

p.m. that Trump released a video that unmistakably called for the mob to disperse while simultaneously praising their conduct. Trump continued to praise the violent conduct of the mob after it had dispersed.

293. The Court concludes that Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification. Trump cultivated a culture that embraced political violence through his consistent endorsement of the same. He responded to growing threats of violence and intimidation in the lead-up to the certification by amplifying his false claims of election fraud. He convened a large crowd on the date of the certification in Washington, D.C., focused them on the certification process, told them their country was being stolen from them, called for strength and action, and directed them to the Capitol where the certification was about to take place.

294. When the violence began, he took no effective action, disregarded repeated calls to intervene, and pressured colleagues to delay the certification until roughly three hours had passed, at which point he called for dispersal, but not without praising the mob and again endorsing the use of political violence. The evidence shows that Trump not only knew about the potential for violence, but that he actively promoted it and, on January 6, 2021, incited it. His inaction during the violence and his later endorsement of the violence corroborates the evidence that his intent was to incite violence on January 6, 2021 based on his conduct leading up to and on January 6, 2021. The Court therefore holds that the first *Brandenburg* factor has been established.

295. Regarding the second *Brandenburg* factor, the Court finds that the language Trump used throughout January 6, 2021 was likely to incite imminent violence. The language Trump employed must be understood within the context of his promotion and endorsement of political violence as well as within the context of the circumstances as they existed in the winter of 2020, when calls for violence and threats relating to the 2020 election were escalating. For years, Trump had embraced the virtue and necessity of political violence; for months, Trump and others had been falsely claiming that the 2020 election had been flagrantly rigged, that the country was being “stolen,” and that something needed to be done.

296. Knowing of the potential for violence, and having actively primed the anger of his extremist supporters, Trump called for strength and action on January 6, 2021, posturing the rightful certification of President Biden’s electoral victory as “the most corrupt election in the history, maybe of the world” and as a “matter of national security,” telling his supporters that they were allowed to go by “very different rules” and that if they didn’t “fight like hell, [they’re] not going to have a country anymore.” Such incendiary rhetoric, issued by a speaker who routinely embraced political violence and had inflamed the anger of his supporters leading up to the certification, was likely to incite imminent lawlessness and disorder. The Court, therefore, finds that the second *Brandenburg* factor has been met.

297. Trump has, throughout this litigation, pointed to instances of Democratic lawmakers and leaders using similarly strong, martial language, such as calling on supporters to “fight” and “fight like hell.” The Court acknowledges the prevalence of

martial language in the political arena; indeed, the word “campaign” itself has a military history. *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 928 (“Strong an effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases.”). This argument, however, ignores both the significant history of Trump’s relationship with political violence and the noted escalation in Trump’s rhetoric in the lead up to, and on, January 6, 2021. It further disregards the distinct atmosphere of threats and calls for violence existing around the 2020 election and its legitimacy. When interpreting Trump’s language, the Court must consider not only the content of his speech, but the form and context as well. *See Id.* at 929 (noting that, if there had been “other evidence” of Evers’ “authorization of wrongful conduct,” the references to “discipline” in his speeches could be used to corroborate that evidence).

298. Consequently, the Court finds that Petitioners have established that Trump engaged in an insurrection on January 6, 2021 through incitement, and that the First Amendment does not protect Trump’s speech.

C. DOES SECTION THREE OF THE FOURTEENTH AMENDMENT APPLY TO PRESIDENT TRUMP?

299. For Section Three of the Fourteenth Amendment to apply to Trump this Court must find both that the Presidency is an “office . . . under the United States” and that Trump took an oath as “an officer of the United States” “to support the Constitution of the United States.” U.S. CONST. amend. XIV, § 3.

300. Professor Magliocca provided historical evidence that the Presidency was understood as an “office, civil or military, under the United States” such that

disqualified individuals could not assume the Presidency. 11/01/23 Tr. 59:17-62:6. The most compelling testimony to that effect was an exchange between Senators Morrill and Johnson during the Congressional Debates over Section Three, where one Senator explained to the other that the Presidency was covered by “office, civil or military, under the United States.” Professor Magliocca also testified it would be preposterous that Section Three would not cover Jefferson Davis—the President of the Confederacy—should he have wished to run for President of the United States after the civil war. *Id.*

301. The Court holds there is scant direct evidence regarding whether the Presidency is one of the positions subject to disqualification. The disqualified offices enumerated are presented in descending order starting with the highest levels of the federal government and descending downwards. It starts with “Senator or Representatives in Congress,” then lists “electors of President and Vice President,” and then ends with the catchall phrase of “any office, civil or military, under the United States, or under any State.” U.S. CONST. amend. XIV, § 3.

302. To lump the Presidency in with any other civil or military office is odd indeed and very troubling to the Court because as Intervenors point out, Section Three explicitly lists all federal elected positions except the President and Vice President. Under traditional rules of statutory construction, when a list includes specific positions but then fails to include others, courts assume the exclusion was intentional. *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) (finding that Congress intended to exclude rules or regulations when it included only the word “law” versus elsewhere where it used the phrase “laws, rule or regulation”).

303. Finally, the Intervenor point out that an earlier version of the Amendment read “No person shall be qualified or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress....” Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 10 (Oct. 28, 2023) (unpublished draft) (on file with the Social Science Research Network). This fact certainly suggests that the drafters intended to omit the office of the Presidency from the offices to be disqualified.¹⁸

304. The Court holds that it is unpersuaded that the drafters intended to include the highest office in the Country in the catchall phrase “office . . . under the United States.”

305. Next the Court addresses whether Trump “previously [took] 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.” U.S. CONST. amend. XIV, § 3. Because President Trump was never a congressman, state legislator, or state officer, Section Three applies only if he was an “officer of the United States.” *Id.*

306. Professor Magliocca testified that during Reconstruction, the President of the United States was understood to be an “officer of the United States.” 11/01/2023 Tr.

¹⁸ In response to the argument that it would be preposterous that Section Three of the Fourteenth Amendment would not prevent Jefferson Davis from being President of the United States, the Court notes that one possible reason why the Presidency was not included in positions disqualified is that Section Three clearly disqualifies electors for the office of the President and Vice President. Perhaps, the thought process was that by excluding electors who were former oath swearing confederates, there was effectively no chance of a former confederate leader becoming President or Vice President.

51:20-52:3. He points to Attorney General Stanbery's first opinion that stated that the phrase "officer of the United States" was used "in its most general sense and without any qualification" in Section Three. 11/01/23 Tr. 53:12-54:4; The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 158 (1867). The next sentence, however, would cut against including a President when Stanbery states "I think, as here used, it was intended to comprehend military as well as civil officers of the United States who had taken the prescribed oath." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 158. To refer to the President of the United States as a mere "civil officer" is counterintuitive.

307. The Court holds that the more obvious reading of Attorney General Stanbery's opinion is that his reference to the "most general sense and without any qualification" was to make it clear that, unlike with State officers, the phrase applied to all lower-level federal officers so long as they took an oath, and did not apply only to the upper echelon of the military and civil ranks.

308. Stanbery's second opinion likewise states that "officers of the United States" applied "without limitation" to any "person who has, at any time prior to the rebellion held any office, civil or military, under the United States and has taken an official oath to support the Constitution of the United States." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 203(1867); 11/03/23 Tr. 256:22-257:13.

309. In other words, Magliocca testified because the Presidency is an "office," the person who holds that office and swears an oath was understood to be an "officer." Stanbery's second opinion later goes on to say that the President is an "executive officer." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 196 (1867); 11/01/23 Tr.

59:11–16. But to some extent this reference cuts against the President being included because Section Three explicitly includes “executive . . . officer[s] of any State” but only includes “officer of the United States”. U.S. CONST. amend. XIV, § 3.

310. Magliocca further argued that contemporary usage supports the view that the President is an “officer of the United States.” Andrew Johnson repeatedly referred to himself as such in presidential proclamations, members of Congress both during the 39th Congress that ratified the Fourteenth Amendment and during Johnson’s impeachment several years later repeatedly referred to the President the same way, and earlier presidents in the Nineteenth Century were referred to the same way. 11/01/23 Tr. 56:3–59:16, 69:21–71:21.

311. On the other hand, Intervenors argue that five constitutional provisions show that the President is not an “officer of the United States.”

- The Appointments Clause in Article II, Section 2, Clause 2 distinguishes between the President and officers of the United States. Specifically, the Appointments Clause states that the President “shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. CONST. art. II, § 2, cl. 2.
- The Impeachment Clause in Article II, Section 4 separates the President and Vice President from the category of “civil Officers of the United States:” “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4.
- The Commissions Clause in Article II, Section 3 specifies that the President “shall Commission all the Officers of the United States.” U.S. CONST. art. II, § 3.

- In the Oath and Affirmation Clause of Article VI, Clause 3, the President is explicitly absent from the enumerated list of persons the clause requires to take an oath to support the Constitution. The list includes “[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States.” US. CONST. art. VI, cl. 3.
- Article VI provides further support for distinguishing the President from “Officers of the United States” because the oath taken by the President under Article II, Section 1, Clause 8 is not the same as the oath prescribed for officers of the United States under Article VI, Clause 3.

312. The Court agrees with Intervenors that all five of those Constitutional provisions lead towards the same conclusion—that the drafters of the Section Three of the Fourteenth Amendment did not intend to include the President as “an officer of the United States.”

313. Here, after considering the arguments on both sides, the Court is persuaded that “officers of the United States” did not include the President of the United States. While the Court agrees that there are persuasive arguments on both sides, the Court holds that the absence of the President from the list of positions to which the Amendment applies combined with the fact that Section Three specifies that the disqualifying oath is one to “support” the Constitution whereas the Presidential oath is to “preserve, protect and defend” the Constitution,¹⁹ it appears to the Court that for

¹⁹ The Court agrees with Petitioners that an oath to preserve, protect and defend the Constitution encompasses the same duties as an oath to support the Constitution. The Court, however, agrees with Intervenors that given there were two oaths in the Constitution at the time, the fact that Section Three references the oath that applies to Article VI, Clause 3 officers suggests that that is the class of officers to whom Section Three applies.

whatever reason the drafters of Section Three did not intend to include a person who had only taken the Presidential Oath.²⁰

314. To be clear, part of the Court’s decision is its reluctance to embrace an interpretation which would disqualify a presidential candidate without a clear, unmistakable indication that such is the intent of Section Three. As Attorney General Stanbery again noted when construing the Reconstruction Acts, “those who are *expressly* brought within its operation cannot be saved from its operation. Where, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter.” The Reconstruction Acts, 12 U.S. Op. Att’y Gen. 141, 160 (1867) (emphasis added).²¹ Here, the record demonstrates an appreciable amount of tension between the competing interpretations, and a lack of definitive guidance in the text or historical sources.

315. As a result, the Court holds that Section Three of the Fourteenth Amendment does not apply to Trump.

²⁰ Whether this omission was intentional, or an oversight is not for this Court to decide. It may very well have been an oversight because to the Court’s knowledge Trump is the first President of the United States who had not previously taken an oath of office.

²¹ The Court is mindful that Stanbery was considering disenfranchisement, not qualification for office, and that he was interpreting a statute he considered “penal and punitive” in nature; the Court nevertheless finds that the principle articulated, that the law ought err on the side of democratic norms except where a contrary indication is clear, is appropriate and applicable to the circumstances.

VI. CONCLUSION

Pursuant to the above, the Court ORDERS the Secretary of State to place Donald J. Trump on the presidential primary ballot when it certifies the ballot on January 5, 2024.

DATED: November 17, 2023.

BY THE COURT:



Sarah B. Wallace
District Court Judge

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