited insurrectionary conduct which would injure the petitioner in the absence of disqualification, and attaching all relevant evidence in the possession of the petitioner. This approach should be sufficient to enable voters to raise any sustainable claims. We do not think it necessary to burden the courts with the commencement of separate actions by each claimant which would then be delayed for 60 days or more during review by the government, stays of discovery and/or litigation of motions to consolidate.

Confiscation Act of 1862.[64] Congress, clearly aware of this situation, nonetheless went on to craft the separate proscription against holding office found in Section 3. Neither the criminal statute nor the constitutional amendment was intended to supplant the other. The current version of the Confiscation Act found in 18 USC section 2383 provides criminal penalties of a fine or imprisonment, and additionally renders any person convicted under its terms "incapable of holding any office under the United States."[65] Yet, Congress was not content to rely merely on conviction after a criminal prosecution under section 2383 as the route to removal of officeholders who had engaged in insurrection.[66] And because the process would be civil, rather than criminal, the potential penalty of disqualification would not interfere with the Justice Department's role in establishing guilt beyond a reasonable doubt in any criminal prosecutions relating to the same conduct. Thus, the imposition of disqualification from office would neither constitute a double jeopardy bar to criminal prosecution for the same conduct nor constitute an impermissible bill of attainder, because it would constitute a civil forfeiture rather than a punishment.[67]

iii. **Application.** For the same reasons, and because enactment of a federal

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[64] 12 Stat. 589 (1862). The Confiscation Act was the precursor to the current criminal statute proscribing rebellion or insurrection, codified at 18 USC 2383. *See* discussion *infra*.

[65] 18 USC 2383 provides:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

[66] An analog to this approach can be found in the practice of state legislatures of creating civil causes of action for wrongful death notwithstanding their states having penal statutes proscribing murder and manslaughter. Neither in such circumstances, nor in those contemplated here, would a criminal conviction under a statute proscribing the same conduct be a prerequisite to bringing the civil proceeding. We note that the New Mexico District Court in *Couy Griffin* did not find any requirement that the defendant have been convicted of insurrection under 18 USC 2383 (or any other crime) as a precondition to Section 3 disqualification ("neither the courts nor Congress have ever required a prior criminal conviction for a person to be disqualified under Section Three." *White v Griffin, supra* n. 56, at 26). No such requirement is found in either H.R. 1405 or H.R. 7906.

[67] *But see Griffin's Case, supra*, n. 7 (holding that a Section 3 disqualification from holding public office precluded the prosecution of Jefferson Davis for treason in 1869); Congressional Research Service Report, *The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment* (Jan. 29, 2021) (opining that clear precedent is lacking as to whether disqualification from holding office would constitute a punishment and therefore be an unlawful bill of attainder under Article I, Sections 9 and 10 of the U.S. Constitution, or whether Section 5 of the Fourteenth Amendment amounts to a constitutionally established exception to those constitutional sections), https://crsreports.congress.gov/product/pdf/LSB/LSB10569/2 (updated Sept. 7, 2022, https://crsreports.congress.gov/product/pdf/LSB/LSB10569). Today, the imposition of a civil forfeiture such as the Section 3 disqualification from seeking public office would not create a double jeopardy bar to prosecution for related insurrectionary criminal conduct. *See United States v. Ursery*, 518 US 267 (1996) (holding that *in rem* civil forfeiture proceedings are neither "punishment" not criminal for double jeopardy purposes). Further, neither the *Berger* proceedings nor the *Couy Griffin* case (each discussed *supra*) treated the Section 3 disqualification which they imposed as amounting to a punishment as opposed to a civil forfeiture, notwithstanding the respective officeholders in those cases having been previously convicted for the same conduct at issue in the Section 3 disqualification proceeding. The court in *Couy Griffin* expressly held that Section 3 disqualification was not a

enforcement statute would merely implement Section 3's disqualification provision, established more than 150 years ago, it would not constitute an *ex post facto* law. Accordingly, we do not believe it needs to be limited to prospective application.

iv. **Safeguards.** Due to the seriousness of permanently disqualifying someone from seeking or holding public office, and in order to prevent candidates and incumbents from using the procedure to seek disqualification of their adversaries without a sound basis, we would recommend that certain safeguards, some of them novel for civil proceedings, be incorporated into the new federal enforcement law. At the outset, we agree with the approach taken in H.R. 1405, that the statute should define insurrectionary conduct meriting disqualification to require a showing of violence or acts supported by the threat of violence.[68] We believe that the broader definition in H.R. 7906, which includes attempting corruptly to obstruct the counting of electoral votes would not be easily susceptible of proof, may raise First Amendment concerns, and would therefore only serve to undermine the purposes of the enforcement statute.

v. **Standard of Proof.** We suggest that the new provision incorporate a higher standard of proof than is typical in civil cases, that being proof at least by clear and convincing evidence. Where the complaining witness is a competing candidate or is affiliated with one, it might be advisable to require proof beyond a reasonable doubt.

vi. **Additional Due Process Considerations.** We strongly recommend incorporation of some further due process considerations, such as affording pretrial discovery,[69] mandating the disclosure prior to trial by the government of exculpatory evidence, as required by *Brady v Maryland*[70] in criminal cases, and extending the constitutional privilege against self-incrimination[71] to these proceedings.

vii. **Judicial Determinations.** Neither of the two pending federal bills includes any provision for decision by a jury, an approach with which we agree. The decision being rendered in a Section 3 challenge is not one of criminal liability; it is one of

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criminal penalty. *White v. Griffin*, *supra* n. 56, at 26. Finally, where there has been a judicial trial, as opposed to solely legislative action, no bill of attainder will be found. *United States v. Lovett*, 328 US 303, 315 (1946) ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial.") As noted, disqualification has not been considered punishment. Further, the judicial proceedings we are proposing would involve a trial with safeguards adapted from criminal trials built in.

[68] *See* Hemel, *supra* n. 7 (noting that by requiring that insurrection activity be "violent" in nature in order to be disqualifying, Congress would avoid the routine application of the statute to protestors who have engaged in non-violent civil disobedience).

[69] *See* n. 75, *infra*.

[70] 373 US 83 (1963).

[71] US Const., amend. V.

qualification for public office, which is in the nature of an administrative determination. Moreover, the proceedings must be expeditiously handled to avoid the election of candidates later found to be subject to disqualification.[72]

viii. **"Insurrection" Defined.** A declaration in the text of an enforcement statute that the January 6 Events constituted an insurrection for Section 3 purposes, in a manner analogous to the approach taken in H.R. 7906, would be expedient in terms of avoiding unnecessary relitigation of any question as to whether those occurrences constituted an "insurrection" in multiple cases, with the possibility of disparate results. This conclusion is amply supported by the evidence produced at the hearings held by the House January 6 Select Committee earlier this year. Whether any other incident amounted to an "insurrection" for purposes of Section 3 disqualification would require judicial determination in each case. Similarly, the liability of individuals for their participation in the January 6 Events (or any other insurrection) would be left for judicial determination on a case-by-case basis, based upon the evidence adduced.

We urge the House January 6 Select Committee to include a recommendation for Section 3 enforcement legislation in its forthcoming report, although we recommend that the legislation be generally applicable to any alleged insurrection, in a manner analogous to the approach taken in H.R. 1405.

B. Advantages to Federal Enforcement Legislation

Additional jurisprudential benefits which would flow from the enactment of a federal enforcement statute pursuant to Section 5 of the Fourteenth Amendment would be:

i. development of a unified jurisprudence under Section 3, defining the terms "engaged in" and "insurrection or rebellion";

ii. application of a single standard to all candidates and public officeholders, on both federal and state levels, including the President and Vice President[73];

iii. preclusion of any further debate as to whether Section 3 is self-executing;

iv. reliance upon the express power of Congress "to enforce, by appropriate legislation, the provisions" of Section 3,[74] eliminating any further argument over whether the 1872 Act or the 1898 Act diminished or eliminated the provisions of Section 3;

v. elimination of the controversy over whether the Article I, section 5 of the U.S.

[72] Additionally, these types of proceedings have not generally involved juries. *See, e.g., Rowan v. Greene, supra*; *White v. Griffin, supra*; *Berger, supra*.

[73] *See* Parloff, *supra,* n. 45 (discussing commentators who have opined that Section 3 does not apply to those officeholders).

[74] U.S. Const., amend. XIV, sec. 5.

Constitution power of Congress does or does not yield to the authority of states under the Elections Clause of Article I, section 4 of the U.S. Constitution, as the federal judiciary, under authority from Congress, would make the determination;

vi. the expedited review authorized by the statute would promptly and efficiently resolve controversies over a candidate's qualifications, without having to await the results of an election or the necessity of repeated elections, and with all challenges to a candidate consolidated before the same district court;

vii. discovery could be had during the proceedings,[75] ensuring a more comprehensive factual record and a more appropriate determination;

viii. claims of ex post facto application would be eliminated, as the disqualification procedure would clearly be civil in nature; and

ix. any concern as to anti-democratic application of Section 3 would be ameliorated, as partisan groups, including from outside the state, would not be mounting challenges to candidacies supported by the local community.

VI. CONCLUSION

In sum, because a federal civil enforcement statute, whether or not legally necessary to continued application of Section 3, would eliminate ambiguity and confusion surrounding Section 3, would preclude jurisdictional conflicts as to a candidate for office in multiple jurisdictions, and would assure a reasoned, evidence-based, due process approach to candidate disqualification, the New York City Bar Association urges Congress, pursuant to its powers under section 5 of the Fourteenth Amendment, to pass legislation enforcing the terms of Section 3 at its earliest opportunity. We also urge the House of Representatives' Select Committee to Investigate the January 6 Attack on the Capitol to include in its forthcoming report a recommendation that Congress take such action.

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[75] Notwithstanding the comprehensive review of the factual record by the ALJ in *Greene*, discovery was not permitted in that proceeding (Parloff, *supra*, n. 45). On the other hand, in *Cawthorn*, as previously noted, the Fourth Circuit found that the voter-intervenor had standing based on her interest in taking discovery in the administrative proceeding.