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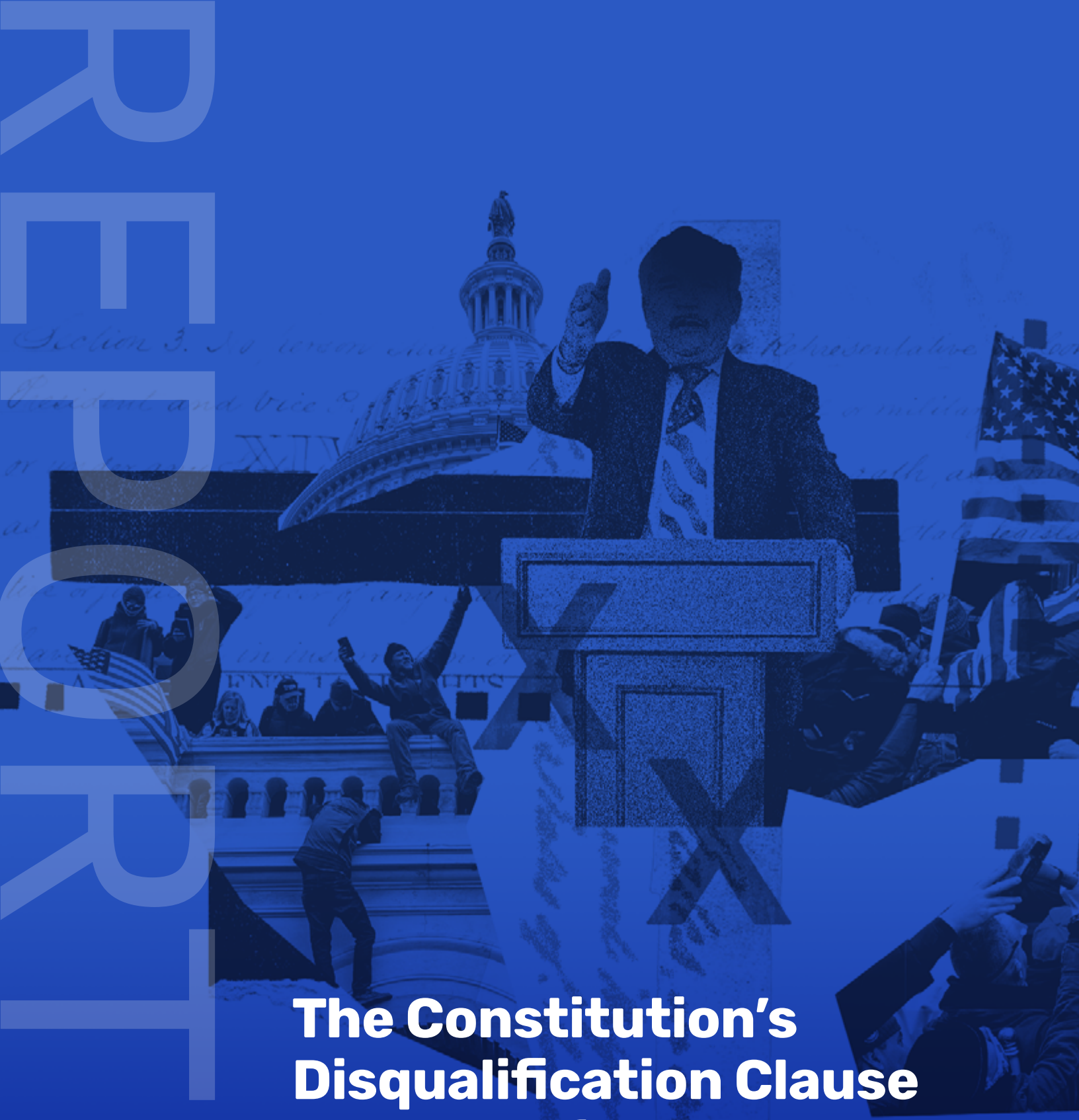
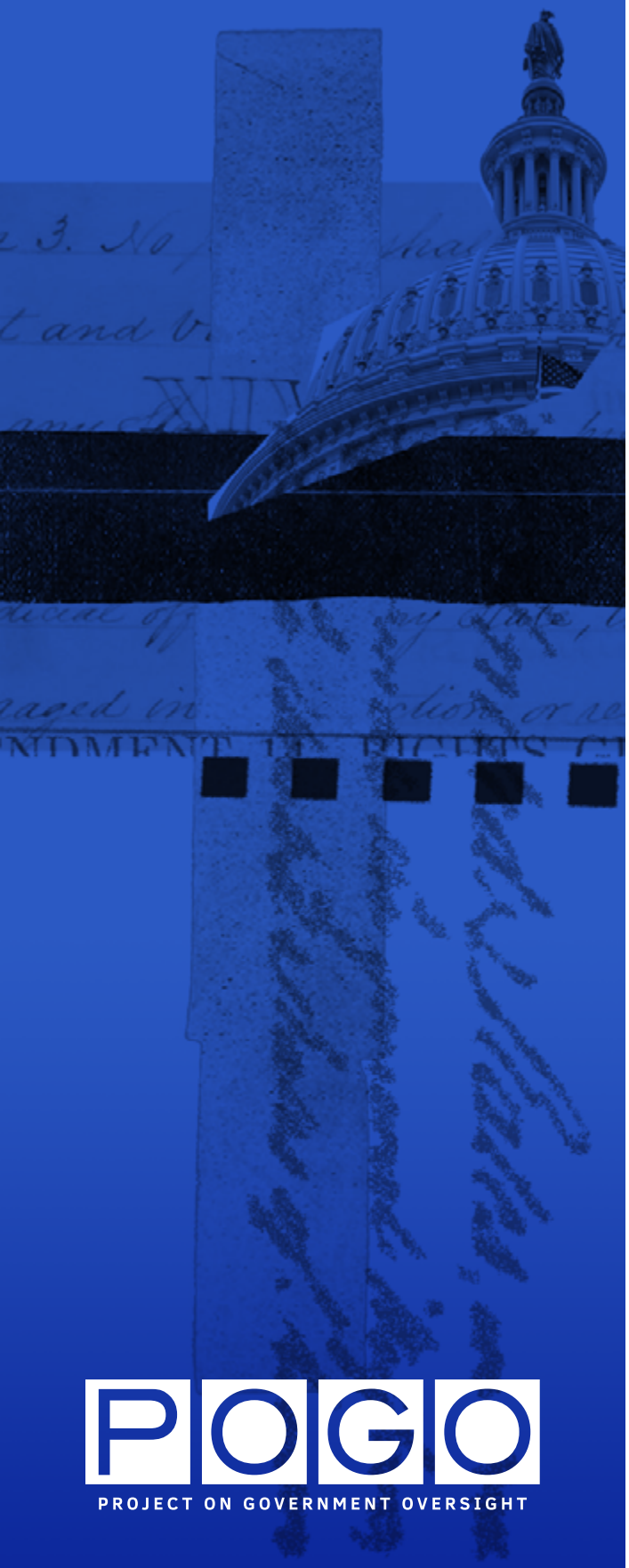


The Constitution's Disqualification Clause Can Be Enforced Today

November 14, 2022

POGO



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THE PROJECT ON GOVERNMENT OVERSIGHT (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing.

We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Introduction

The attack on the United States Capitol complex to disrupt the certification of the 2020 presidential election on January 6, 2021, led to the first application of the disqualification clause contained in Section 3 of the 14th Amendment in more than a century. Section 3 prohibits public office holders who have taken an oath to support the U.S. Constitution and then engage in insurrection or rebellion against the United States, or who give aid or comfort to enemies of the United States, from serving in public office.

The analysis in this report will build on the established collective understanding of Section 3 to guide contemporary application of the clause. The report will specifically prescribe how the disqualification clause can currently be enforced against individuals involved in the January 6 attack.

To support and strengthen the existing legal processes for enforcing the disqualification clause, we recommend the Select Committee to Investigate the January 6th Attack on the United States Capitol includes in its final report a full, particularized recital of all relevant evidence it has uncovered implicating Section 3.

We further recommend that the final report also include clear statements affirming that the lack of a specific federal enforcement statute does not preclude other, existing methods of disqualifying or removing offending office holders. Finally, we encourage the Committee to reaffirm in its report that the presidency and vice presidency are considered federal offices under Section 3.

Background on Section 3 of the 14th Amendment

Section 3 of the 14th Amendment was ratified shortly after the Civil War to prevent military officers, federal officers, and state officials who served in the Confederacy from serving in any future public office unless a supermajority of each chamber of Congress voted to allow such service. The text — which extends to future acts of insurrection, rebellion, or other treasonous behavior — reads:

> 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.[1]

[1] U.S. Constitution amend. XIV. § 3.

Individuals Covered and Offices Prohibited

The disqualification clause of the 14th Amendment covers any member of Congress, officer of the United States, member of a state legislature, or executive or judicial officer of any state who has taken an oath to support the Constitution of the United States. While some have claimed that the term "officer of the United States" does not include the president, the overwhelming weight of scholarship and evidence is that it does.[2]

Individuals disqualified from office under the section are excluded from *future service* in either chamber of Congress, as an elector of president or vice president, as a member of any office, civil or military, under the United States (including the office of the president or vice president), or under any state. This disqualification can only be removed by a two-thirds vote in each house of Congress; a presidential pardon cannot lift this disqualification.

Disqualifying Conduct

Section 3 disqualification applies to covered individuals who participate in two categories of activities: those who have "engaged in insurrection or rebellion against" the United States, and those who have "given aid or comfort to the enemies thereof."[3] Thus, imposing the disqualification requires a finding that there was an insurrection or rebellion against the federal government and that an individual engaged in it — or, alternatively, that an individual gave aid or comfort to enemies of the United States. However, as is often the case with the Constitution, the text provides no further clarity on what circumstances or actions meet the thresholds of insurrection, rebellion, engagement, aid or comfort, or acting as an enemy of the United States.

There should be little doubt that the attack on the Capitol on January 6 rises to the level of an insurrection. In determining whether the attack triggers the disqualification clause, a New Mexico county trial court recently summarized the historical understanding of "insurrection" as: "an (1) assemblage of persons, (2) acting to prevent the execution of one or more federal laws, (3) for a public purpose, (4) through the use of violence, force, or intimidation by numbers."[4]

The court's definition is consistent with other definitions of insurrection. For instance, 10 U.S.C. § 253 authorizes the president to use the armed services to suppress "any insurrection" if it "opposes or obstructs the execution of the laws of the United States or

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[2] Josh Blackman and Seth Barrett Tillman, "Is the President an 'officer of the United States' for purposes of Section 3 of the Fourteenth Amendment?" *Reason*, January 20, 2021, https://reason.com/volokh/2021/01/20/is-the-president-an-officer-of-the-united-states-for-purposes-of-section-3-of-the-fourteenth-amendment/; Mark A. Graber, "Their Fourteenth Amendment and Ours," *Just Security*, February 16, 2021, https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/.

[3] U.S. Constitution amend. XIV. § 3.

[4] New Mexico, ex rel. White v. Griffin, No. D-101-CV-2022-00473, 2022 WL 4295619 at 29 (N.M. Dist. Ct. Sept. 6, 2022), https://perma.cc/88PE-SXPJ.

impedes the course of justice under those laws."[5] Notably, as the New Mexico decision observes, all three branches of the federal government have described the January 6 attack on the U.S. Capitol as an "insurrection."[6]

Cases applying the disqualification clause to former Confederates after the Civil War provide some guidance about what sort of conduct rises to the level of "engaging" in insurrection. For instance, one court found that "'engage' implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination," while another defined it as "Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of anything that was useful or necessary" to the insurrection.[7] The New Mexico judge similarly suggested that a broad swath of activity was prohibited by the clause when he ruled that a county commissioner "engaged" in the January 6 insurrection by participating in the "planning, mobilization, and incitement" preceding the attack on the Capitol, and not just the attack itself.

"Giving aid and comfort" has generally been given a similar definition to "engaging," to the extent that both can involve voluntarily acting in ways that support insurrection. For instance, in 1867 the House refused to seat John D. Young of Kentucky, finding that he had given aid and comfort by, among other things, sharing information that led to the capture of Union soldiers.

However, the House report about John D. Young raised the possibility that written or spoken statements of support could also constitute aid and comfort, writing that it "may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position."[8] The following year, the House refused to seat John Young Brown of Kentucky, finding that he had given "aid and comfort" to the enemy by publicly suggesting that anyone who joined the Union Army should be "shot down in their tracks."[9]

The 1919 exclusion of Victor Berger from the House of Representatives also was based on purely expressive acts: The House refused to seat Berger after he was found guilty of Espionage Act violations for publishing statements espousing socialist opposition to U.S. involvement in World War I.[10] The House took these statements as giving "aid and comfort" to enemies during the war.

Just as relevant to the application of this disqualification is the definition of "enemies." The Berger disqualification suggests that the term "enemies" is not limited to those formally

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[5] 10 U.S.C. § 253 (2022), https://www.law.cornell.edu/uscode/text/10/253.
[6] New Mexico, ex rel. White v. Griffin [see note 4].
[7] United States v. Powell, 27 F. Cas. 605 at 607 (1871), https://cite.case.law/f-cas/27/605/; Worthy v. Barrett and Others, 63 N.C. 199 at 203, (N.C. 1869), https://casetext.com/case/worthy-v-barrett-and-others.
[8] *Hinds' Precedents of the U.S. House of Representatives*, vol. 1, ch. 14 (March 4, 1907), 452, https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V1/pdf/GPO-HPREC-HINDS-V1-15.pdf.
[9] *Hinds' Precedents of the U.S. House of Representatives*, 445 [see note 8].
[10] The Congressman, Victor Berger, was eventually seated at a subsequent Congress after the Supreme Court threw out his conviction.

aligned with an opposing government, though some have read other precedent to suggest that such formal allegiance is required to satisfy this clause.[11] However, despite the similarities to the Constitution's treason clause (which centers on foreign powers), the post-Civil War context and early enforcement of Section 3 suggests that the term "enemies" is not limited to subjects of a hostile foreign power. This later interpretation would have "enemies" include all insurrectionists and rebels encompassed in Section 3.[12]

As we discuss below, while there are many public and private actors who can enforce the disqualification clause through litigation and other means, the Select Committee is in a unique position to determine which actions uncovered in its investigation are most clearly covered by Section 3. It can also clarify the extent to which it endorses these past precedents.

Prior Enforcement

There is a relatively limited history of Section 3 enforcement, largely because Congress granted amnesty to former Confederates in 1872. However, the existing record establishes that a variety of actors, including state officials and courts, federal prosecutors, and Congress itself, have enforced the disqualification clause.

Congress passed the Ku Klux Klan Act (also sometimes referred to as the "Enforcement Act") shortly after ratifying the 14th Amendment.[13] The legislation included a statutory directive to federal district attorneys to petition courts for a writ of *quo warranto* — a legal action that challenges the right of an official to hold office and allows a court to remove an unauthorized officeholder — to remove any covered official who would be disqualified from holding office under the 14th Amendment.[14] Federal prosecutors brought several cases under this provision.[15]

Two years after passing the legislation, Congress "removed such disability" by passing the Amnesty Act of 1872, allowing most former Confederates to hold office despite the disqualification clause (and mooting several prosecutions then underway). The Ku Klux Klan Act was later repealed, so the explicit cause of action for district attorneys to enforce the provisions is no longer operative.[16]

However, beyond this federal legislation, Congress also possesses its own internal mechanisms to enforce Section 3 against its members. The Senate and the House of

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[11] Jennifer K Elsea, Congressional Research Service, *The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment*, LSB10569, September 7, 2022, 4, https://crsreports.congress.gov/product/pdf/LSB/LSB10569.
[12] Daniel J. Hemel, "Disqualifying Insurrectionists and Rebels: A How-To Guide," *Lawfare*, January 19, 2021, https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide.
[13] First Ku Klux Klan Act, Ch. 114, 16 Stat. 140 (1870).
[14] Elsea, *The Insurrection Bar to Office,* 5 [see note 11].
[15] Gerard Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," *Constitutional Commentary* vol. 36 (2021), 109-110, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3748639.
[16] Elsea, *The Insurrection Bar to Office,* 5 [see note 11].

Representatives have both exercised their exclusive constitutional authority to exclude or disqualify individuals by refusing to seat them and citing the disqualification clause.[17]

States have also enforced Section 3 against their officials, both before and after the passage and repeal of the Ku Klux Klan Act. In one early example, county commissioners in North Carolina refused to induct a man who had been elected Sheriff due to his service to the Confederate government in the same position.[18] This action was eventually approved by the North Carolina Supreme Court; the United States Supreme Court dismissed the sheriff's appeal.[19] The most recent Section 3 disqualification occurred in September 2022, when a New Mexico court disqualified county commissioner Couy Griffin in a state-law *quo warranto* lawsuit brought by New Mexico residents.[20] Other enforcement actions earlier in 2022 have also yielded important legal precedent, even though they did not result in findings of disqualification.[21]

Existing Enforcement Mechanisms

The limited prior enforcement of the disqualification clause has led some to conclude that modern federal enforcement legislation is necessary to apply Section 3 against individuals involved in the January 6 attack on the Capitol. However, a combination of state, federal, and administrative mechanisms already provide a limited legal framework to enforce this provision, as a law review article completed shortly before the events of January 6, 2021, illustrates.[22] This structure consists of processes to prevent a declared candidate for elected office from being placed on the ballot, prevent a disqualified candidate-elect from taking the oath of office, or remove a disqualified official from office.[23]

The type of office at issue dictates which process is the right one and when the challenge can be most effectively made. Below is a high level summary of the strongest existing processes available to enforce the disqualification clause. We also address the types of offices those

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[17] Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," 37 [see note 15].
[18] Myles S. Lynch, "Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment," *William & Mary Bill of Rights Journal*, vol. 30, no. 1 (2021), 201, https://scholarship.law.wm.edu/wmborj/vol30/iss1/5.
[19] Worthy v. Barrett, 63 N.C. 199, appeal dismissed sub nom. Worthy v. Comm'rs, 76 U.S. 611 (1869).
[20] New Mexico, ex rel. White v. Griffin [see note 4].
[21] Such precedent included holding that the Amnesty Act of 1872 does not apply to the January 6 Insurrection, as in Cawthorn v. Amalfi, 35 F.4th 245 (4th Cir. 2022) https://www.ca4.uscourts.gov/opinions/221251.p.pdf; and Greene v. Raffensperger, __ F.Supp.3d __, 2022 WL 1136729 (N.D. Ga. Apr. 18, 2022) appeal filed (11th Cir. 2022). Another case held that that to "engage" in insurrection is evaluated under Worthy-Powell standard, does not require acts of violence or criminal conviction, can consist of speech including "marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding," and that such speech can satisfy any ostensible "overt act" requirement. See Rowan v. Greene, 2222582-OSAH-SECSTATE-CE-57-Beaudrot, at 13-14 (Ga. Office of State Admin. Hearings May 6, 2022) https://freespeechforpeople.org/wp-content/uploads/2022/05/2222582.pdf.
[22] Lynch, "Disloyalty & Disqualification," 153 [see note 18].
[23] Lynch, "Disloyalty & Disqualification," 153, 184 [see note 18].

processes are best suited toward barring insurrectionists from holding, and the proper timing for such a challenge.

State-Level Mechanisms[24]

States have their own processes that allow a specified challenger to petition the state's designated certifying body to find that an individual is not qualified to hold the office for which they are running.[25] Those processes vary by state, but they could be used to enforce the 14th Amendment disqualification of individuals who are running for the following: to hold elected state office; to serve as a presidential elector; to serve as the president or vice president; or to serve as a member of Congress.[26]

In some circumstances, individuals may bring legal actions to challenge a candidate's qualification to hold an office. Where states permit challenges to a candidate's ability to even appear on the ballot based on a lack of constitutional qualifications for the office, these challenges can often be brought before the election. A state level challenge to an individual's qualification to hold the office of president or vice president should come at or before the primary stage of a presidential election, since that is the stage in which individuals are asked to cast a vote for or against the candidates themselves. After the primaries, individuals vote for presidential *electors*, not individual candidates.[27]

Some states may also include processes for such challenges to office after an election. And even where there is no designated process, it may be possible to challenge an elected official's candidacy by *writ of mandamus*, where an individual petitions a court to compel or withhold an administrative action, such as refusing to administer an oath of office to someone disqualified to hold that office.

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[24] Any argument against state-level enforcement of the disqualification clause disregards the plain text of the Supremacy Clause, which makes clear that the "Constitution … shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Constitution art VI., cl. 2.

[25] POGO is currently compiling a resource that identifies what this process is in each state as well as who can bring such a challenge. For the purposes of this analysis, we are assuming that each state does in fact have such a process. Should we determine that one or more states do not, we will update this analysis.

[26] Lynch "Disloyalty & Disqualification," 184-187, 190 [see note 18]. While Congress has the exclusive constitutional authority to judge the qualifications of its members (which includes the power to refuse to seat members-elect), states have long used their own power over elections to prevent candidates from appearing on ballots if they are constitutionally ineligible to hold the office they seek. See Cawthorn v. Amalfi (Wynn, J., concurring in the judgment) [see note 21]. A small number of federal judges have argued in non-binding concurrences that states lack the authority to enforce Section 3 against congressional candidates, but these arguments fail to give Section 3 the weight it is due as a constitutional condition for holding office. See Greene v. Beaudrot, no. 22-11299 (11th Circuit, November 3, 2022) (Branch, J, concurring in judgement), https://www.courthousenews.com/wp-content/uploads/2022/11/Marjorie-taylor-greene-moot-11th-circuit.pdf; Cawthorn v. Amalfi (Richardson, J, concurring in judgement) [see note 21].

[27] Congressional Research Service, *How Can the Results of a Presidential Election Be Contested*, (August 26, 2016), https://sgp.fas.org/crs/misc/contest.pdf.

Alternatively, officials charged with administering oaths of office to newly elected or appointed officials may themselves refuse to administer an oath to an individual they believe is disqualified from holding office under Section 3. The individual whose eligibility is being questioned is not without recourse: They could then bring their own *writ of mandamus* action to compel that swearing in.[28]

For members of the Electoral College, challenges should likely be brought post-appointment.

This is because there is no popular election for most of these positions. They are largely appointed by their corresponding political parties.

Quo Warranto

The writ of *quo warranto* generally allows a court to hear challenges to a person's right to hold public office and remove an unqualified individual from office. In many jurisdictions, *quo warranto* rules are now codified. At the federal level, Congress codified *quo warranto* in the District of Columbia Code.[29] Under the *quo warranto* law, the federal district court in Washington may issue a writ of *quo warranto* against anyone in the District who unlawfully holds "a public office of the United States."[30]

Both the U.S. attorney general and the U.S. attorney for Washington D.C. may initiate this action of their own accord, or based on the relation of a "third person."[31] If the attorney general or U.S. attorney for D.C. refuses to bring an action, a "person interested" may ask the court for permission to bring the case in the name of the United States over the objection of the Justice Department.[32] Despite the language of the statute, however, as a practical matter it appears that the U.S. attorney general and U.S. attorney for D.C. are the only people who can reliably bring *quo warranto* challenges against most federal government officials.[33]

Because the *quo warranto* statute constitutes federal law, this mechanism can be used to remove individuals from: holding appointed or elected office in the District of Columbia government, serving as appointed officers of the federal government (Senate-confirmed or non-Senate-confirmed) with offices in the District of Columbia, and potentially serving as vice

[28] Lynch "Disloyalty & Disqualification," 153, 186 [see note 18].

[29] The current form of this provision dates to the 1960s, but substantially similar provisions have been in effect since the early 1900s. DC Code §§16-3501 – 16-3503, https://code.dccouncil.gov/us/dc/council/code/titles/16/chapters/35/subchapters/I.

[30] DC Code §§16-3501, 16-3502 [see note 29].

[31] DC Code §16-3522, https://code.dccouncil.gov/us/dc/council/code/sections/16-3522.html.

[32] DC Code §16-3503 [see note 29].

[33] This is because there is a very narrow and poorly defined pool of individuals who would qualify as an "interested person" able to bring a quo warranto action over the objection of the AG and US Attorney. A general interest in the function of government is not sufficient. The clearest category of an interested person is someone with a claim to the office being challenged, but it's not clear what that would look like for appointed offices.

president or president.[34] For all four categories of office, the challenges would be brought post-appointment or post-election.

It is worth noting that the *quo warranto* statute only applies to federal offices in the District of Columbia; there are federal appointed offices with headquarters outside of Washington to which the statute would not apply.

State Statutory or Common Law Quo Warranto Actions

Like the federal government, some states have codified processes for individuals to petition courts for a writ of *quo warranto*.[35] However, even in states where the process has not been codified, it may still be possible to petition a court to remove a disqualified office holder under the common law writ of *quo warranto*. These processes can be used to remove disqualified elected state or local office holders and appointed state or local office holders. However, they would not reach federal officials based in those states.

For elected state office holders, these challenges could likely be brought both post-election and post-assumption of office. For appointed state office holders, they would likely best be brought post-assumption of office. Who has standing to bring such challenges will depend on the rules of each state.

How the Select Committee Can Encourage Section 3 Enforcement

As this report has described, there is already legal infrastructure in place to enforce Section 3 against many federal, state, and local officials. Congressional action is not necessary for enforcement actions utilizing these processes. However, certain statements by the Select Committee in its final report would bolster any future enforcement action. Specifically, the Select Committee should make factual and legal findings that it has uncovered disqualifying conduct, and that Section 3 can and should be enforced through existing processes.

Factual Findings

The Select Committee should publish factual findings that particularize what actions it has uncovered related to the January 6 attack that it believes constitute "insurrection" or "rebellion," or an act of "aid or comfort to the enemies" of the United States, and should

[34] There are some structural and legal considerations that cast doubt on the applicability of the DC *quo warranto* law to the president. It is unclear if an attorney general would be permitted to pursue such an action against the president who appointed them. In addition, at least one court suggested the judiciary lacks the power to remove a sitting president. See Barnett v. Obama, 2009 U.S. Dist. Lexis 101206 (Central D. Calif.) Engaging in insurrection or rebellion is undeniably grounds for impeachment.

[35] See, for example, Fla. Stat. §§ 80.01-80.04 (2022), http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0000-0099/0080/0080ContentsIndex.html. POGO is currently compiling a resource that identifies what this process is in each state as well as who can bring such a challenge.

thereby trigger the disqualification clause. All available evidence underlying those findings should be presented with the report.

Having undertaken a thorough investigation, the Select Committee is in a unique position to offer comprehensive evidence regarding which activities related to the attack on the Capitol should be considered disqualifying under the 14th Amendment and which should not. Clear boundaries around — and evidence of — the acts the committee has uncovered in its work could be instructive to a court or other body hearing a challenge under the above legal framework.

There is a variety of activity that could very well constitute acts covered by Section 3:

- A member of Congress leading a Capitol tour group including someone who planned to return to disrupt the certification of Electoral College votes on January 6 (provided the member knew of these plans);
- The president and others making efforts to intimidate the vice president into refusing his constitutional duty to certify the Electoral College votes;
- The president urging armed rally goers to march to the Capitol on January 6;
- The president refusing to take action during the attack despite a constitutional duty as chief executive to intervene;
- Advisors and attorneys scheming to undermine the 2020 election results through the coordination and submission of a false slate of electors.[36]

Whether any of this conduct constitutes engaging in "insurrection," "rebellion," or an act of "aid or comfort" to enemies of the United States will depend on what the facts uncovered by the Select Committee reveal.

Committee findings could include specific examples of behavior or more general statements of the types of actions related to the January 6 attack that should disqualify someone from future office, such as those included in H.R. 7906, legislation proposed to establish a civil

[36] Nicholas Wu and Kyle Cheney, "Loudermilk tour group taking basement photos 'raises concerns' for Jan. 6 panel," *Politico*, June 15, 2022, https://www.politico.com/news/2022/06/15/loudermilk-tour-group-photos-00039804; Patrick Phillips, "Trump pushes Pence to 'do the right things,' reject Electoral College vote," *WCSC*, January 6, 2021, https://www.live5news.com/2021/01/06/trump-supporters-rally-columbia-washington-ahead-congress-certifying-election-results/; Jamie Gangel and Jeremy Herb, "Memo shows Trump lawyer's six-step plan for Pence to overturn the election," *CNN*, September 21, 2021, https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo; Luke Broadwater and Michael S. Schmidt, "Trump Urged Armed Supporters to Capitol, White House Aide Testifies," *New York Times*, June 28, 2022, https://www.nytimes.com/2022/06/28/us/politics/trump-meadows-jan-6-surprise-hearing.html; Albert W. Alschuler, "Trump and the Insurrection Act: The Legal Framework," *Just Security*, August 16, 2022, https://www.justsecurity.org/82696/trump-and-the-insurrection-act-the-true-legal-framework/; Nicholas Wu and Kyle Cheney, "Ron Johnson tried to hand fake elector info to Mike Pence on Jan. 6, panel reveals," *Politico*, June 21, 2022, https://www.politico.com/news/2022/06/21/jan-6-panel-trump-overturn-2020-election-00040816.

action for disqualification under Section 3.[37] Whatever the findings, they must be bolstered by the considerable evidence the committee has obtained.

The classic example of the presentation of such evidence is the 1974 Watergate "Road Map."[38] In that case, a grand jury was providing evidence to the House of Representatives, and this case it is the House that would be making evidence available to others, but the principle is the same.

Legal Findings

We believe several legal findings would be useful to clarify debated or ambiguous points. Though nonbinding, a formal statement from Congress, as the attacked institution, through the committee duly constituted to review the attack should be instructive to courts or other decision-makers involved in the existing processes.

First, although the overwhelming weight of scholarship and common sense makes clear that the president and vice president are considered officers of the United States for the limited purposes of the disqualification clause, the Select Committee's report could include a clear statement to that effect, adding even more support to that body of evidence.

Most importantly, the report should reaffirm that the mechanisms we have outlined in this report are viable and appropriate avenues for enforcing Section 3 where applicable, even in the absence of federal legislation specifically designed to enforce the disqualification clause.

This kind of affirmation is especially important given that more than a century elapsed between the two most recent successful applications of Section 3.

In the intervening years, some have criticized the current enforcement structure, suggesting that Section 3 can only be enforced by federal law.[39] In 1869 and again in 2022, judges speculated that only an act of Congress could empower states to enforce the disqualification clause.[40] The 1869 case, decided by Chief Justice Samuel Chase when he was sitting as a

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[37] To establish a civil action for disqualification under section 3 of the 14th Amendment to the Constitution, and for other purposes, H.R. 7906, 117th Cong., § 1(h)(1) (2022) https://www.congress.gov/bill/117th-congress/house-bill/7906.

[38] "Grand Jury Report and Recommendations Concerning Transmission of Evidence to the House of Representatives," March 1, 1974, https://www.archives.gov/research/investigations/watergate/roadmap; Norman Eisen, Danielle Brian and E. Danya Perry, "The Jan. 6 Hearings Are Over. These 3 Things Must Happen Now." *New York Times*, October 14, 2022, https://www.nytimes.com/2022/10/14/opinion/january-6-committee-trump.html.

[39] Hemel, "Disqualifying Insurrectionists and Rebels" [see note 12]; Noah Bookbinder and Donald K. Sherman, "Why our 14th Amendment lawsuit against a Trump fanatic sets a key American precedent," NBC News, September 11, 2022, https://www.nbcnews.com/think/opinion/cowboys-trump-fanatic-lawsuit-wins-sets-big-precedent-rcna46946. Other Section 3 challenges earlier in 2022 were not successful in yielding a finding of disqualification, though two such cases helped establish legal precedent on important sub-issues under Section 3, and were relied upon in the Griffin case [see note 4].

[40] See In re Griffin, 11 F. Cas. 7 (Chase, Circuit Justice, C.C.D. Va. 1869) (No. 5,815); Hansen v. Finchem, No. CV2022-004321 (Ariz. Maricopa Superior Ct. Apr. 22, 2022CV-22-0099-AP/EL (Ariz. May. 9, 2022) (relying on In re Griffin),

circuit judge, applied to federal court. The 2022 decision, by a county judge in Arizona, reached more broadly but was not upheld by that state's higher court.

Beyond this handful of rulings, the New York City Bar Association recently released a report suggesting that state-level enforcement of Section 3 is undesirable and suggesting Congress pass a federal civil enforcement statute to prevent those who participated in the events of January 6 from holding public office in the future.[41] Importantly, the report makes no determination about whether such legislation is necessary, but instead it defends the recommendation as a way to avoid ambiguity and varied enforcement in different jurisdictions.[42]

We disagree with these views and believe the historical record, modern jurisprudence, and the principles of federalism largely resolve ambiguities and support the legitimacy of the existing enforcement mechanisms that we've detailed above.

As Judge Julius Richardson of the U.S. Court of Appeals for the Fourth Circuit recently explained, the idea that a federal enforcement statute is a prerequisite to any Section 3 enforcement is based on the 1869 ruling by Chief Justice Chase, a decision that directly contradicts another ruling Chase issued around the same time period, which "make[s] it hard to trust Chase's interpretation."[43]

Furthermore, there is strong evidence against the strict need for a federal statute.

While the Ku Klux Klan Act did offer the federal enforcement statute Chase called for, there are at least three examples of state courts disqualifying individuals from office under Section 3 of the 14th Amendment before the enactment of any such legislation.[44] This too, demonstrates that a federal statutory enforcement mechanism is not required for the operation of Section 3.

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aff'd on other grounds, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. May 9, 2022) (relying purely on state law grounds); For an explanation of why Griffin applies to federal cases but not state cases, see Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," 104, n. 91 [see note 15].

[41] Task Force on the Rule of Law, New York City Bar Association, *Historical Context, Current Challenges & Recommendations Regarding the Disqualification Clause* (September 29, 2022), 12, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/disqualification-clause-history-and-recommendations-for-amendments.

[42] Task Force on the Rule of Law, *Historical Context, Current Challenges & Recommendations Regarding the Disqualification Clause* [see note 41].

[43] About Chase's understanding of Section 3, Richardson also wrote, "[b]etween the shifting legal conclusions, Chase's pragmatic political concerns, and the obvious conflicts of interest, I do not take his discussion as much evidence of a broader contemporary understanding." See Cawthorn v. Amalfi, (Richardson, J., concurring in the judgment) [see note 21].

[44] Worthy v. Barrett , 63 N.C. 199, appeal dismissed sub nom. Worthy v. Comm'rs, 76 U.S. 611 (1869) (N.C. 1869); In re Tate, 63 N.C. 308 (1869); Louisiana ex rel. Sandlin v. Watkins, 21 La. Ann. 631 (La. 1869); see also State ex rel. Downes v. Towne, 21 La. Ann. 490 (La. 1869) (finding that state court, not the governor, needed to determine whether the individual was disqualified).

It also reflects a unique aspect of Section 3: It is the only qualification for state-level office set forth in the U.S. Constitution. State courts and election officials have not only an interest in enforcing Section 3, but an affirmative obligation to do so.

At the federal level, while the Ku Klux Klan Act has lapsed, the federal *quo warranto* statute remains on the books. Congress also possesses its own internal mechanisms to enforce Section 3 against its members.

A clear statement by the Select Committee will help resolve the misconception that an additional act of Congress is necessary to enforce Section 3.

Red Herrings

Some may raise other potential objections to Section 3 enforcement. Below, we outline two possible objections and explain why they are not actual barriers to enforcement.

Bill of attainder or ex post facto?

The Constitution plainly prohibits Congress from passing a "Bill of Attainder or ex post facto Law."[45] A "bill of attainder" is a law that decides guilt and inflicts punishment on an identifiable individual without a judicial trial.[46] An "ex post facto law" is a law that retroactively punishes or criminalizes specific actions.[47]

Although these two issues are sometimes noted the context of the disqualification clause, any concerns they raise are misplaced. Bills of attainder and ex post facto laws only apply in the criminal context. Section 3 of the 14th Amendment is not a criminal punishment. Instead, as was made clear during the debates when Section 3 was adopted, it is merely a qualification for office.[48]

What about the First Amendment?

One challenge that is likely to appear in any effort to define the scope of disqualifying conduct under Section 3 is the extent to which purely expressive acts could count as "engaging in insurrection" or "giving aid and comfort" to enemies of the United States. There is some uncomfortable precedent in this area.[49] Most notably, in 1919, Victor Berger was disqualified

[45] U.S. Constitution art. I, § 9, cl. 3.
[46] "Wex: bill of attainder," Legal Information Institute, last updated July 2022 https://www.law.cornell.edu/wex/bill_of_attainder.
[47] "Wex: ex post facto," Legal Information Institute, accessed October 27, 2022, https://www.law.cornell.edu/wex/ex_post_facto.
[48] James Wagstaffe, "Time to Reconsider the 14th Amendment for Trump's Role in the Insurrection," *Just Security,* February 11, 2021, https://www.justsecurity.org/74657/time-to-reconsider-the-14th-amendment-for-trumps-role-in-the-insurrection/.
[49] Lynch "Disloyalty & Disqualification," 171-173 [see note 18].

after being convicted of Espionage Act violations that stemmed from publishing op-eds opposing military service in World War I.

A careful application of Section 3 can and should avoid such concerns. First, by requiring the existence of an insurrection or rebellion — which requires some overt act of force or intimidation by multiple people to block the government for public purposes, not just a mere expression of anti-government opinions, even if accompanied by violence (something notably absent in Berger's case) — Section 3 has a narrow application that does not threaten protected First Amendment activities.[50]

Second, conduct that is disqualifying is likely to fit within traditional First Amendment exceptions. For instance, speech intended to incite illegal action or speech in furtherance of a conspiracy does not enjoy First Amendment protections.[51] Because Section 3 is as much a part of the Constitution as the First Amendment, these First Amendment exceptions should be at least as broad in the disqualification context as they are in their more familiar, criminal law, application.[52]

Finally, Section 3 disqualification does not infringe on the qualified First Amendment right to run for office. As a constitutional condition on eligibility, the disqualification clause is no different from provisions like the age requirements for serving in Congress. Disqualified individuals do not suffer a constitutional injury for failing to meet the constitutional requirements to serve in office.

Conclusion

The U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol has already revealed compelling new evidence showing the involvement of the former president, several members of Congress, and scores of other individuals who are covered by Section 3 of the 14th Amendment, in a coordinated effort to overturn the election. Some of this evidence points to planning an act of insurrection against the U.S. government, which would squarely trigger disqualification under Section 3.

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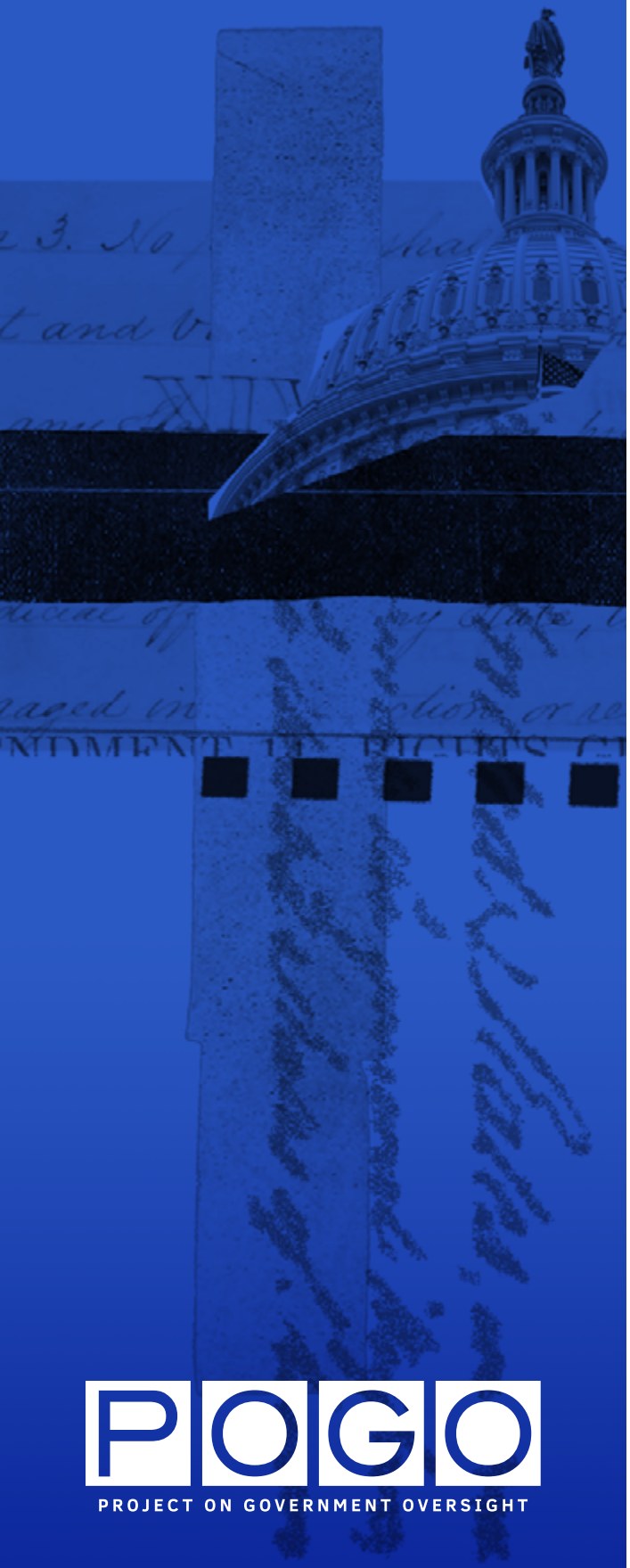
[50] See, for example, New Mexico, ex rel. White v. Griffin [see note 4].

[51] James Wagstaffe, "Incitement to Violence Ain't Free Speech," *Just Security*, January 15, 2021, https://www.justsecurity.org/74217/incitement-to-violence-aint-free-speech/.

[52] In the 2021 challenge to Marjorie Taylor Greene's eligibility, a judge held that "'Merely disloyal sentiments or expressions' do not appear be sufficient. Id. But marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear to constitute 'engagement' under the Worthy-Powell standard. To the extent (if any) that an 'overt act' may be needed, see id., it would appear that in certain circumstances words can constitute an 'overt act,' just as words may constitute an 'overt act' under the Treason Clause … or for purposes of conspiracy law." Rowan v. Greene, 2222582-OSAH-SECSTATE-CE-57- Beaudrot, at 14 (Ga. Office of State Admin. Hearings May 6, 2022) https://freespeechforpeople.org/wp-content/uploads/2022/05/2222582.pdf.

Though there is no statute explicitly designed to enforce Section 3, there are multiple legal processes currently available to enforce the disqualification against many of the individuals covered by the 14th Amendment. While these processes are viable without additional congressional action, a clear statement by Congress could help settle open questions and provide guidance to the various decision-makers involved in the current legal processes.

Additional federal enforcement legislation is necessary *only* in the sense that it would ensure that every single individual within the scope of the 14th Amendment's disqualification clause can be held accountable for their actions with regards to engaging in insurrection or rebellion, or giving aid and comfort to enemies of the United States.



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