FORCIBLY SWEEPING SECTION 3 UP TO THE SUPREME COURT

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In the wake of January 6, 2021 a two-year lawfare campaign was waged to prevent Donald Trump from being re-elected president. That movement reached its pinnacle on December 19, 2023, when the Colorado Supreme Court ruled that Section 3 of the Fourteenth Amendment disqualified Donald Trump from the presidency. But less than three months later, on March 3, 2024, the United States Supreme Court unanimously reversed the state court. President Trump was re-elected, and certified on January 6, 2025.

This Article is not intended to explain the nuances of Section 3, summarize all of the litigation, or even analyze how the Supreme Court decided the case. Rather, this Article is somewhat personal in nature. It tells my own experience in the Section 3 litigation, from January 6, 2021, through January 6, 2025. This Article, I hope, will encapsulate the role that I played in this process with my friend and colleague Seth Barrett Tillman.

INTRODUCTION

Long before Donald Trump ever came on the political scene, I had written about how the Constitution refers to offices and officers with my friend and colleague, Professor Seth Barrett Tillman. During the first Trump Administration, Tillman and I wrote articles, amicus briefs, and op-eds about the Constitution's Foreign Emoluments Clause. This provision would only apply to Trump if the presidency was an "Office . . . under the United States." In our longstanding view, it was not.

After Trump lost in the 2020 election, Tillman and I thought that our work on the offices and officers of the Constitution would no longer be politically salient. Our prediction proved not to be accurate. Before the dust settled on January 6, 2021, we realized that our work would become relevant again. Section 3 of the Fourteenth Amendment could only impose a disqualification on Donald Trump if the president was an "Officer of the United States." In our longstanding view, it was not.

In the wake of January 6, 2021 a two-year lawfare campaign was waged to prevent Trump from being re-elected president. That movement reached its pinnacle on December 19, 2023, when the Colorado Supreme Court ruled that Section 3 of the Fourteenth Amendment disqualified Donald Trump from the presidency.[1] But less than three months later, on March 3, 2024, the United States Supreme Court unanimously reversed the state court.[2] President Trump was re-elected, and certified on January 6, 2025.

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This Article proceeds roughly chronologically. Part I recounts my experiences on January 6, 2021, when I first recognized how the First and Fourteenth Amendments would impact Trump's future. Part II describes my work over the following forty-eight hours,

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[1] Anderson v. Griswold, 2023 CO 63, 543 P.3d 283, *cert. granted sub nom.* Trump v. Anderson, 144 S. Ct. 539 (2024), and *rev'd sub nom*. Trump v. Anderson, 601 U.S. 100, 144 S. Ct. 662 (2024).

[2] Trump v. Anderson, 601 U.S. 100 (2024).

where Tillman and I offered one of the earliest Free Speech defenses of President Trump. Part III describes the inauguration on January 20, at which point President Trump still had not yet been formally impeached. Part IV walks through the Senate impeachment trial, in which my work was cited.

Part V considers the criminal insurrection statute, which Trump was ultimately never charged with violating. Part VI recounts the efforts to disqualify two members of Congress, Madison Cawthorne and Marjorie Taylor Greene, on insurrection grounds. Part VII describes the criminal prosecution brought against Trump by the Manhattan District Attorney. Part VIII turns to Special Counsel Jack Smith, who indicted Trump in federal courts in the District of Columbia and Florida.

Part IX introduces an important article written by Professors Will Baude and Michael Stokes Paulsen, which criticized Tillman & Blackman's scholarship. Part X turns to exchanges among Professor Steve Calabresi, former Attorney General Michael Mukasey, and Professor Akhil Reed Amar, about Section 3.

Part XI describes the Colorado state trial court's decision, which found that the President was not an "Officer of the United States" and thus could not be disqualified. Part XII tracks the briefing and oral argument before the Colorado Supreme Court. Part XIII engages with the Colorado Supreme Court's decision that disqualified Trump from the presidential ballot. Part XIV demonstrates that in the wake of that decision, the Tillman & Blackman position was squarely "on the wall."

Part XV discusses our decision to file the first merit-stage brief before the United States Supreme Court. Part XVI enters the Section 3 end game, as new entrants to the field made rushed and flawed arguments. Part XVII explains our decision to seek oral argument time before the Supreme Court. Part XVIII revisits a *New York Times* article about Tillman, which called him a "legal outsider."

Part XIX is situated in the Supreme Court for oral argument in *Trump v. Anderson*. Part XX breaks down the oral argument, with a focus on the questions asked by Justices Gorsuch, Jackson, Sotomayor, and Kavanaugh. Part XXI crosses the continent as I flew from Washington, D.C. to San Diego to speak about Section 3. Finally, Part XII describes the Supreme Court's decision in *Trump*

v. Anderson, which dropped the day before the Super Tuesday Primary.

This Article, I hope, will encapsulate the role that Tillman and I played in this process.

I. JANUARY 6, 2021

January 6, 2021, was a day that began much like any other. I did not anticipate that anything out of the ordinary would happen. That day I had several Zoom meetings scheduled, including an afternoon panel on clerkships. At some point during the call, I saw some sort of news alert about a situation at the Capitol. I turned on Cable News and saw a live feed of a guy wearing a Viking hat, face paint, and a fur vest standing in the Senate chamber. I was shocked, and very confused. But soon, that confusion turned to clarity.

I soon realized that there would be several important legal issues to sort out in very little time. First, did President Trump's speech at the Ellipse cross the line from protected expression to unlawful incitement of imminent violence? Second, did the riot at the Capitol amount to an insurrection? Third, would there be an attempt to remove Trump from office, either under the Twenty-Fifth Amendment or through some sort of snap impeachment proceeding in the final two weeks of his lame duck term. And, fourth, would there be an effort to disqualify Trump from holding future office, either through a conviction in the Senate, or through Section 3 of the Fourteenth Amendment. After four years of a never-ending series of constitutional questions, the final two weeks of Trump's term would raise so many more.

Around 9:00 ET that evening, I appeared on *Spectrum News* to discuss the events of the day.[3] The host asked me about Trump's speech.[4] My off-the-cuff reaction was that this was a close call. I said,

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[3] *See generally* Josh Blackman, *Interviewed on Spectrum News Austin about January 6, 2021*, YOUTUBE (Jan. 6, 2021), https://youtu.be/dFS9rEcALY0?si=bobmX5SvaGDTwyfa [https://perma.cc/J4DJ-XKCW].

[4] *Id.* at [00.08].

> We have free speech rights, but you can't incite violence, and telling a mob of people to march on the Capitol to object to the electoral vote counting, if it doesn't cross the line of incitement it comes awfully close. I still have to give this some more thought. Today has been a bit of a blur.[5]

I quite consciously added the hedge at the end. At the time, I hadn't watched Trump's entire speech. I also hadn't been aware of the chronology, in which the rioting began before Trump even finished his speech.

II. JANUARY 7 AND 8, 2021

Shortly after midnight, I emailed my colleague, Professor Eugene Volokh, who is an expert on the First Amendment. I asked him whether Trump's speech crossed the line between protected expression and unprotected incitement. I was still wrestling with the issue. On the morning of January 7, Volokh wrote on his blog that "it seems to me very hard to see how prosecutors can show beyond a reasonable doubt that [Trump] was intentionally promoting a riot, or even intentionally promoting trespassing."[6] Over the course of that evening, I had also come to the same conclusion. Volokh's post was framed in terms of a criminal prosecution, but I was already moving onto whether Trump could be impeached for incitement of violence.

That morning, I did what I often do when faced with a novel legal question. I called my friend and frequent co-author, Professor Seth Barrett Tillman. We had an especially frank conversation. In the past, we had written about a wide range of Trump-related topics, including the Foreign Emoluments Clause, the first impeachment, and others. But this topic felt different. This time felt different. There had been an unprecedented incursion at the Capitol. Yet, after talking the issues through, we decided that we had a perspective to share. We were fully aware that going down this road would likely bring a wave of criticism and attacks. We had

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[5] *Id.* at [02:00].

[6] Eugene Volokh, *Incitement and Ordinary Speakers; Duty and Political Leaders,* VOLOKH CONSPIRACY (Jan. 7, 2021, 11:09 AM), https://reason.com/volokh/2021/01/07/incitement-ordinary-speakers-duty-and-political-leaders/ [https://perma.cc/88CQ-MQCT] (citation omitted).

been criticized at some length about our positions on the Foreign Emoluments Clause and the first impeachment trial. But again, this time felt different. There was a frenzy in the air, and there would be little time for sober reflection. We hoped our writing would perhaps provide a moment of pause to consider these issues apart from the heat of the moment.

We spent most of the day on January 7 writing a 3,000-word post titled, "Can President Trump be Impeached and Removed on the Grounds of Incitement? If Trump's speech is protected by the First Amendment, then incitement cannot be grounds for impeachment." Around 5:00 a.m. ET on January 8, we published the post on the *Volokh Conspiracy*.[7] We wrote:

> Both of us were shaken by the events of January 6, 2021. Over the past several days, President Trump has taken actions that heedlessly risked third-parties' violating trespassing laws, the destruction of public property in and around the Capitol, and the ability of federal officials and civil servants to perform their legal duties. Yet, we again feel an obligation to hit the pause button, ever so briefly, to discuss continuing, permanent, and vital principles of free and democratic self-government. Here, we write, with most immediate relevance, to impeachment—albeit similar principles apply in the context of civil and criminal law as administered by Article III courts.[8]

We argued that Trump's speech would likely be protected under the precedent of *Brandenburg v. Ohio*.[9] We carefully parsed the exact words that Trump uttered at the speech and illustrated that Trump's supporters would have had to walk some distance to get to the Capitol.[10] We concluded any incitement was not imminent,[11] and we quoted Eugene Volokh, who reached a similar conclusion.[12] We then explained how the President could raise the

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[7] Josh Blackman & Seth Barrett Tillman, *Can President Trump be Impeached and Removed on the Grounds of Incitement?*, VOLOKH CONSPIRACY (Jan. 8, 2021, 3:57 AM), https://reason.com/volokh/2021/01/08/can-president-trump-be-impeached-and-removed-on-the-grounds-of-incitement/ [https://perma.cc/W82L-ZNZV].

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

First Amendment as a defense during impeachment proceedings.[13] During the first Trump Impeachment, the managers argued that the Bill of Rights had no bearing on those proceedings.[14] We disagreed with that position in 2020, and we again disagreed in 2021.[15] Even during President Andrew Johnson's impeachment in 1868, a First Amendment defense was raised.[16]

As best as I can recall, our post was one of the first sustained defenses of Trump from a constitutional perspective. The reactions were swift and, generally, negative.[17] I expected as much. However, by January 8, articles of impeachment were already being drafted.[18]

On January 13, the House adopted a single article of impeachment, titled *Incitement of Insurrection*.[19] The House did not actually charge President Trump with personally engaging in insurrection.[20] Rather, the five-page resolution asserted that Trump's words and tweets since the election "encouraged" the "lawless action at the Capitol" and "gravely endangered the security of the United States."[21] The House Judiciary Committee rejected any argument that the President's speech was protected by the First Amendment.[22] The committee concluded that freedom of

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See generally* Ilya Somin, *The First Amendment Doesn't Protect Trump Against Impeachment for his Role in Inciting the Assault on the Capitol*, VOLOKH CONSPIRACY (Jan. 8, 2021, 4:17 PM), https://reason.com/volokh/2021/01/08/the-first-amendment-doesnt-protect-trump-against-impeachment-for-his-role-in-inciting-the-assault-on-the-capitol/ [https://perma.cc/DY8Z-M7ZF]; Jonathan H. Adler, *Yes, Congress May Impeach and Remove President Trump for Inciting Lawless Behavior at the Capitol*, VOLOKH CONSPIRACY (Jan. 8, 2021, 3:21 PM) https://reason.com/volokh/2021/01/08/yes-congress-may-impeach-and-remove-president-trump-for-inciting-lawless-behavior-at-the-capitol/ [https://perma.cc/86BW-PB6Y].

[18] *Read: House Democrats' Draft of a New Article of Impeachment Against Trump*, CNN, https://www.cnn.com/2021/01/08/politics/trump-article-of-impeachment-draft/index.html [https://perma.cc/63MA-F9K2] (last updated Jan. 8, 2021, 4:07 PM).

[19] *See generally* H.R. RES. 24, 117th CONG. (2021), https://www.congress.gov/bill/117th-congress/house-resolution/24/text [https://perma.cc/6KTL-HZ3W].

[20] *See generally id.*

[21] *Id.* at 3-4.

[22] MAJORITY STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 117TH CONG., MATERIALS IN SUPPORT OF H. RES. 24, IMPEACHING DONALD JOHN TRUMP, PRESIDENT OF THE UNITED STATES, FOR HIGH CRIMES AND MISDEMEANORS 35 (Jan. 12, 2021), https://democrats-

speech "applies very differently" to the President "[b]y virtue of his office" than it does to "private citizens.[23] Moreover, the committee endorsed the views of constitutional scholars who argued the President has no enforceable free speech rights in this process. In a January 14 post, Tillman and I explained how President Andrew Johnson's impeachment trial taught very different lessons about free speech.[24] Three days later, Tillman and I demonstrated that the President does not have the speech rights of a mere civil servant.[25] Rather, the President, as an elected public official, has far broader speech rights.[26]

III. JANUARY 20, 2021

Inauguration day came on January 20, 2021. But the House Managers had not yet delivered the articles of impeachment to the Senate before January 20, 2021.[27] It is questionable whether Trump was, in fact, impeached as early as January 13 when the House adopted its single article of impeachment, or whether he was impeached when the single article of impeachment was delivered on January 25, 2021.[28] In any event, Trump was no longer President, and so, removing Trump from the presidency in consequence of a Senate conviction would no longer be possible.[29]

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judiciary.house.gov/uploadedfiles/house_judiciary_committee_report_-_materials_in_support_of_h._res._24.pdf?utm_campaign=4640-519 [https://perma.cc/8YGW-GAUR].

[23] *Id.*

[24] *See* Josh Blackman & Seth Barrett Tillman, *We Should Not Forget the Free Speech Lessons from President Johnson's Impeachment Trial,* VOLOKH CONSPIRACY (Jan. 14, 2021, 2:35 PM), https://reason.com/volokh/2021/01/14/we-should-not-forget-the-free-speech-lessons-from-president-johnsons-impeachment-trial/ [https://perma.cc/BEX6-LKCS].

[25] *See* Josh Blackman & Seth Barrett Tillman, *Why Do Different Positions in the Government Receive Different Types of Free Speech Rights?*, VOLOKH CONSPIRACY (Jan. 17, 2021, 3:21 PM), https://reason.com/volokh/2021/01/17/why-do-different-positions-in-the-government-receive-different-types-of-free-speech-rights/ [https://perma.cc/239B-F5L7].

[26] *Id.*

[27] *Id.*

[28] *See* Adam Liptak, *A Law Professor's Provocative Argument: Trump Has Not Yet Been Impeached*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/us/trump-feldman-impeach.html [https://perma.cc/ZL22-ULBF].

[29] Jeremy Herb & Manu Raju, *House Delivers Impeachment Article to Senate, Triggering Only 4th Impeachment Trial of a President in US History,* CNN (Jan. 25,

Instead, the Senate would have to consider the issue of "late impeachment."[30] The only conceivable judgment for late impeachment would be disqualification from holding future office.[31]

The Impeachment Disqualification Clause provides, "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . . ."[32] Tillman and I had long taken the position that the phrase "Office . . . under the United States" does not include any elected federal positions, including the presidency.[33] Therefore, the Senate could not disqualify Trump from running for another term.

However, some saw another path to preclude Trump from holding a second term. Section 3 of the Fourteenth Amendment provides:

> 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.[34]

2021), https://www.cnn.com/2021/01/25/politics/impeachment-article-senate-house/index.html [https://perma.cc/7TTV-RRVG].

[30] Brian C. Kalt, *The Trump Impeachment as Precedent for Future Late Impeachments*, LAWFARE, (Feb. 23, 2021, 10:26 AM), https://www.lawfaremedia.org/article/trump-impeachment-precedent-future-late-impeachments [https://perma.cc/A84K-4PNA].

[31] *Id*.

[32] U.S. CONST. art. I, § 3, cl. 7.

[33] *See* Seth Barrett Tillman, *Originalism & the Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59, 63 (2014); Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 3 — So What if the President Does Not Hold 'Office . . . Under the United States'?,* WASH. POST (Sept. 28, 2017) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/28/the-emoluments-clauses-litigation-part-3-so-what-if-the-president-does-not-hold-office-under-the-united-states/ [https://perma.cc/7NZ9-PZQ4].

[34] U.S. CONST. art. I, § 3, cl. 7.

Tillman and I had discussed Section 3 from time-to-time over the years. The provision related to our work on the "offices" and "officers" of the Constitution. As a general matter, our prior joint publications focused on the Constitution of 1788. We had not discussed, at length, the meaning of office- and officer-language in the Fourteenth Amendment, which was ratified in 1868. Indeed, an early critic of Tillman's work pointed out that it would be "rather strange" if Section 3 did not disqualify Jefferson Davis or Robert E. Lee from serving as president.[35]

But now, we decided to address the issue directly.

At noon on January 20, the moment President Biden took the oath of office, we published a post titled, *Is the President an 'officer of the United States' for purposes of Section 3 of the Fourteenth Amendment?*[36] We made two primary arguments. First, a person who held only one office—the presidency—and took only that one oath of office as President of the United States would not be subject to a disqualification under Section 3.[37] Consistent with our longstanding view, the President is not an "Officer of the United States."[38] This point was true in 1788 when the original Constitution was ratified and in 1868 when the Fourteenth Amendment was ratified.[39] In other words, there was no linguistic drift for the phrase "Officers of the United States" between 1788 and 1868.

Second, we did not take a position on whether a person lawfully disqualified by Section 3 can serve as President.[40] In other words, we did not opine on whether the presidency was an "Office under the United States" for purposes of Section 3.[41] While we did not believe there was linguistic drift for the phrase "Officers of the United States," we acknowledged the possibility for such drift with

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[35] Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL'Y 143, 151 (2009).

[36] Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, VOLOKH CONSPIRACY (Jan. 20 2021, 12:00 PM), 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/ [https://perma.cc/XXP8-MEUV].

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

the phrase "Office under the United States."[42] We could not draw a firm conclusion in regard to the meaning of "office under the United States" in 1868.[43] In our view, this latter issue was immaterial.[44] President Trump had taken one, and only one oath to the Constitution: the presidential oath of office.[45] Therefore, he was not and had never been an "officer of the United States," and he was not subject to Section 3 at all.[46]

Our work on the Foreign Emoluments Clause was always a bit esoteric. Our view that the President was not subject to this provision was not widely accepted by academia. However, as the federal courts never reached the merits of the plaintiffs' claims in the Foreign Emoluments Clause. Thus the correctness of our position remained unresolved and theoretical. Most scholars agreed that these cases would fail due to a lack of standing by the plaintiffs, or for some other threshold hurdle.[47] But in the Section 3 debate, many believed that our position had some force.[48] If we were right, then Section 3 could not apply to Trump at all. It was a textual kill shot against the Section-3-based disqualification position.

We recognized that our argument would come under sustained attack, so we proceeded with caution. What started as a blog post on January 20 would evolve into a full law review article, that we would publish ten months later in December 2021.[49]

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[42] This was not a new or ad hoc position. Tillman took that position as early as 2011. *See* Seth Barrett Tillman, Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar – Contradictions and Suggested Reconciliation 69 (2012) (unpublished manuscript) (available at https://ssrn.com/abstract=1970909 [https://perma.cc/K5BR-S52P]).

[43] Blackman & Tillman, *supra* note 36.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See*, *e.g.*, Jonathan H. Adler, *Why CREW's Emoluments Clause Lawsuit Against President Trump Still Has Standing Problems*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/19/why-crews-emoluments-clause-lawsuit-against-president-trump-still-has-standing-problems/ [https://perma.cc/CZZ5-935V].

[48] Josh Blackman, *Natelson on the Offices and Officers of the Constitution in 1788 and 1868*, VOLOKH CONSPIRACY (Dec. 29, 2023, 12:32 PM), https://reason.com/volokh/2023/12/29/natelson-on-the-offices-and-officers-of-the-constitution-in-1788-and-1868/ [https://perma.cc/3HVK-2NGP].

[49] *See generally* Josh Blackman & Seth Barrett Tillman, *Is the President an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment?*, 15 NYU J. L. & LIBERTY 1 (2021).

IV. IMPEACHMENT 2.0

Trump's second impeachment trial would begin on February 9, 2021. In the leadup to that trial, Tillman and I continued our writings on the issue.

On February 3, we wrote a post titled, "Defining a Theory of 'Public' and 'Private' Offenses for Impeachment."[50] We concluded that Trump's speech at the Ellipse was a "private" offense, and such conduct was not impeachable. [51] By contrast, the House Managers claimed that Trump was engaging in some sort of official or public act.[52] Somewhat ironically, in the years following January 6, members of Congress who sued Trump argued that Trump was, in fact, engaging in private conduct.[53]

The Managers' brief cited several posts from *Volokh Conspiracy* bloggers Jonathan Adler, Ilya Somin, and Keith Whittington. These posts responded to our prior *Volokh Conspiracy*

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[50] *See* Josh Blackman & Seth Barrett Tillman, *Defining a Theory of "Public" and "Private" Offenses for Impeachment*, VOLOKH CONSPIRACY (Feb. 3, 2021, 6:00 PM), https://reason.com/volokh/2021/02/03/defining-a-theory-of-public-and-private-offenses-for-impeachment/ [https://perma.cc/T7ZG-XMAB].

[51] *Id.*

[52] TRIAL MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP 46 (2021), https://assets.documentcloud.org/documents/20468363/house_trial_brief_final.pdf [https://perma.cc/S5ML-5FLB] [hereinafter HOUSE TRIAL MEMORANDUM].

> Thus, just as a President may legitimately demand the resignation of a Cabinet Secretary who publicly disagrees with him on a matter of policy (which President Trump did repeatedly), the public's elected representatives may disqualify the President from federal office when they recognize that his public statements constitute a violation of his oath of office and a high crime against the constitutional order.

Id.

[53] Thompson v. Trump, 590 F. Supp. 3d 46, 80 (D.D.C. 2022), *aff'd sub nom.* Blassingame v. Trump, 87 F.4th 1 (D.C. Cir. 2023).

> For their part, Plaintiffs urge the court to reject President Trump's claim of absolute immunity for two reasons: first, because they 'allege that he was acting solely in his personal capacity as a *candidate*,' and second, because he 'engaged in serious misconduct that obstructed a co-equal branch of government, removing his actions from the outer bounds of permissible presidential conduct.

Id.

posts.[54] But the brief did not cite our posts.[55] The Managers suggested that the First Amendment does not control an Impeachment Proceeding, but they did not take an absolute position.[56] This argument, we thought, represented a tacit recognition that Senators, in good faith, could find that the President may raise a First Amendment defense. The Managers argued in the alternative.[57] The Mangers' first position was that the President stands in the same position with respect to free speech rights as civil servants,[58] who enjoy limited free speech rights. We did not think the President can be analogized to a civil servant.[59] The Managers' alternative position was that the President stands in the same position, with respect to free speech rights, as do senior appointed federal officers with policy-making responsibilities, and such officers, in some ways have, have free speech rights even more circumscribed than do civil servants.[60] Whether the President is better analogized to a civil servant or to a senior appointed federal officers is an unsettled question. Indeed, a letter from more than one-hundred law professors about the First Amendment was quite fractured about how *Brandenburg* would apply to the President's statements.[61] In our view, elected officials have greater free speech rights than both civil servants and appointed officers. Indeed, elected officials have more free speech rights than private citizens—as they must be able to communicate freely with other elected officials and their constituents.

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[54] *See* Josh Blackman & Seth Barrett Tillman, *The First Amendment Arguments in the House of Representatives' Managers' Trial Memorandum*, VOLOKH CONSPIRACY (Feb. 4, 2021, 6:19 PM), https://reason.com/volokh/2021/02/04/the-first-amendment-arguments-in-the-house-of-representatives-managers-trial-memorandum/ [https://perma.cc/5PL6-UL6W].

[55] *See generally* HOUSE TRIAL MEMORANDUM, *supra* note 52.

[56] Blackman & Tillman, *supra* note 54.

[57] HOUSE TRIAL MEMORANDUM, *supra* note 52, at 69-70.

[58] *Id.* at 45-48.

[59] *Id.*

[60] *Id.*

[61] *See* Josh Blackman, *What Do "Many" of the 140+ Law Professors Think About the First Amendment and Impeachment?*, VOLOKH CONSPIRACY (Feb. 6, 2021, 1:35 PM), https://reason.com/volokh/2021/02/06/what-do-many-of-the-140-law-professors-think-about-the-first-amendment-and-impeachment/ [https://perma.cc/R8QV-FPSX].

We wrote a response to the House Managers' Brief. Our post addressed another issue that we had written about repeatedly over the course of many years.[62] The Impeachment Disqualification Clause provides: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."[63] Since 2014, Tillman had argued that the presidency is not an "Office of honor, Trust or Profit under the United States."[64] Blackman came around to Tillman's position several years later. Therefore, even if Trump was impeached, convicted, and disqualified, the Impeachment Disqualification Clause would not bar him from holding any elected federal position, including the presidency. Our post put forward some new historical evidence in support of our position from the founding era, the federalist era, the age of Jackson, and the antebellum era.[65]

On February 8, Trump's attorneys filed their trial memorandum.[66] Blackman's work was cited in two places, and both of the cited works were written well before Trump's second impeachment trial.[67] The first essay, from 2019, considered what would happen if the Chief Justice could not serve as the presiding officer during the Senate trial proceedings of what would be President Trump's first impeachment.[68] The second article,

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[62] *See* Josh Blackman & Seth Barrett Tillman, *New Evidence and Arguments About the Scope of the Impeachment Disqualification Clause: A Response to the House of Representatives' Managers' Trial Memorandum*, VOLOKH CONSPIRACY (Feb. 7, 2021, 4:01 PM), https://reason.com/volokh/2021/02/07/new-evidence-and-arguments-about-the-scope-of-the-impeachment-disqualification-clause-a-response-to-the-house-of-representatives-managers-trial-memorandum/ [https://perma.cc/J62E-A98L].

[63] U.S. CONST. art. I, § 3, cl. 7.

[64] *See generally* Tillman, *Either/Or*, *supra* note 42

[65] Blackman & Tillman, supra note 62.

[66] *See generally* TRIAL MEMORANDUM OF DONALD J. TRUMP, 45TH PRESIDENT OF THE UNITED STATES OF AMERICA (2021), https://int.nyt.com/data/documenttools/trump-defense-impeachment-trial/3a17fbb266bf3bf5/full.pdf [https://perma.cc/SLJ7-S5VD].

[67] Blackman was also quoted during Trump's first impeachment trial. On January 27, 2020, Trump's Counsel, Alan Dershowitz read at some length from Blackman's New York Times op-ed. *See* Josh Blackman, *From the New York Times Opinion Page to the Senate Impeachment Trial*, VOLOKH CONSPIRACY (Jan. 27, 2020, 10:15 PM), https://reason.com/volokh/2020/01/27/from-the-new-york-times-opinion-page-to-the-senate-impeachment-trial/ [https://perma.cc/4JDS-RC5U].

[68] *See* Josh Blackman, *What Happens if the Chief Justice Cannot Serve at the Presidential Impeachment Trial?*, VOLOKH CONSPIRACY (Nov. 25, 2019, 12:39 PM),

published on *Lawfare* in 2017, opined that that the First Amendment would place limits on the impeachment process.[69] The brief discussed other topics that Tillman and I had developed in the literature, including the First Amendment and free speech defense raised during President Johnson's impeachment trial, as well as the distinction between the First Amendment rights of elected and appointed officials.[70]

On February 9, the House Managers filed a reply memorandum.[71] We addressed that brief in a blog post on February 11.[72] The Managers argued there was "no precedent" that the First Amendment limits the impeachment power.[73] This absolute statement failed to account for the proceedings during the Johnson impeachment trial. The Managers also responded to another argument that we had advanced, and which Trump's attorneys had adopted: different types of officeholders have different degrees of free speech rights.[74] The managers explained that Trump's statements "would not be protected whether they were made by an elected official, a civil servant, or a private citizen."[75]

Trump's impeachment trial began on February 9, 2021, and he was acquitted on February 13, 2021.[76]

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https://reason.com/volokh/2019/11/25/what-happens-if-the-chief-justice-cannot-serve-at-the-presidential-impeachment-trial/ [https://perma.cc/84Z8-AK3N].

[69] Josh Blackman, *Obstruction of Justice and the Presidency: Part II*, LAWFARE (Dec. 12, 2017, 2:00 PM), https://www.lawfaremedia.org/article/obstruction-justice-and-presidency-part-ii [https://perma.cc/EJ3D-CZYS].

[70] HOUSE TRIAL MEMORANDUM, *supra* note 52.

[71] *See generally* REPLY MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP (2021) [hereinafter HOUSE REPLY MEMORANDUM], https://democrats-judiciary.house.gov/uploadedfiles/house_impeachment_trial_reply_2.9.21.pdf [https://perma.cc/WM4A-MWWN].

[72] Josh Blackman & Seth Barrett Tillman, *A Reply to the House of Representatives' Managers' Reply Memorandum*, VOLOKH CONSPIRACY (Feb. 11, 2021, 5:35 PM), https://reason.com/volokh/2021/02/11/a-reply-to-the-house-of-representatives-managers-reply-memorandum/ [https://perma.cc/E54J-MH2V].

[73] HOUSE REPLY MEMORANDUM, supra note 71, at 20.

[74] *Id.* at 22.

[75] *Id.*

[76] *Federal Impeachment: Donald J. Trump*, LIBR. CONG., https://guides.loc.gov/federal-impeachment/donald-trump [https://perma.cc/2AP3-TQCL] (last visited Apr. 21, 2025).

V. SECTION 2383

After Trump was acquitted, we began to think of a potential future phase of lawfare. Specifically, we considered 18 U.S.C. § 2383. This criminal statute bars a person who "engages in any rebellion or insurrection" from holding "any office under the United States."[77] In a February 18 post, we addressed whether if Trump were convicted under this statute, the statute's disqualification provision would bar him from holding the presidency.[78] We argued the answer was no.[79] Three months later, we expanded this blog post into a law review article.[80] It would be published in a special symposium issue of the *Illinois Law Review Online*.[81]

At the time, we did not know if the Biden Justice Department would indict Trump, or anyone else, for insurrection. Attorney General Garland faced a difficult choice about whether to criminally charge Biden's potential rival for re-election.[82] As it turned out, the choice would not fall to Garland. Rather, Garland would appoint Jack Smith as Special Counsel, who determined to indict Trump—albeit not for insurrection.[83]

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[77] 18 U.S.C. § 2383.

[78] Josh Blackman & Seth Barrett Tillman, *If Donald Trump is Convicted of Violating 18 U.S.C. § 2383, Will He Be Disqualified from Serving as President?*, VOLOKH CONSPIRACY (Feb. 18, 2021, 1:46 PM), https://reason.com/volokh/2021/02/18/if-donald-trump-is-convicted-of-violating-18-u-s-c-%c2%a7-2383-will-he-be-disqualified-from-serving-as-president/ [https://perma.cc/9PSL-YR2L].

[79] *Id.*

[80] Josh Blackman, *New Article: What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, VOLOKH CONSPIRACY (Apr. 30, 2021, 4:17 PM), https://reason.com/volokh/2021/04/30/new-article-what-happens-if-the-biden-administration-prosecutes-and-convicts-donald-trump-of-violating-18-u-s-c-%c2%a7-2383/ [https://perma.cc/4C9A-N9K4].

[81] *See generally* Josh Blackman & Seth Barrett Tillman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, 2021 UNIV. ILL. L. REV. ONLINE 190 (2021).

[82] *See* Josh Blackman, *Garland's Choice: Should He Indict Donald Trump for Inciting an Insurrection?*, VOLOKH CONSPIRACY (Dec. 23, 2021, 2:13 PM), https://reason.com/volokh/2021/12/23/garlands-choice-should-he-indict-donald-trump-for-inciting-an-insurrection// [https://perma.cc/DB8E-T4WQ].

[83] Dep't Just., Appointment of a Special Counsel (Nov. 18, 2022) (available at https://www.justice.gov/archives/opa/pr/appointment-special-counsel-0 [https://perma.cc/PE8M-GU86]); *see also* APPOINTMENT OF JOHN L. SMITH AS SPECIAL COUNSEL, NO. 5559-2022, OFF. ATT'Y GEN. (Nov. 18, 2022), https://www.justice.gov/archives/opa/media/1260551/dl [https://perma.cc/J7DR-EQP9].

Throughout 2021, we were working on another article about whether President Trump was even subject to Section 3. Section 3 would only apply to Trump if the presidency was an "Officer of the United States." Consistent with our longstanding position, we argued it was not.[84] The article was published in the *NYU Journal of Law & Liberty* in December 2021.[85] At the time, we did not know if any Section 3 litigation would proceed against Trump. But our argument, if accepted by the courts, would prevent Trump from being disqualified. We do not recall much discussion of our article in the immediate wake of its publication. The Congressional Research Service did cite one of our posts.[86] And Indiana University Law Professor Gerard Magliocca had previously put forward some careful scholarship to the contrary.[87] But most scholars seemed to have moved on from the topic. Perhaps they assumed that Trump would never again be a viable political candidate, so the Section 3 debate was purely academic. With the benefit of hindsight, this view was very mistaken.

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[84] Josh Blackman, *New Article in NYUJLL: Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, VOLOKH CONSPIRACY (Dec. 13, 2021, 8:00 AM), https://reason.com/volokh/2021/12/13/new-article-in-nyujll-is-the-president-an-officer-of-the-united-states-for-purposes-of-section-3-of-the-fourteenth-amendment/ [https://perma.cc/67AB-E374].

[85] Blackman & Tillman, *supra* note 24.

[86] JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB 10569, THE INSURRECTION BAR TO OFFICE: SECTION 3 OF THE FOURTEENTH AMENDMENT 2 (2022) (available at https://crsreports.congress.gov/product/pdf/LSB/LSB10569 [https://perma.cc/4WCA-JUYL] (last visited Apr. 29, 2025)).

[87] Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 102-03 (2021); Josh Blackman, *Don't Be So Certain About Trump and Section 3*, VOLOKH CONSPIRACY (Feb. 2, 2022, 12:19 AM), https://reason.com/volokh/2022/02/02/dont-be-so-certain-about-trump-and-section-3/ [https://perma.cc/6DDP-M4L3].

VI. MADISON CAWTHORN AND MARJORIE TAYLOR GREENE

On January 6, Representative Madison Cawthorn of North Carolina spoke at the Ellipse prior to President Trump.[88] It was alleged that Cawthorn, like Trump, engaged in insurrection.[89] Cawthorn planned to run for re-election in 2022.[90] An organization called Free Speech for People filed a petition on behalf of several voters seeking to challenge Cawthorn's candidacy.[91] The same organization filed a similar challenge to prevent Representative Marjorie Taylor Greene of Georgia from running for re-election. The suit claimed she *too* was disqualified by Section 3.[92] Both of these cases were filed with state election officials.[93]

These suits did not implicate our work on the officer-issue. Members of Congress were squarely covered by Section 3, and a person disqualified by Section 3 could not serve in Congress.[94] But we did have a contribution to make to this issue. In April 2020, we published a guest essay in the *New York Times*.[95] We argued that

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[88] Cory Vaillancourt, *Cawthorn's 'Political Prisoners' Comments Clash with Past Remarks About 1/6*, BPR NEWS (Sept. 2, 2021, 3:23 PM), https://www.bpr.org/news/2021-09-02/cawthorns-political-prisoners-comments-clash-with-past-remarks-about-1-6 [https://perma.cc/W9ML-NYGT].

[89] *Challenge to Madison Cawthorn Under 14.3 Insurrectionist Disqualification Clause*, FREE SPEECH FOR PEOPLE (last visited Apr. 21, 2025), https://freespeechforpeople.org/challenge-to-madison-cawthorn-under-14-3-insurrectionist-disqualification-clause/ [https://perma.cc/6PSX-ADKA].

[90] Josh Blackman, *Section 3 Lawsuit Filed Against Candidacy of Rep. Madison Cawthorn*, VOLOKH CONSPIRACY (Jan. 11, 2022, 11:02 AM), https://reason.com/volokh/2022/01/11/section-3-lawsuit-filed-against-candidacy-of-rep-madison-cawthorn/ [https://perma.cc/THW5-HYDH].

[91] IN RE: CHALLENGE TO THE CONSTITUTIONAL QUALIFICATIONS OF REP. MADISON CAWTHORN, NOTICE OF CANDIDACY CHALLENGE (Jan. 10, 2022), https://reason.com/wp-content/uploads/2022/01/nc-14.3-complaint-cawthorn-final-2022-01-10-1.pdf [https://perma.cc/8Y6F-PQTE]; *Challenge to Madison Cawthorn Under 14.3 Insurrectionist Disqualification Clause*, *supra* note 89.

[92] *Georgia Voters Challenge Rep. Marjorie Taylor Greene's Candidacy for Re-election Under Fourteenth Amendment's Insurrectionist Disqualification Clause*, FREESPEECHFORPEOPLE.ORG (Mar. 24, 2022), https://freespeechforpeople.org/georgia-voters-challenge-rep-marjorie-taylor-greenes-candidacy-for-re-election-under-fourteenth-amendments-insurrectionist-disqualification-clause/ [https://perma.cc/5LLE-N99A].

[93] *See supra* notes 91-92.

[94] U.S. CONST. amend. XIV, § 3.

[95] Josh Blackman & S. B. Tillman, Opinion, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, N.Y. TIMES (Apr. 20, 2022),

"Only the federal government—not the states—can disqualify insurrectionists from congressional ballots." In our view, "States cannot unilaterally create procedures, unless authorized by federal statute, to keep accused insurrectionists off the congressional ballot."[96]

Our primary authority was an 1869 decision by Chief Justice Salmon Chase from the federal circuit court for Virginia. In *Griffin's* Case, Chase wrote "that legislation by Congress is necessary to give effect to" Section 3 of the 14th Amendment—and that "only" Congress can enact that legislation.[97] Chief Justice Chase added that the exclusion of disqualified office holders "can only be provided for by Congress."[98] At the time, we thought this was a very strong precedent to explain why state boards lacked the power to disqualify candidates for federal positions due to an alleged Section 3 violation. We also thought that Chase, who was widely regarded as an influential jurist, was a credible figure to rely on. However, we did not anticipate that Judge Richardson, a Fourth Circuit judge, in the *Cawthorn* case would actively attempt to discredit Chase's 150-year-old opinion.[99] Richardson was not alone. For example, Professor Mark Graber of the University of Maryland wrote a reply to our *New York Times* essay that challenged Chase's opinion.[100] This would not be the last word on Chief Justice Chase.

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https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html [https://perma.cc/G3B3-QN28].

[96] *Id.*

[97] Griffin's Case, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5815) [hereinafter *Griffin's Case*].

[98] *Griffin's Case*, *supra* note 97, at 26.

[99] Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring); *see also* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350, 507-09 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771 [https://perma.cc/H5WX-22CF].

[100] Mark Graber, *Legislative Primacy and the Fourteenth Amendment*, BALKINIZATION (Apr. 22, 2022), https://balkin.blogspot.com/2022/04/legislative-primacy-and-fourteenth.html [https://perma.cc/5DKL-Q8DZ]; *c.f.* Seth Barrett Tillman & Josh Blackman, *A Reply to Mark Graber's "Legislative Primacy and the Fourteenth Amendment"*, BALKINIZATION (Apr. 25, 2022), https://balkin.blogspot.com/2022/04/a-reply-to-mark-grabers-legislative.html [https://perma.cc/M4C2-KADC].

VI. INDICTMENT AND REMOVAL

In 2022, it became clear that Trump was in fact going to run for re-election. I am reasonably convinced that if Trump had announced that he had no intention of seeking re-election, much of the lawfare against him would have never occurred. But Trump actively sought a second term. And the investigations against Trump ramped up.[101] Attorney General Merrick Garland faced something of a dilemma. In August 2022, I wrote, "If DOJ indicts Trump, then Trump may see the presidency as his (literal) get-out-of-jail free card. And the prosecution of Trump could galvanize his supporters, leading to his re-election."[102] I think hindsight would prove me largely correct. Garland would avoid the tough choice of deciding whether to indict Trump. Instead, he appointed Jack Smith as Special Counsel. Smith chose to indict Trump in D.C. and in the Southern District of Florida.[103] Insurrection was not among the charges.[104] It is not clear if Smith even consulted Garland before seeking the indictment.

In March 2023, Trump was indicted in New York Supreme Court, the criminal trial court in Manhattan. Trump attempted to remove the case to federal district court.[105] The relevant removal statute, Title 28 Section 1442, permits a person holding an "office . . . of the United States" to remove a criminal prosecution to federal court.[106] Trump could only invoke this statute if, as President, he had been an "Officer of the United States." Though this was not a

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[101] *See* Josh Blackman, *No, 18 U.S.C. § 2071 Cannot Disqualify Trump from the Presidency*, VOLOKH CONSPIRACY (Aug. 8, 2022, 11:25 PM), https://reason.com/volokh/2022/08/08/no-18-u-s-c-%c2%a7-2071-cannot-disqualify-trump-from-the-presidency/ [https://perma.cc/7KZJ-WK43].

[102] Josh Blackman, *To Indict or Not to Indict? That is the Question*, VOLOKH CONSPIRACY (Aug. 31, 2022, 11:56 PM), https://reason.com/volokh/2022/08/31/to-indict-or-not-to-indict-that-is-the-question/ [https://perma.cc/Z7UF-GE3V].

[103] *Special Counsel Jack Smith Delivers Statement*, DEP'T JUST. (June 9, 2023), https://www.justice.gov/archives/sco-smith/speech/special-counsel-jack-smith-delivers-statement [https://perma.cc/LPD2-XQMP].

[104] *See generally* Superseding Indictment, United States v. Donald J. Trump, No. 23-cr-80101-AMC (S.D. Fla. July 27, 2023), available at https://www.justice.gov/storage/US-v-Trump-Nauta-De-Oliveira-23-80101.pdf [https://perma.cc/3KFK-TPWN].

[105] Donald J. Trump's Notice of Removal, New York v. Donald J. Trump, No. 23-cv-2773 (S.D. N.Y. May 4, 2023), https://storage.courtlistener.com/recap/gov.uscourts.nysd.598311/gov.uscourts.nysd.598311.1.0_1.pdf [https://perma.cc/PY4P-7JUE].

[106] 28 U.S.C. § 1442(a)(1).

Section 3 case, we realized there would be a close relationship to the imminent litigation over Trump's eligibility.

If Trump was an "Officer of the United States" for purposes of the removal statute, then he might also be an "Officer of the United States" for purposes of Section 3. In other words, if Trump made the former argument in the New York State criminal case, he might be put in a bind regarding the latter argument in a Section 3 case. On May 18, 2023, we wrote an essay in *Lawfare* arguing that Trump could not remove the case to federal court because he was not an "Officer of the United States."[107] Here, we were taking a position that was directly opposite of Trump's position in the state criminal case, though we predicted that our position would likely be consistent with what Trump might argue in a future ballot-access Section-3 case.

We had no contact with the New York District Attorney's Office. But it is at least possible that District Attorney Alvin Bragg, or someone in his staff, may have seen our posts. Bragg's motion argued that the President was *not* an "Officer of the United States."[108] His brief cited many of the same authorities that we had flagged in our Lawfare essay, and in many of our prior writings.[109] Yet, there was something of a dilemma for Bragg and his team. If Bragg was correct, and the President was not an "Officer of the United States" under the removal statute, then that would be a precedent which Trump could use to argue that he was not an "Officer of the United States" for the purposes of Section 3.[110] We

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[107] Josh Blackman & Seth Barrett Tillman, *Why the Manhattan DA's Trump Case Cannot Be Removed to Federal Court*, LAWFARE (May 18, 2023, 8:15 AM), https://www.lawfaremedia.org/article/why-the-manhattan-da-trump-case-cannot-be-removed-to-federal-court [https://perma.cc/J7RY-SX9B].

[108] People's Memorandum of Law in Support of Motion for Remand at 6-8, People v. Trump, 683 F. Supp. 3d 334 (S.D.N.Y. 2023) (No. 23 Civ. 3773), 2023 WL 3791275, https://storage.courtlistener.com/recap/gov.uscourts.nysd.598311/gov.uscourts.nysd.598311.19.0.pdf [https://perma.cc/M2ZV-FCVU].

[109] Josh Blackman & Seth Barrett Tillman, *New York District Attorney Bragg Argues that President Trump Was Not an "Officer of the United States"*, VOLOKH CONSPIRACY (May 31, 2023, 3:23 PM), https://reason.com/volokh/2023/05/31/new-york-district-attorney-bragg-argues-that-president-trump-was-not-an-officer-of-the-united-states/ [https://perma.cc/P36P-M73Y].

[110] *Id.*

suggested that the federal district court should call for the views of the Department of Justice on this issue.[111]

Two weeks later, Trump's lawyers filed an opposition to the District Attorney's motion to remand.[112] The brief was signed by Todd Blanche, who would become President Trump's Deputy Attorney General.[113] The brief charged that "Although [District Attorney of New York Bragg] disappointingly never gives them any credit, DANY's argument is cribbed, at times nearly word-for-word, from a recent Lawfare blog post by Professors Blackman and Tillman."[114] However, the brief parried, that "while [Blackman & Tillman's] argument—that elected officials, including the President, are not 'officers of the United States'—has been advocated by these professors for some time, to our knowledge it has never been accepted by any court."[115] A footnote cited three of our publications, and stressed, "To be clear, we mean no disrespect to either of these fine academics but their views on this matter are idiosyncratic and of limited use to this Court."[116] We were grateful for the citations. Moreover, we think this brief models how attorneys (and others) can cite those with whom they disagree—even if Trump's lawyers said our position should not be adopted by the court.[117]

Ultimately, the District Court remanded the case to state court.[118] The court did not definitively hold whether the President was an "officer of the United States."[119] The most the court would say is, "I believe that the President should qualify as a 'federal

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[111] *Id.*

[112] *See generally* President Donald J. Trump's Memorandum of Law in Opposition to the People of the State of New York's Motion for Remand, People v. Trump, 683 F. Supp. 3d 334 (S.D.N.Y. 2023) (No. 23 Civ. 3773), 2023 WL 4046483, https://reason.com/wp-content/uploads/2023/06/2023-06-15-Opposition-Remand.pdf [https://perma.cc/J8TR-Y42M].

[113] *See generally id.*

[114] *Id.* at 2.

[115] *Id.* (footnote omitted).

[116] *Id.* at 2-3 n.1.

[117] Josh Blackman, *Trump's Lawyers Cite, and Disagree with Blackman & Tillman on Whether the President Is or Is Not an "Officer of the United States"*, VOLOKH CONSPIRACY (June 16, 2023, 1:39 PM), https://reason.com/volokh/2023/06/16/trumps-lawyers-cites-and-disagrees-with-blackman-tillman-on-whether-the-president-is-not-an-officer-of-the-united-states/ [https://perma.cc/PC2U-X99D].

[118] New York v. Trump, 683 F. Supp. 3d 334, 337-38 (S.D.N.Y. 2023).

[119] *Id.* at 343.

officer' under the removal statute but, as is evident from the discussion below, the proposition is dictum, unnecessary for the decision that I reach."[120] It is unusual for a trial court to label its own analysis as dictum. In any event, we were and remain unsure how much weight to place on this dictum.[121] This removal episode illustrated once again how our once-niche argument about offices and officers became a central component of a major legal dispute.

VII. SPECIAL COUNSEL JACK SMITH

In June 2023, Special Counsel Jack Smith indicted Trump in the U.S. District Court for the Southern District of Florida.[122] This indictment arose out of the FBI's search of Trump's Mar-A-Lago club.[123] In August 2023, Smith indicted Trump in the U.S. District Court for the District of Columbia.[124] This indictment arose out of the events leading up to, and during, January 6, 2021.[125] Smith charged Trump with conspiracy to defraud the United States, conspiracy to obstruct an official proceeding, and related charges.[126] Smith did not indict Trump for insurrection under 18 U.S.C. § 2383.[127] To date, no one has been charged with violating the federal insurrection statute. Smith also did not charge Trump with

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[120] *Id.*

[121] Josh Blackman, *SDNY "Believe[s]" in Dictum that President an "Officer of the United States" for Purposes of Federal Officer Removal Statute*, VOLOKH CONSPIRACY (July 19, 2023, 4:29 PM), https://reason.com/volokh/2023/07/19/sdny-believes-in-dictum-that-president-an-officer-of-the-united-states-for-purposes-of-federal-officer-removal-statute/ [https://perma.cc/5GK9-Z9BD].

[122] *See generally* Superseding Indictment, *supra* note 104.

[123] Josh Blackman, *Smith's Indictment of Trump in Florida Suggest He Won't Bring an Insurrection Charge in D.C.*, VOLOKH CONSPIRACY (June 16, 2023, 5:02 PM), https://reason.com/volokh/2023/06/16/smiths-indictment-of-trump-in-florida-suggest-he-wont-bring-an-insurrection-charge-in-d-c/ [https://perma.cc/DT58-QCN5].

[124] *See generally* Indictment, United States v. Trump, 2024 WL 4885816 (Nov. 25, 2024) (No. 1:23-cr-00257-TSC), 2023 WL 4883396, https://storage.courtlistener.com/recap/gov.uscourts.dcd.258149/gov.uscourts.dcd.258149.1.0_1.pdf [https://perma.cc/T36Z-HPX5].

[125] *Id.* at 1-2.

[126] *Id.* at 2.

[127] *See generally id.*; Josh Blackman, *What the Trump Indictment Left Out*, VOLOKH CONSPIRACY (Aug. 1, 2023, 11:22 PM), https://reason.com/volokh/2023/08/01/what-the-trump-indictment-left-out/ [https://perma.cc/Z9UJ-BPGT].

seditious conspiracy, a charge that was brought against Stuart Rhodes and the Proud Boys.[128]

In mid-2023, the press reported that Smith would not indict Trump for insurrection to avoid distracting fights.[129] In January 2025, Smith's report explained in greater detail why he chose not to bring an insurrection charge against Trump.[130] In short, his reason was that there was no clear definition of insurrection under federal law and there was no clear evidence that Trump personally engaged in insurrection.[131] Smith also acknowledged the difficult First Amendment issues which would arise if he had charged Trump with insurrection or with some related lesser-included, indirect, or inchoate offense, e.g., inciting an insurrection.[132] On this point, I think Smith's decision was well-informed, and if so, his decision not to indict Trump for these crimes casts some doubt on the House's decision to impeach Trump.

VIII. PROFESSOR BAUDE AND PROFESSOR PAULSEN

In late-July 2023, Professor Will Baude and Professor Michael Stokes Paulsen graciously shared a copy of their co-authored draft article. This article contended that full "sweep and force" of Section 3 disqualified Trump from the presidency. [133] The article criticized our argument that the President was not an "Officer of the United States."[134] The article also argued that Chief Justice Chase's position in *Griffin's Case* was wrong.[135] Indeed, they disparaged

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[128] *Leader of Oath Keepers and 10 Other Individuals Indicted in Federal Court for Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach*, U.S. DEP'T JUST. (Jan. 13, 2022), https://www.justice.gov/opa/pr/leader-oath-keepers-and-10-other-individuals-indicted-federal-court-seditious-conspiracy-and [https://perma.cc/DK82-SGWQ].

[129] Blackman, *supra* note 123.

[130] Josh Blackman, *Jack Smith Explains Why He Did Not Charge Trump with Insurrection*, VOLOKH CONSPIRACY (Jan. 14, 2025, 12:11 PM), https://reason.com/volokh/2025/01/14/jack-smith-explains-why-he-did-not-charge-trump-with-insurrection/ [https://perma.cc/S83T-H3ES].

[131] *Id.*

[132] *Id.*

[133] William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 722, 726 (2024).

[134] *Id.* at 725-30.

[135] *Id.* at 644-45.

Chase's opinion in harsh terms.[136] Baude and Paulsen further contended that Trump engaged in insurrection, or at least gave aid and comfort to an insurrection, and was thus disqualified.[137] We were grateful that Baude shared a draft of their article, and we promptly provided them with some comments.

After completing our review, we decided that we would write something in response. Initially, we thought a short blog post would suffice. But that short blog post turned into a long blog post. And that long blog post turned into a short essay. And that short essay turned into a full-length law review article. When we put our first draft on SSRN, it was 126 single-spaced pages, which, coincidentally, was the same length as Baude and Paulsen's article. It was not intentional! Tillman and I had been working together for more than six years on many projects, but never before had we found a period of such sustained productivity.

Early in the morning on September 12, 2023,[138] we posted our article on SSRN, titled *Sweeping and Forcing the President into Section 3*.[139] The article addressed five primary questions.[140] First, we argued that Section 3 was not self-executing.[141] Second, we explain that Chief Justice Chase's decision in *Griffin's Case* was "reasonably probative evidence of the original public meaning of Section 3, and whether, and in what circumstances, it is or is not self-executing."[142] Third, we demonstrated that Chase's decision in *Griffin's Case* was consistent with the *Case of Jefferson Davis*. Fourth, we explained that Section 3 does not extend to inchoate or indirect wrongs, such as assisting an insurrection.[143] Fifth, we addressed the "officer" issue: *Was the President an "Officer of the*

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[136] *Id.* at 647 ("All in all, *Griffin's Case* is a case study in how *not* to go about the enterprise of faithful constitutional interpretation."); *see also id.* at 650 ("Put bluntly, Chase made up law that was not there in order to change law that was there but that he did not like.").

[137] *Id.* at 610.

[138] Josh Blackman, *New Article: Sweeping and Forcing the President into Section 3*, VOLOKH CONSPIRACY (Sept. 12, 2023, 1:24 AM), https://reason.com/volokh/2023/09/12/new-article-sweeping-and-forcing-the-president-into-section-3/ [https://perma.cc/5Y8U-SUNX].

[139] *See generally* Blackman & Tillman, *supra* note 99.

[140] *Id.* at 350-53.

[141] *Id.* at 350-51.

[142] *Id.* at 351.

[143] *Id.* at 351-52.

United States"? And was the presidency an "Office under the United States"?[144] We concluded that Baude and Paulsen's articles had theoretical defects and other errors that were not insubstantial.[145] We "suggest[ed] that scholars, litigants, elections administrators, and judges allow Baude and Paulsen's article to percolate in the literature before placing too great a reliance on its novel claims."[146]

Shortly after Tillman and I posted our article on SSRN, the editors at the *Texas Review of Law & Politics* invited us to publish with them. In addition, the student editors made a commitment to work promptly to get our finished product to market. As it turned out, the delays (such as they were) emanated from the authors, not the journal. We were pleased to accept their offer.

IX. CALABRESI, MUKASEY, AND AMAR

For more than a decade, Tillman had been writing that the President was not an "Officer of the United States" and the presidency was not an "Office . . . under the United States." In the early days of those debates, Tillman had scholarly exchanges with Professors Zephyr Teachout, Saikrishna Prakash, and Steven G. Calabresi.[147] Each of these scholars argued that Tillman was wrong, and that the President was an "Officer of the United States,"

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[144] *Id.* at 352-53.

[145] *Id.*

[146] *Id.* at 353.

[147] Seth Barrett Tillman & Steven Calabresi, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 135-40, 141-45, 146-53, 154-59 (2008); Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107 (2009), http://ssrn.com/abstract=1099355 [https://perma.cc/EPH2-DTGL]; 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2008-2009), http://ssrn.com/abstract=1660547 [https://perma.cc/29YH-3SRW]; Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 35 (2008), http://ssrn.com/abstract=1557164 [https://perma.cc/EXV4-J3X8]; Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 Nw. U.L. Rev. 399 (2012); Zephyr Teachout, Rebuttal, *Gifts, Offices, and Corruption*, 107 NW. U.L. REV. COLLOQUY 30 (2012), http://ssrn.com/abstract=2081879 [https://perma.cc/7765-3LAG]; Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013), http://ssrn.com/abstract=2012803 [https://perma.cc/F9PW-EL4J]; Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200 (2013), http://ssrn.com/abstract=2383385 [https://perma.cc/7NY8-BKQJ].

and the presidency was an "Office under the United States."[148] These exchanges were focused on the meaning of the office- and officer-language in the Constitution of 1788.[149] We were not certain how these scholars would approach the phrase "Officer of the United States" in Section 3.

To be sure, Professors Baude and Paulsen did not find our position persuasive. Baude and Paulsen contend that our textualist approach is a "hidden-meaning hermeneutics" that renders Section 3 "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati."[150] But in fairly rapid succession, our position received some substantial support.

On Thursday, September 7, Michael Mukasey, the former-Chief Judge of the United States District Court for the Southern District of New York, and former-Attorney General, published an op-ed in the Wall Street Journal, contending that the President was not an "Officer of the United States" for purposes of Section 3.[151] We had no clue this piece was coming, and we were pleasantly surprised to see that his thinking aligned with our own. (Or to put it another way, Tillman and my views, as well as Mukasey's, aligned with Justice Story's.)

Then it happened again.

On September 12, the *Wall Street Journal* published a letter to the editor from Professor Steven Calabresi.[152] He now concluded that President Trump cannot be disqualified under Section 3.[153] In particular, Calabresi changed his mind on a debate he had had with Professor Seth Barrett Tillman in 2008.[154] Calabresi now agreed

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[148] *See* articles cited *supra* note 147.

[149] *Id.*

[150] Baude & Paulsen, *supra* note 133, at 726.

[151] Michael B. Mukasey, Opinion, *Was Trump 'an Officer of the United States'?*, WALL ST. J. (Sept. 7, 2023, 12:59 PM), https://www.wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26?st=5PMSyK&reflink=desktopwebshare_permalink [https://perma.cc/R4UA-XBMZ].

[152] Steven Calabresi, Opinion, *President Trump Can Not Be Disqualified*, WALL ST. J. (Sept. 12, 2023, 4:30 PM), https://www.wsj.com/articles/trump-can-not-be-disqualified-14th-amendment-calabresi-16657a1b?st=2s6kLC&reflink=desktopwebshare_permalink [https://perma.cc/E6VJ-5KVW].

[153] *Id.*

[154] *Id.*

with Tillman that the President is not an "Officer of the United States."[155] Indeed, the previous month, Calabresi had endorsed Baude and Paulsen's article, and he concluded that Section 3 does disqualify Trump.[156] We appreciate that Calabresi took the time to correct the public record as to his own views.[157] Calabresi told Blackman that when he had submitted his *Wall Street Journal* letter, he had not yet seen our new article on Section 3. We had no clue he would publish his revised view in the *WSJ*. Here again, we were pleasantly surprised.

After we saw Calabresi's letter, our minds turned to Yale Law Professor Akhil Reed Amar. Amar and Calabresi are long-time friends, have taught a class together at Yale, regularly cite and respond to each other's material, and are (or, perhaps, were) co-authors of a leading constitutional law treatise. We realized that Mukasey's and Calabresi's public positions were now in tension with Amar's position. Nearly three decades ago, Vikram and Akhil Amar argued that there is no difference between "Officers of the United States" and "Office[s] . . . under the United States," and that the President is covered by both phrases.[158]

Then, on Wednesday, September 13, Amar released a new podcast about Section 3. The podcast only references Mukasey's op-ed.[159] It did not address the Blackman-Tillman article, or Calabresi's letter to the editor.[160] (We suspect it was recorded at some point after Thursday, September 7, and before Tuesday, September 12.) Amar criticizes Mukasey, as well as the amicus

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[155] *Id.*

[156] Steven Calabresi, *Trump Is Disqualified from Being on Any Election Ballots*, VOLOKH CONSPIRACY (Aug. 10, 2023, 6:44 PM), https://reason.com/volokh/2023/08/10/trump-is-disqualified-from-being-on-any-election-ballots/ [https://perma.cc/G9XV-2RY4].

[157] *Id.*

[158] Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114 (1995).

[159] *See generally* Akhil Reed Amar, *An Officer and a President*, AMARICA'S CONST., (Sept. 12, 2023), https://www.podbean.com/ew/pb-q5dmr-14a4c42 [https://perma.cc/MMC2-WUAT].

[160] Josh Blackman & Seth Barrett Tillman, *Professor Akhil Amar, On His Podcast, Responds to Attorney General Mukasey and the Tillman-Blackman Position*, VOLOKH CONSPIRACY (Sept. 14, 2023, 1:08 AM), https://reason.com/volokh/2023/09/14/professor-akhil-amar-on-his-podcast-responds-to-attorney-general-mukasey-and-the-tillman-blackman-position/ [https://perma.cc/72AS-TDRQ].

briefs that Tillman and Blackman submitted in 2017 in connection with the Emoluments Clauses case(s).[161]

We commend Amar for stating clearly and directly what he thinks about Mukasey and our position. Here are a few highlights, with timestamps. (We add our comments in italics within brackets.)

- "And I was **laughing**, because I actually couldn't resist because to even hear these formulations elicits **laughter** from me."[162]
- "This was not ex-General Mukasey's **finest moment**."[163]
- "The Tillman-Blackman position, which I think is **daft** . . ."
- "This one was just a brief by Tillman. Maybe Blackman wasn't involved in the brief, but see brief for scholar Seth Barrett Tillman."[164] [*If you check the front cover of the brief, and the signature block, Blackman's name was listed as counsel.*][165]
- On the Tillman-Blackman position: "I actually didn't think it was worth the audience's time. I thought it was such a **ridiculous** point."[166] [*Here, Amar was referring to his two earlier podcasts in which he interviewed Professors Will Baude and Michael Stokes Paulsen.*]
- "Will Baude clerked for Chief Justice John Roberts and is among the most distinguished scholars there is. He is the single most cited young scholar by the Supreme Court, Will Baude, Roberts clerk. Sai Prakash is the most cited the younger-ish scholar by the Supreme Court and he clerked for Thomas, these are very

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[161] *See generally* Amar, *supra* note 159.

[162] *Id.* at [07:31].

[163] *Id.* at [1:07:47].

[164] *Id.* at [1:13:17].

[165] *See* Brief Submitted by Professor Seth Barrett Tillman as Amicus Curiae in Support of Intervenor-Appellant/Cross-Appellee Donald J. Trump at 1, Anderson v. Griswold, 543 P.3d 283 (Colo. 2023) (No. 2023SA00300), https://reason.com/wp-content/uploads/2024/02/2023-11-27-brief.pdf [https://perma.cc/7G7E-NEK7] (naming Professor Seth Barrett Tillman and Josh Blackman as *Attorneys for Amicus Curiae*).

[166] *Id.* at [1:17:07].

credible people you see who are really experts. Truthfully, and **that's less true of Professor Tillman**, truth be told, [Tillman] who is **not cited by the Supreme Court** and, in the one case where a court really turns and discusses his work, **body slams him**."[167] [*We agree that Baude and Prakash are among the most distinguished legal scholars in the United States.*]

- "Let me be clear, this is a **genuinely stupid** argument on the merits, I'm going to demolish it. It's **embarrassing** that someone so distinguished [as Mukasey] at the end of, you know, near the end of their career would say something like this and so prominent to place."[168] [*The podcast was posted on Erev Rosh Hashanah*, and *we wished General Mukasey a long and healthy life.*]

- "This is very **wrong**. It's **silly**. It's so **silly** that we didn't spend time on it in three hours with Baude and Paulsen because I moved beyond it because it seemed to me they were just pushing on an open door." [169]

- "Truthfully, this is not true of all great lawyers and judges who aren't scholars they have sometimes underlings write stuff for them. Judges have law clerks, lawyers have associates, great lawyers have staff attorneys who do this. So it's possible that General Mukasey did all this himself, but it's possible that some **underling**, and he offered his name he [is] still responsible for it."[170]

- "But when a scholar says something, typically, that scholar did it himself, herself is responsible for it. And especially if that scholar is building on a lifetime of scholarship on, let's say, the Constitution, in general, I'm going to give more benefit of the doubt to the scholar, and they have two scholars like Sai Prakash, and Will Baude and Mike Paulsen and Larry Tribe. On

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[167] *Id.* at [1:17:31].
[168] *Id.* at [1:19:16].
[169] *Id.* at [1:23:16].
[170] *Id.* at [1:24:10].

> the one side, Akhil and Vik[ram] have taken this position back in 1996, an article on presidential succession. And on the other side, **we do have a scholar Seth Barrett Tillman, he has a track record of citation or non citation, you can judge it for yourself. I don't think it's a very distinguished record, truthfully.** And, and you have General Mukasey, but I think this is not his finest hour."[171] [*Query: What* ***is*** *a record of non-citation?*]

- "But what I'm saying is that he's [Mukasey] written no article that I know of in which he elaborates all this. **I know where it's coming from**. **It's coming from Seth Barrett Tillman, which has been properly body slammed** by Sai Prakash and judges and Baude and Paulsen, so, and Tribe himself was involved in that Emoluments Clause litigation on the other side, and I hold I don't always agree with Larry Tribe, I don't always agree with Sai Prakash or Will Baude, our audience has heard that, but **these are the serious people**. That's why these are the serious people that you've heard from on our podcast."[172]

To be sure, we had no personal objection with Amar's position, language, or tone. Indeed, we applauded his willingness to be direct and clear. No doubt, this *is* civility as Amar sees things.[173]

X. THE COLORADO DISTRICT COURT

By the time we posted our article to SSRN, Section 3 suits were being filed across the country, including in Colorado, Connecticut, Michigan, Minnesota, Nevada, New Hampshire, West Virginia, and Wyoming.[174] We were grateful that many of the briefs filed by

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[171] *Id.* at [1:24:34].

[172] *Id.* at [1:26:10].

[173] Blackman & Tillman, *supra* note 160. A few weeks later, Professor Amar would put forward a less harsh take. *See* Charlie Savage, *A Legal Outsider, an Offbeat Theory and the Fate of the 2024 Election*, N.Y. TIMES (Feb. 7, 2024) https://www.nytimes.com/2024/02/07/us/politics/tillman-constitution-trump-colorado-ballot.html [https://perma.cc/35QQ-DX7U].

[174] Seth Barrett Tillman, *Briefs and Other Filings in Section 3 Cases*, NEW REFORM CLUB (Nov. 16, 2023, 4:11 AM), https://reformclub.blogspot.com/2023/11/briefs-and-other-filings-in-section-3.html [https://perma.cc/72DP-FDLZ].

President Trump, as well as amicus briefs in support of Trump, cited our writings.[175]

The litigation in Colorado seemed to move quicker than in other states. Several voters, led by Norma Anderson, filed a complaint on September 6, 2023.[176] On September 23, Trump filed his motion to dismiss.[177] The brief cited our article, which had been posted to SSRN about two weeks earlier.[178] District Court, Judge Sarah B. Wallace scheduled a trial to resolve the legal question of whether Trump should be disqualified.[179] She asked both sides to present expert witnesses who would provide reports on the meaning of Section 3.[180]

President Trump's counsel invited both Tillman and me to testify as expert witnesses. We were honored to be invited, but after much deliberation, we declined for several reasons. First, we were uncertain, and remain uncertain, how a law professor could testify about legal matters as an expert. Law professors are not like scientists or doctors who can present factual information that may be beyond the judge's expertise. There is no *Daubert* standard for constitutional scholars. Rather, questions of law can be argued by lawyers in the briefs and in oral argument. In our view, it is odd for legal scholars to take the stand as witnesses. Indeed, during Section 3 litigation in Georgia, a judge refused to allow a constitutional scholar to testify about legal issues.[181]

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[175] *Id.*

[176] *See generally* Verified Petition Under C.R.S. § 1-4-1204, § 1-1-113, § 13-51-105, and C.R.C.P. 57(a), Anderson v. Griswold, 2023 WL 8006216 (D. Colo. Nov. 17, 2023) (No. 2023CV32577), 2023 WL 5963907, https://reason.com/wp-content/uploads/2025/02/2023-09-06-08-43-07-Complaint-Petition.pdf [https://perma.cc/FW43-LP7F].

[177] Brief in Support of Respondent Donald J. Trump's Motion to Dismiss, Anderson v. Griswold, No. 2023CV32577 (Colo. Dist. Ct. Sept. 29, 2023), https://reason.com/wp-content/uploads/2025/04/2023-09-23-MTD.pdf [https://perma.cc/S82Q-GW6H].

[178] *Id.* at 8.

[179] Order on Topics for the Oct. 30, 2023 Hearing, Anderson v. Griswold, No. 2023CV32577 (Colo. Dist. Ct. Oct. 18, 2023), https://reason.com/wp-content/uploads/2025/04/2023-10-18-Topics-for-the-October-30-2023-Hearing.pdf [https://perma.cc/DY6U-D4HP].

[180] *Id.*

[181] Ross Williams, *Marjorie Taylor Greene Defiant, Forgetful in Court Challenge to Reelection Eligibility*, GA. RECORDER (Apr. 22, 2022, 8:01 PM), https://georgiarecorder.com/2022/04/22/marjorie-taylore-greene-defiant-forgetful-in-court-challenge-to-reelection-eligibility/ [https://perma.cc/U7NN-5A28].

Second, we were both reasonably confident this case was headed to the Supreme Court. If we were retained and compensated as experts by President Trump, we thought we would be unable to file an amicus brief before the Supreme Court. The ethical rules on this matter are not clear, but we made the informed judgment that serving as an expert witness would basically make us a party to the case, and thus unable to serve as an amicus. With the benefit of hindsight, I think our judgment was correct. Professor Gerard Magliocca served as an expert witness for the plaintiffs, but did not file an amicus brief before the Supreme Court.

There is a third reason that may not have been apparent at the time, but we were well aware of. Since we began writing about Section 3, we were very careful about which arguments we would make, and which arguments we would not make. We contended that the President was not an "Officer of the United States" for purposes of Section 3. Therefore, Trump was never subject to Section 3. But we were careful to not take a position on whether the presidency was an "Office under the United States." This was our scholarly view. Still, we recognized that President Trump's lawyers, who had a duty to zealously advocate for their client, might disagree with us on this point. They would likely argue that the President was an "Officer of the United States" and the presidency was an "Office under the United States." Given that we could only make one of those two arguments, we thought it best that Trump retain a different witness. We recommended Robert Delahunty, a retired law professor who had served in the Office of Legal Counsel. Delahunty prepared an expert report for the court.[182]

> The attorneys invited Indiana University professor Gerard Magliocca to testify as an expert witness about how the framers of the 14th Amendment would have conceptualized the idea of insurrection, but Judge Charles Beaudrot expressed skepticism in the relevance of the testimony. 'This is what I would expect to be reading during briefs,' he said. 'This is not what I expect to hear testimony on. This is historical data that can be reviewed and commented on, proffered and so forth. I'm indulging you because (of) the importance of this hearing.

Id.

[182] *See generally* Expert Report of Robert J. Delahunty, Anderson v. Griswold (Nov. 17, 2023) (No. 2023CV32577), 2023 WL 8006216, https://reason.com/wp-content/uploads/2025/02/2023-10-27_Expert_Report_Delahunty-FINAL.pdf [https://perma.cc/MP4A-WF8F].

During the week of October 30, 2023, Judge Wallace presided over a five-day bench trial. Delahunty testified on behalf of Trump.[183] Gerard Magliocca, a scholar on the Fourteenth Amendment, testified on behalf of the plaintiffs.[184] The court also heard testimony from witnesses about the events of January 6.[185]

On November 17, Judge Wallace issued her opinion.[186] It was something of a split decision. The court found that the events of January 6 were an insurrection, and Trump engaged in insurrection.[187] The Court also found that the state court had the authority to remove Trump from the ballot.[188] But the Court saved the threshold issue for last. Judge Wallace ruled that the President was not an "Officer of the United States," and therefore found that Section 3 did not apply to Trump in the first place.[189]

Judge Wallace agreed with Trump's lawyers that the Appointments Clause, the Impeachment Clause, the Commissions Clause, the Oath or Affirmation Clause, and the Presidential Oath Clause "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.'"[190] Judge Wallace added, "the Court is persuaded that 'officers of the United States' did not include the President of the United States." [191]The Court also followed the democracy cannon: "the law ought err on the side of democratic norms except where a contrary indication is

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[183] *Id.*

[184] Expert Report on Professor Gerard N. Magliocca, Anderson v. Griswold (Nov. 17, 2023) (No. 2023CV32577), 2023 WL 8006216, https://reason.com/wp-content/uploads/2025/04/2023-10-15-Magliocca-Report.pdf [https://perma.cc/M3PA-9TY9]

[185] Trial Transcript of Day 3 Testimony, at 210-29, Anderson v. Griswold (Colo. Dist. Ct. Nov. 1, 2023) (No. 2023CV32577), 2023 WL 8006216, https://reason.com/wp-content/uploads/2025/04/2023-11-01-Testimony.pdf [https://perma.cc/S3P4-GPGC]; *see generally* Trial Transcript of Day 5 Testimony, Anderson v. Griswold (Colo. Dist. Ct. Nov. 3, 2023) (No. 2023CV32577), 2023 WL 8006216, https://reason.com/wp-content/uploads/2025/04/2023-11-03-Transcript-Day-5.pdf [https://perma.cc/L6S9-JJ7L].

[186] Anderson v. Griswold, No. 2023CV32577, 2023 WL 8006216 (Colo. Dist. Ct. Nov. 17, 2023).

[187] *Id.* at *33.

[188] *Id.* at *29-31.

[189] *Id.* at *45-46.

[190] *Id.* at *45.

[191] *Id.*

clear, is appropriate and applicable to the circumstances."[192] This holding tracked very closely the arguments that Tillman and I have advanced for some time.[193]

Judge Wallace's decision was significant. In the months leading up to that opinion, our position was ridiculed and mocked by scholars and pundits alike. Indeed, a week before, the Federalist Society National Lawyer's Convention hosted a discussion between Professor Will Baude and Professor Michael McConnell. McConnell, who had served as a federal appeals court judge, said our argument was not going to be accepted by any court.[194] Blackman publicly challenged both McConnell and Baude to a debate; only the latter accepted.[195]

The Colorado Trial Court ruled exactly one week after McConnell's remarks. Indeed, a Democratic judge in a deep blue state, who found that Trump was an insurrectionist, accepted our arguments. In our view, this opinion moved our Section 3 argument from "off the wall" to "on the wall."[196]

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[192] *Id.* at *46 n.21.

[193] Josh Blackman, *Colorado District Court "Holds that Section Three of the Fourteenth Amendment Does Not Apply to Trump"*, VOLOKH CONSPIRACY (Nov. 17, 2023, 7:23 PM), https://reason.com/volokh/2023/11/17/colorado-district-court-holds-that-section-three-of-the-fourteenth-amendment-does-not-apply-to-trump [https://perma.cc/U8B6-7XS8].

[194] *Id.* at [14:42]; *see generally* The Federalist Society, *Insurrection and the 14th Amendment [NLC 2023]*, YOUTUBE (Nov. 10, 2023), https://www.youtube.com/watch?v=UCEnHqAT_6c&ab_channel=TheFederalistSociety [https://perma.cc/368Y-Q65C].

[195] Josh Blackman, *Blackman & Baude Debate Section 3 in Chicago*, VOLOKH CONSPIRACY (Jan. 17, 2024, 4:04 PM), https://reason.com/volokh/2024/01/17/blackman-baude-debate-section-3-in-chicago/ [https://perma.cc/325K-9BU4].

[196] Josh Blackman, *Moving the Section 3 Officer Argument from "Off the Wall" to "On the Wall"*, VOLOKH CONSPIRACY (Nov. 21, 2023, 8:30 AM), https://reason.com/volokh/2023/11/21/moving-the-section-3-officer-argument-from-off-the-wall-to-on-the-wall/ [https://perma.cc/8VHU-CJBM].

XI. BRIEFING AND ORAL ARGUMENT BEFORE THE COLORADO SUPREME COURT

As the case was appealed to the Colorado Supreme Court, we decided to prepare an amicus brief. Our brief made two primary arguments. First, we contended that the state court could not provide the requested relief in light of *Griffin's Case*. Second, we argued that the President was not an "Officer of the United States."[197] Our brief was submitted on November 27, 2023. Shortly thereafter, we filed a similar brief before the Michigan Court of Appeals.[198]

On December 6, the Colorado Supreme Court heard oral argument in *Griswold v. Anderson*.[199] "The arguments stretched more than two hours, perhaps as much as 1/3 of that time was devoted to the officer issue. The justices asked both sides probing questions, and seemed to understand the nuances of the textual arguments."[200] They inquired about the Oath Clause, the Appointments Clause, the Commissions Clause, and more.[201] Counsel for the Plaintiff cited the Incompatibility Clause, the Religious Test Clause, and the Foreign Emoluments Clause.[202] Trump's counsel countered by citing foreign state gifts that President Washington accepted, and are on display at Mount

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[197] Brief Submitted by Professor Seth Barrett Tillman as *Amicus Curiae* in Support of Intervenor-Appellant/Cross-Appellee Donald J. Trump, *supra* note 165 at 9-10; Request for Oral Argument Motion of *Amicus Curiae* Professor Seth Barrett Tillman in Support of Intervenor-Appellant/Cross-Appellee Donald J. Trump at 3-4, Anderson v. Griswold, 543 P.3d 283 (Colo. 2023) (No. 2023SA00300), https://reason.com/wp-content/uploads/2024/02/2023-11-27-leave-arg.pdf [https://perma.cc/8VCJ-XCTZ].

[198] *See generally* Motion by Professor Seth Barrett Tillman for Leave to File *Amicus Curiae* Brief in Support of Defendant-Appellee Secretary of State Jocelyn Benson and in Support of Affirmance of the Court of Claims' Order Denying Plaintiffs' Prayer for Relief, Davis v. Wayne Cnty. Election Comm'n, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023) (Nos. 368615 & 368628), https://reason.com/wp-content/uploads/2024/02/2023-12-06-Tillman-Brief.pdf [https://perma.cc/V89L-TYUA].

[199] *See generally* OMPCOJudicial, *23SA300*, YOUTUBE (Dec. 6, 2023), https://www.youtube.com/watch?v=w63HiVgvVvo&ab_channel=OMPCOJudicial [https://perma.cc/S5LY-YB26].

[200] Josh Blackman & Seth Barrett Tillman, Griswold v. Anderson*: The Section 3 Case Before the Colorado Supreme Court*, VOLOKH CONSPIRACY (Dec. 7, 2023, 3:41 PM), https://reason.com/volokh/2023/12/07/griswold-v-anderson-the-section-3-case-before-the-colorado-supreme-court/ [https://perma.cc/P366-AFAH].

[201] *Id.*

[202] *Id.*

Vernon.[203] "We recognize that some well-known professors insist that this argument is frivolous and not even worth discussing." But the questions at oral argument suggest otherwise.[204]

During the argument, counsel for the plaintiffs raised the *Jefferson Davis horrible*.[205] If the presidency was not an "Office under the United States," then Jefferson Davis would have been eligible for the presidency.[206] We had been aware of this issue for some time. But frankly, this question was not a problem for us, since we had never taken a position on the meaning of "Office under the United States" for purposes of Section 3. However, we developed some responses to this position.[207] First, what matters is the meaning of the text and not what the Framers may have intended.[208] Second, "the Framers and Ratifiers of the Fourteenth Amendment were not worried about Jefferson Davis becoming President."[209] Third, "Section 3 disqualified rebel presidential electors, which would prevent a rebel president."[210] Fourth, "Section 3 was a compromise that did not accomplish everything the Radical Republicans wanted."[211] Fifth, "Section 3, which was modeled after the Impeachment Disqualification Clause, does not disqualify a person from holding the presidency."[212]

Trump's lawyer also cited our amicus brief with regard to *Griffin's Case*.[213] These arguments seemed to gain some traction on

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[203] *Id.*

[204] *Id.*

[205] Josh Blackman & Seth Barrett Tillman, *Jefferson Davis: President of the United States?*, VOLOKH CONSPIRACY (Dec. 8, 2023, 10:54 AM), https://reason.com/volokh/2023/12/08/jefferson-davis-president-of-the-united-states/ [https://perma.cc/Z7F7-89EL].

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] Blackman & Tillman, *supra* note 200.

> Griffin, the habeas applicant, sought to use Section 3 as a sword—i.e., offensively as a cause of action supporting affirmative relief, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a shield—i.e., as a defense in a criminal prosecution, and he could do so without enforcement legislation.

Id.

the bench. Though neither of us were present at the oral argument, our positions were discussed at length.

XII. THE COLORADO SUPREME COURT'S DECISION

On December 19, 2023, about two weeks after oral argument, the Colorado Supreme Court announced its decision.[214] The opinion stretched more than two-hundred pages. The seven-member court split 5–4. The majority opinion, per curiam, ruled that Trump was disqualified under Section 3. As relevant to our work, the Court reached two primary conclusions.

First, the majority ruled "that Section Three is 'self-executing' in the sense that it is enforceable as a constitutional disqualification without implementing legislation from Congress."[215] The majority acknowledged that "*Griffin's Case* concludes that congressional action is needed before Section Three disqualification attaches, but this one case does not persuade us of that point."[216] The Court further noted that *Griffin's Case* "has been the subject of persuasive criticism" from Professors Magliocca, Baude, and Paulsen.[217] The latter two, the Court observed, criticized "Chief Justice Chase's interpretation as wrong and constituting a strained interpretation based on policy and circumstances rather than established canons of construction."[218] The Court did not acknowledge any of contrary arguments about *Griffin's Case*, including from Blackman and Tillman.

Second, the Court ruled that the Presidency is an "Office under the United States" and the President is an "Officer of the United States."[219] The Court wrote: "When interpreting the Constitution, we prefer a phrase's normal and ordinary usage over 'secret or technical meanings that would not have been known to ordinary citizens in the founding generation.'"[220] Along similar lines, Professors Baude and Paulsen contend that Blackman & Tillman's

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[214] Anderson v. Griswold, 2023 CO 63, 543 P.3d 283, *cert. granted sub nom*. Trump v. Anderson, 144 S. Ct. 539 (2024), *rev'd sub nom.* Trump v. Anderson, 601 U.S. 100 (2024).

[215] *Id.* at 312.

[216] *Id.* at 315.

[217] *Id.* at 315-16.

[218] *Id.* at 316.

[219] *Id.* at 319-25.

[220] *Id.* at 320 (quoting D.C. v. Heller, 554 U.S. 570, 577 (2008)).

textualist approach is "hidden-meaning hermeneutics" that renders Section 3 "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati."[221] Yet, the state court did not even mention how the phrase "Officers of the United States" was used in the Constitution of 1788 when it would support the Petitioner's position. The Court once again did not acknowledge any of contrary arguments from Blackman and Tillman's scholarship concerning the Constitution's "office"- and "officer"-language.

There were three separate dissents. The first dissent was from Chief Justice Boatright. He narrowly ruled that the court could not resolve this case under the Colorado election code.[222] A second dissent was from Justice Berkenkotter. She also ruled based on Colorado election law.[223] The third, and most significant dissent, was from Justice Samour.[224] Justice Samour, cited Blackman and Tillman's scholarship in several places.[225] His dissent observed that the Fourth Circuit "aptly adopted this distinction . . . thereby reconciling any apparent inconsistencies in Fourteenth Amendment jurisprudence."[226] Justice Samour cited *Cale v. Covington*,[227] which discussed *Griffin's Case*. Justice Samour was right that *Griffin's Case* has not been "discredited."[228] It was not based on some set of political "circumstances."[229] Chief Justice Chase's jurisprudence was not "bonkers" or "wacky."[230] Rather, *Griffin's Case* is the "fountainhead" and "wellspring of Section 3 jurisprudence."[231] For 150 years, from 1869 to 2021, *Griffin's Case* was settled law.

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[221] Baude & Paulsen, *supra*, at 133.

[222] *Anderson,* 543 P.3d. at 352 (Boatright, C.J., dissenting).

[223] *Id*. at 361 (Berkenkotter, J., dissenting).

[224] *Id*. at 351 (Samour, J., dissenting).

[225] *Id*. at 348, 350 n.6, 351 n.7, 356 (Samour, J., dissenting) (citing Blackman & Tillman).

[226] *Id*. at 351 (Samour, J., dissenting).

[227] *Id*. at 352-53 (Samour, J., dissenting).

[228] Baude & Paulsen, *supra* 133, at 43, 44.

[229] *Id*.

[230] *Id*.

[231] *Id*. at 348-89 (Samour, J., dissenting).

Cale recognized "the protection the Fourteenth Amendment provided of its own force as a *shield* under the doctrine of judicial review."[232] The Fourth Circuit held "that the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress."[233] It is these "two distinct senses of self-execution" which "reconciled in a principled manner" *Griffin's Case* and Chase's decision in the Case of Jefferson Davis.[234]

We were grateful that Justice Samour found our scholarship helpful. We also think he offered astute observations about the sword/shield dichotomy. The Supreme Court would later reaffirm Justice Samour's analysis in *Trump v. Anderson*[235] *and in DeVillier v. Texas*.[236]

XIII. ON THE WALL

In the wake of Colorado Supreme Court's decision, it soon became clear that our arguments were squarely *on the wall*.[237] Over the course of forty-eight hours, our work was cited and discussed on two Fox News programs. On *Outnumbered*, Emily Compagno argued that the President does not fall under Section 3.[238] Then she mentioned us by name:

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[232] 586 F.2d 311, 316 (4th Cir. 1978) (emphasis added).

[233] *Id.* (emphasis added).

[234] *Anderson*, 543 P.3d at 351 (Samour, J., dissenting) (citing Blackman & Tillman, *supra* 99, at 484–505).

[235] Trump v. Anderson, 601 U.S. 100 (2024); Josh Blackman & Seth Barrett Tillman, *Unanimous Supreme Court Adopts the Sword-Shield Dichotomy to Explain How Constitutional Rights Can Be Litigated*, VOLOKH CONSPIRACY (Apr. 17, 2024, 12:03 PM) https://reason.com/volokh/2024/04/17/unanimous-supreme-court-adopts-the-sword-shield-dichotomy-to-explain-how-constitutional-rights-can-be-litigated/ [https://perma.cc/N4LN-PG2M].

[236] DeVillier v. Texas, 601 U.S. 285 (2024); Josh Blackman, *Justice Thomas's Statement Reaffirms Sword-Shield Dichotomy*, VOLOKH CONSPIRACY (Dec. 9, 2024 1:15 PM) https://reason.com/volokh/2024/12/09/justice-thomass-statement-reaffirms-sword-shield-dichotomy/ [https://perma.cc/DN5W-9T7Z].

[237] Josh Blackman, *Blackman & Tillman, On The Wall*, VOLOKH CONSPIRACY (Dec. 21, 2023, 11:26 PM), https://reason.com/volokh/2023/12/21/blackman-tillman-on-the-wall/ [https://perma.cc/2WG2-ATK9].

[238] *See generally* Josh Blackman, *Blackman & Tillman's Article on Section 3 discussed on Fox News Channel*, YOUTUBE (Dec. 21, 2023), https://www.youtube.com/watch?v=nd9y6jl6Ge0 [https://perma.cc/HWB4-3WUE].

> At the end of the day, the Democracy Canon as Josh Blackman and Seth Barrett Tillman wrote for NYU Journal of Law & Liberty, which I really suggest everyone should read. They go into detail. . . . The NYU Journal of Law & Liberty, Josh Blackman and Seth Tillman wrote an amazing, long article about why exactly the presidency does not fall under this, why the Framers intended for this to be excluded. And they say exactly the point that I made in the beginning. It is because of the power of the people should rest in their hands. And they point out that the Democracy Canon, precedents, said the entire time that the presidency was not an officer of the United States. And they go one-by-one through those advocates, their arguments otherwise, and they say, look, this is scattered sources, there is not enough precedent. Only recently did people start shoving the presidency into that box. But at the end of the day, they say, it's not about the courts, and it's not about congress actually, it's about the people, and so therefore, it is up to the courts right now to right this decision, and restore that power back to the people because here, they can do what they want with those other offices, but the Presidency does not apply under Section 3, overwhelmingly in legal scholarship.[239]

As Compagno made these comments, it appears she was holding a printout of our very long article, and at times was reading from it.[240]

On *Hannity*, guest host Kayleigh McEnany, who had served as President Trump's press secretary, also cited our work.[241] She said:

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[239] *Id.* at [00:54].

[240] *See generally id.*

[241] Josh Blackman, *Mentioned on Hannity on Fox News Chanel Segment on Section 3 Decision*, YOUTUBE (Dec. 19, 2023), https://www.youtube.com/watch?v=zzN_H26dJfU&t=97s&ab_channel=JoshBlackman [https://perma.cc/J7G5-ZT8V].

> There's been peer reviewed articles written on this. Josh Blackman, a professor down in Texas, has made the point that Greg just made, which is this is not intended to apply to the president, Section 3. Another argument in the President's corner.[242]

Several minutes later, McEnany interviewed Senator, and future Vice President, J.D. Vance.[243] The host returned to our work:

> Senator Vance, last question, Professor Josh Blackman, who I referenced with our previous guest, said this would be "the single biggest disenfranchisement in modern history." Do you think the Supreme Court puts a stop to this and these radical leftist groups from trying to stop the will of the American people.[244]

Vance replied:

> I certainly hope they will, and I actually think they will. I think the Supreme Court has to step in here to protect the rights of the American voters.[245]

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[242] *Id.* at [04:24]. In fairness, this article of ours had not been vetted through traditional academic peer review, but other Tillman publications on offices and officers of the Constitution had been published in peer-reviewed journals.

[243] *Id.* at [05:50].

[244] *Id.* at [08:45].

[245] *Id.* at [09:08].

We were also mentioned in the *New York Times*, three times.[246] I also appeared on several radio stations.[247] Other leading scholars, including Robert Natelson, supported our position.[248] Our argument was on the wall.

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[246] Adam Liptak, *Colorado Ruling Knocks Trump Off Ballot: What It Means, What Happens Next*, N.Y. TIMES (Dec. 19, 2023), https://www.nytimes.com/2023/12/19/us/politics/colorado-trump-legal-questions-supreme-court.html?searchResultPosition=2 [https://perma.cc/2C4F-74HP].

> Other scholars, notably Josh Blackman of South Texas College of Law Houston and Seth Barrett Tillman of Maynooth University in Ireland, say that Section 3 does not cover Mr. Trump. There is, they wrote, "substantial evidence that the president is not an 'officer of the United States' for purposes of Section 3.

Id.; Charlie Savage, *Trump Ruling in Colorado will Test Conservative Approach to Law*, N.Y. TIMES (Dec. 21, 2023), https://www.nytimes.com/article/14th-amendment-trump-colorado-textualism.html?searchResultPosition=3 [https://perma.cc/E3G8-5UES].

> In 2021, two conservative legal scholars, Josh Blackman of the South Texas College of Law Houston and Seth Barrett Tillman of the National University of Ireland, Maynooth, published a law review article about the clause arguing on textualist and originalist grounds that a president does not count as an officer of the United States. Among other issues, they focused on language about "officers" in the original Constitution as ratified in 1788 — including language about oaths that can be read as distinguishing appointed executive branch officers from presidents, who are elected.

Id.; Maggie Astor, *Trump Ballot Ruling: Trump is Disqualified from Holding Office, Colorado Supreme Court Rules*, N.Y. TIMES (Dec. 19, 2023), https://www.nytimes.com/live/2023/12/19/us/trump-colorado-ballot-news/14th-amendment-trump-section-3?searchResultPosition=1 [https://perma.cc/EE4E-X5PQ] ("Others have argued the opposite, with the law professors Josh Blackman and Seth Barrett Tillman saying in a recent draft paper that they saw 'no sound basis' for Mr. Baude's and Mr. Paulsen's conclusions.").

[247] Josh Blackman, *Guest on Airtalk with Larry Mantle (KPCC LA) to Discuss Section 3 Case*, SOUNDCLOUD (Dec. 20, 2023), https://soundcloud.com/josh-blackman-4/guest-on-airtalk-with-larry-mantle-kpcc-la-to-discuss-section-3-case [https://perma.cc/TK8N-XWLN]; Josh Blackman, *Guest on Ross Kaminsky Show KOA (Denver) to Talk About CO Supreme Court Ruling on Section 3*, SOUNDCLOUD (Dec. 20, 2023), https://soundcloud.com/josh-blackman-4/guest-on-ross-kaminsky-show-koa-denver-to-talk-about-co-supreme-court-ruling-on-section-3 [https://perma.cc/ZTL7-SES2]; Josh Blackman, *Guest on the John Kobylt Show on KFI Radio (LA) to Talk About Co Supreme Court Ruling on Section 3*, SOUNDCLOUD (Dec. 20, 2023), https://soundcloud.com/josh-blackman-4/guest-on-the-john-kobylt-show-on-kfi-radio-la-to-talk-about-co-supreme-court-ruling-on-section-3 [https://perma.cc/T6GP-SE8U].

[248] Blackman, *supra* note 48.

XIV. FIRST TO FILE MERITS BRIEF BEFORE THE SUPREME COURT

On January 3, 2024, Trump's counsel filed a petition for a writ of certiorari in the case now styled as *Trump v. Anderson*.[249] Only two days later, on January 5, the Court granted certiorari.[250] The Court set January 18 as the deadline for the Petitioner's brief as well as any amicus briefs.[251] Oral argument would be heard on February 5, 2024.

We decided to file our amicus brief early on January 9—more than a week before Trump's brief would come in.[252] We chose to file early for several reasons. First, and perhaps most importantly, we were ready. Tillman and I had begun to prepare our amicus brief shortly after the Colorado Supreme Cout ruled a month earlier. We had expected the Supreme Court to move with even more dispatch, so we were prepared. Indeed, we were somewhat surprised the Court set oral argument a month after the cert grant.

Second, we knew there would be a torrent of filings around January 18. It would be very easy for an amicus brief to get lost in the shuffle, especially with so many filings in a short period of time. There is some value in filing the first brief for the Supreme Court's clerks (and, possibly, Supreme Court Justices) would read. As it turned out, several other amicus briefs would also file early, starting on January 11.[253] But we were still the first movers.

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[249] Petition for Writ of Certiorari, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (available at http://www.supremecourt.gov/DocketPDF/23/23-719/294892/20240104135300932_20240103_Trump_v_Anderson__Cert_Petition%20FINAL.pdf [https://perma.cc/P34B-C5TY] (last visited Apr. 28, 2025)).

[250] Petition for Writ of Certiorari Granted, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (available at https://www.supremecourt.gov/qp/23-00719qp.pdf [https://perma.cc/54XJ-4ZUM] (last visited Apr. 28, 2025)).

[251] *See* Petitioner brief and amicus briefs filed on Jan. 18, 2024, *No. 23-719*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/23-719.html [https://perma.cc/YTQ9-TVJQ] (last visited Apr. 28, 2025) [hereinafter *2024 Trump v. Anderson Docket Files*].

[252] Brief for Professor Seth Barrett Tillman as *Amicus Curiae* in Support of Petitioner, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (available at http://www.supremecourt.gov/DocketPDF/23/23-719/295290/20240109145107356_23-719%20Amicus%20Brief%20Professors%20Barrett%20and%20Tillman%20Final.pdf [https://perma.cc/H2HR-UF8V] (last visited Apr. 28, 2025)).

[253] *See* Amicus briefs filed on Jan. 11, 2024, *2024 Trump v. Anderson Docket* Files, *supra* note 251.

The third reason may have been the least obvious. Before the Supreme Court, Trump retained Jonathan Mitchell as his lead counsel.[254] Throughout the lower court litigation, Trump's counsel had repeatedly and routinely cited our scholarship and other writings about Section 3. We also had informal conversations with counsel involved in the lower court litigation about our publications and the constitutional questions at the heart of the litigation. But after Mitchell joined the process, that dialogue would wind down, and once lower court litigation concluded, it came to a near halt. Indeed, Trump's cert petition cited several other law professors, but not our work. And ultimately, Trump's merits brief would not cite us either. After the Court granted cert, we had reason to believe there might be some difference of opinions between Mitchell's position and our position. By filing our brief first, we were able to signal to the Court, and to the other amici, our approach to the case, even where that approach might differ from Trump's lead counsel before the Supreme Court.

Our brief addressed two primary threshold questions. First, could the States could enforce Section 3 in the absence of federal enforcement legislation? And second, was the President an "Officer of the United States" for purposes of Section 3? Our brief also introduced to the litigation an important textual argument made in April 1868. A newspaper article from Louisville, Kentucky, shortly before the Fourteenth Amendment was ratified, argued in some detail that the President was not an "Officer of the United States."[255]

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[254] Blackman was a student of Mitchell's and has praised his work extensively over the years. *See* Josh Blackman, *The Genuis v. SCOTUS*, VOLOKH CONSPIRACY (Nov. 11, 2021, 2:49 PM) https://reason.com/volokh/2021/11/02/the-genius-v-scotus/ [https://perma.cc/437R-6AC3].

[255] Josh Blackman & Seth Barrett Tillman, *Louisville Daily Journal (April 1868): The President is not an "Officer of the United States"*, VOLOKH CONSPIRACY (Jan. 10, 2024, 12:01 AM) https://reason.com/volokh/2024/01/10/louisville-daily-journal-april-1868-the-president-is-not-an-officer-of-the-united-states/ [https://perma.cc/QRT9-4RUD]. We give all credit to John Connolly, who located these *Louisville Daily Journal* sources, along with several related contemporaneous newspaper articles. *See generally* John Connolly, Did Anyone in the Late 1860s Believe the President Was Not an Officer of the United States? (Dec. 6, 2023) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4658473 [https://perma.cc/M7J6-K9QZ] (last visited Apr. 28, 2025)).

XV. THE SECTION 3 ENDGAME

Tillman and I have from time to time had the good fortune of writing about issues before they become politically salient. There are virtues to this approach. Specifically, at an early juncture, we are writing behind the proverbial Rawlsian veil of ignorance. Our views can be asserted independently of any contemporary controversy and distributional or political consequences. To be sure, Tillman and I write about novel issues, and sometimes develop theories in real-time. But the foundational basis of our "office"- and "officer"- scholarship was developed long before Trump came onto the scene.

By contrast, during a political controversy, it often happens that others will enter the field without any prior foundation. This short of rushed scholarship can often be flawed, and make mistakes that could have been caught if the work had been published in more of a deliberate manner and not rushed by the press of ongoing litigation. On January 4, 2024, two authors published an article arguing that the President *was* an *appointed* "Officer of the United States." Tillman and I offered this reply:

> The Authors conclude that our position is incorrect. Their Article cites an 'undeniable urgency' to answer this question. As often happens in anticipation of, and during fast-paced litigation, people who have no prior expertise in an area profess an immediate expertise, and make bold conclusions with the intent of influencing that litigation. This may be one such paper. For reasons we discuss below, Justices and judges, lawyers, scholars, and the press should exercise caution before citing this paper. . . . This paper was written quickly, and posted online in haste in order to influence litigation that is now before the United States Supreme Court and many other federal and state courts. We get it. And we have no doubt that scholars and lawyers may look to cite Heilpern and Worley's Article and their positions in short order, perhaps without fully vetting this new scholarship.[256]

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[256] Josh Blackman & Seth Barrett Tillman, *A New, Rushed Flawed Article in the Section 3 Debate*, VOLOKH CONSPIRACY (Jan. 4, 2024, 3:50 PM) https://reason.com/volokh/2024/01/04/a-new-rushed-flawed-article-in-the-section-3-debate/ [https://perma.cc/P6SA-DR5L] [hereinafter *New Rushed Flawed*].

We found that this article misstated our own position, and had significant errors. Indeed, the authors attributed errors to us that in fact were first advanced by James Madison and Joseph Story![257] Still we were not surprised that this article, which ultimately would be published in the Southern California Law Review,[258] was cited by Respondents in *Trump v. Anderson*.[259] Because this article said what some people wanted to hear, any possible errors were simply swept under the rug.

We described this period as the Section 3 endgame:

> Over the next two months or so, the United States Supreme Court is likely to provide some resolution to one or more of these contentious issues. And, we expect that more than a few will try to leave a mark on this debate in the near term and prior to judicial resolution. They will post new 'research' at the last minute knowing full well that those who are in a position to confirm the accuracy of newly reported 'research' will have little or no time to do so before the Supreme Court decides this case. And, for a few, that is not a bug, it is the chief feature.[260]

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[257] *See* James A. Heilpern & Michael T. Worley, *Evidence that the President Is an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment*, 98 S. CAL. L. REV. 65, 101 (October 2024) ("We likewise are unpersuaded by Blackman and Tillman's reading of the Impeachment Clause.") (available at https://southerncalifornialawreview.com/2025/03/16/evidence-that-the-president-is-an-officer-of-the-united-states-for-purposes-of-section-3-of-the-fourteenth-amendment/ [https://perma.cc/5JDD-ATP3] (last visited Apr. 28, 2025)); *New Rushed Flawed*, *supra* note 256.

> But the Authors also do not report that Madison's Notes from the federal convention are consistent with Story's analysis. Madison's Notes indicates that 'other' was included in a preliminary draft of the Impeachment Clause, but it was later stripped out by a style committee. Indeed Madison's Notes is not merely consistent with Story's position; rather, Madison's Notes confirms Story's position. Story published in 1833, but Madison's Notes were not publicly disseminated until the 1840s."

Id.

[258] *See generally* Heilpern & Worley, *supra* note 257.

[259] Brief on the Merits for Anderson Respondents at 38-39, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (available at http://www.supremecourt.gov/DocketPDF/23/23-719/298854/20240126115645084_23-719%20Anderson%20Respondents%20Merits%20Brief.pdf [https://perma.cc/TXR8-M7GH]).

[260] Josh Blackman & Seth Barret Tillman, *We're in the Section 3 Endgame Now*, VOLOKH CONSPIRACY (Jan. 11, 2024, 2:14 AM)

There would be one such piece from Roger Parloff, a former journalist, who wrote for *Lawfare*.[261] Indeed, even established scholars like Professors Akhil Reed Amar and Vikram Amar took a position substantially at odds with their article from three decades earlier.[262] We suggest that scholarship developed in the shadow of a pending Supreme Court case is more than occasionally plagued with problems.

This scholarship had an impact on the litigation. The Respondents and their amici now argued that the President, Vice President, Speaker of the House, and Senate President Pro Tempore are all appointed "Officers of the United States."[263] Yet, this theory would render unconstitutional every Speaker and Senate President Pro Tempore since 1789, as well as President Grant's Vice President just as it would have made George McGovern's candidacy for President moot had he prevailed in the electoral college.[264]

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https://reason.com/volokh/2024/01/11/were-in-the-section-3-endgame-now/ [https://perma.cc/US2S-7VJK].

[261] Josh Blackman & Seth Barrett Tillman, *A Short Response to Roger Parloff and Others*, VOLOKH CONSPIRACY (Jan. 24, 2024, 10:16 AM) https://reason.com/volokh/2024/01/24/a-short-response-to-roger-parloff-and-others/ [https://perma.cc/332S-GRYT].

[262] Josh Blackman & Seth Barrett Tillman, *Professor Akhil Reed Amar and Professor Vikram Amar Retreat from Their "Global" Rule for the "Offices" and "Officers" of the Constitution*, VOLOKH CONSPIRACY (Jan. 27, 2024, 10:54 PM) https://reason.com/volokh/2024/01/27/professor-akhil-reed-amar-and-professor-vikram-amar-retreat-from-their-global-rule-for-the-offices-and-officers-of-the-constitution/ [https://perma.cc/62M2-4HSZ].

[263] *See* Anderson Respondent's Brief in Opposition to Motion of Professor Tillman for Leave to Participate in Oral Argument as *Amicus Curiae* and for Divided Argument at 40, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (available at http://www.supremecourt.gov/DocketPDF/23/23-719/299337/20240131113727902_20240131%20Opp%20Tillman%20Motion%20Divided%20Argument.pdf [https://perma.cc/NL27-SGFD]).

[264] *See* Josh Blackman & Seth Barrett Tillman, *In* Trump v. Anderson*, the Respondents' Theory Would Render Unconstitutional Every Speaker and President Pro Tempore Since 1789, as Well as President Grant's VP and Presidential Candidate George McGovern*, VOLOKH CONSPIRACY (Feb. 4, 2024, 4:01 PM) https://reason.com/volokh/2024/02/04/in-trump-v-anderson-the-respondents-theory-would-render-unconstitutional-every-speaker-and-president-pro-tempore-since-1789-as-well-president-grants-vp-and-presidential-candidate-g/ [https://perma.cc/L8NU-PFHP].

We do not take issue with all scholars. I am grateful to Professor Will Baude. Baude accepted Blackman's challenge to debate. On January 17, 2024, Blackman and Baude debated the Section 3 issue at the Union League Club in Chicago. The debate was civil insightful, and in the tradition of academic discourse.[265]

XVI. MOTION FOR LEAVE TO ARGUE

During the Foreign Emoluments Clause litigation, we filed amicus briefs in several courts.[266] In those cases, we argued that the President did not hold an "Office under the United States," and thus was not subject to the Foreign Emoluments Clause. (This argument was related to, but not the same as, the position we advanced in the Section 3 litigation). In the Foreign Emoluments Clause litigation, the Department of Justice did not reject our argument, but did not advance it either.[267] In the normal course, an amicus can only file a single brief. In the trial court litigation, we filed briefs in support of the government's Motions to Dismiss. Because our briefs were "top-side," our briefs were unable to address any of the arguments raised by the Plaintiffs in their responses.

After the briefing was complete, we would seek leave to participate in oral argument.[268] Such a motion was procedurally

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[265] *See* Blackman, *supra* note 195.

[266] *See* Josh Blackman, *Emoluments Clauses Litigation*, GOOGLE DRIVE (May 23, 2020), https://bit.ly/2LUUTiY [https://perma.cc/G9C3-VTZY].

[267] *See* Josh Blackman & Seth Barrett Tillman, *The Office of Legal Counsel Has Not Shifted Its Position on Whether the Foreign Emoluments Clause Applies to the President. But the Civil Division Has*, VOLOKH CONSPIRACY (Oct. 4, 2019, 7:00 AM), https://reason.com/volokh/2019/10/04/the-office-of-legal-counsel-has-not-shifted-its-position-on-whether-the-foreign-emoluments-clause-applies-to-the-president-but-the-civil-division-has/ [https://perma.cc/S7YN-WV2P].

[268] Memorandum of Law in Support of Motion for Leave of *Amicus Curiae* Scholar Seth Barrett Tillman and Proposed Amicus Curiae Judicial Education Project to Be Heard at Oral Arguments, Citizens for Responsibility and Ethics in Washington v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Case 1:17-cv-00458-GBD), https://drive.google.com/open?id=1eotIpocMoaQiCM0bueKJvC28EZkbtPoJ [https://perma.cc/77RJ-FDEX];
Notice of Motion for Leave of *Amici Curiae* Scholar Seth Barrett Tillman and Judicial Education Project to be Heard at Oral Argument, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-01596-PJM), https://drive.google.com/open?id=1VLg85FtDjOhSCNLOeHXwwqvR4RACaMvs [https://perma.cc/DP37-9M86]; Motion for Leave of *Amici Curiae* Scholar Seth Barrett

proper. We didn't assert some an established right to participate in oral argument. We asked the court for permission, even though the court would likely deny that request. Still, we hoped that our brief perhaps might be read by some of the attorneys on both sides and the judge's law clerks. If any of our arguments made their way into the litigation, then our brief would have been successful. This move was especially important where our arguments were not affirmatively being made in the briefing. We also filed similar briefs before the intermediate federal courts of appeals.[269] Ultimately, none of these motions were successful: we were not granted argument time. However, we think these briefs largely served their secondary purpose.

In *Trump v. Anderson*, we decided to employ this strategy before the United States Supreme Court. On January 29, we filed a motion for leave to participate in oral argument.[270] We were fairly certain that the motion would be denied. With the exception of the motions from the United States Solicitor General, the Court almost never grants motions for non-parties to participate in a case. And in the few cases where such a motion is granted, there is usually a state attorney general or some essential party who is allowed to

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Tillman and the Judicial Education Project to be Heard at Oral Arguments, Blumenthal v. Trump, 373 F. Supp. 3d 191 (D.D.C. 2019) (No. 1:17-cv-01154-EGS), https://drive.google.com/open?id=12jbAiqOsrr9vb84L80h6pZGW3-skKoY- [https://perma.cc/W97D-XETH].

[269] Motion of Scholar Seth Barrett Tillman and the Judicial Education Project for Appointment as *Amici Curiae* in Support of Appellant, or in the Alternative, Motion for Leave to Participate in Oral Argument, Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020) (No. 19-5237), https://drive.google.com/open?id=1_0Kms3SJMDezojeeSWeE7RI1w6EykS-J [https://perma.cc/E2Q2-J58Q]; Motion of *Amici Curiae* Scholar Seth Barrett Tillman and the Judicial Education Project for Leave to Participate in Oral Arguments, District of Columbia v. Trump, 959 F.3d 126 (4th Cir. 2019) (No. 18-2486 & 18-2488), https://drive.google.com/open?id=1P7WqecoZcRBRliyB_btGgqWdmvbIXkq1 [https://perma.cc/NG3E-2DSL]; Motion of Scholar Seth Barrett Tillman and the Judicial Education Project for Appointment as *Amici Curiae* in Support of Appellant, or in the Alternative, Motion for Leave to Participate in En Banc Oral Arguments, District of Columbia v. Trump, 959 F.3d 126 (4th Cir. 2019) (No. 18-2486 & 18-2488), https://drive.google.com/open?id=1wWNL1gPfhDu5GLG9_ax0YhEJE4yfgGG0 [https://perma.cc/E6N3-ZP7Q].

[270] Motion of Professor Seth Barrett Tillman for Leave to Participate in Oral Argument as *Amicus Curiae* and for Divided Argument, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719), https://reason.com/wp-content/uploads/2024/02/2024-01-29-Motion-Argument.pdf [https://perma.cc/F6X4-6BNU].

participate. We are only aware of one scholar in recent years receiving argument time.[271] Our odds were admittedly close-to-nil. And with the benefit of hindsight, the Court was apparently not interested in engaging with some of the merits questions, which would have lessened any interest in our participating.

With all that said, I think our five-page brief largely served a purpose. We highlighted two primary points where our brief diverged from that of Trump's counsel.[272] First, we pointed out that the Petitioner only cited *Griffin's Case* "in passing," and we made no mention of the sword-shield dichotomy. We wrote that we could present "adversarial argument on the sword-shield doctrine, which would dispositively resolve this case." Second, the Petitioner seemed to argue that there was no difference between an "Officer of the United States" and "Office . . . under the United States," and indeed hesitated on taking any position on the latter phrase. By contrast, our position "would allow the Court to split the difference: find that the President is not an 'Officer of the United States,' independent of whether the presidency is or is not an 'Office . . . under the United States' for purposes of Section 3."

Trump's counsel, as we expected, opposed our motion. Respondents also opposed our motion.[273] They observed that Tillman "presses a related argument that the Presidency is not an 'office under the United States,' which Trump advanced below but has now mostly (but not completely) abandoned."

On February 2, the Court denied our motion with any stated explanation.[274] Such a denial, coming absent any explanation, is not unusual.

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[271] Mike Fox, *U.S. Supreme Court Opinion Centers Largely on Professor Aditya Bamzai's Argument*, UVA L. (June 26, 2018), https://www.law.virginia.edu/news/201806/us-supreme-court-opinion-centers-largely-professor-aditya-bamzais-argument [https://perma.cc/M8HU-97W2].

[272] Motion of Professor Seth Barret Tillman for Leave to Participate in Oral Argument as *Amicus Curiae*, *supra* note 270, at 2, 3.

[273] *See* Opposition of respondents filed on Jan. 31, 2024, *2024 Trump v. Anderson Docket Files*, *supra* note 251.

[274] *Id.*

XVII. A "LONELY SCHOLAR" AND A "LEGAL OUTSIDER"

The *New York Times* is often called the newspaper of record.[275] Despite all the usual criticisms of the mainstream media, I've long found their coverage of the legal beat to be largely fair, though I may be somewhat biased. On two occasions, Tillman-Blackman litigation has been the subject of profiles in the *New York Times*.

The first profile came in September 2017 during the Foreign Emoluments Clause litigation.[276] A group of legal historians, in an amicus brief, had challenged a claim we made in our amicus brief, though they later withdrew that claim, apologized, and sought to amend their brief. Adam Liptak, the *New York Times*'s Supreme Court reporter, covered the controversy. His coverage was entirely fair. He referred to Tillman as a "lonely scholar with unusual ideas," quoting from Tillman's affidavit. And he referred to me as an "energetic law professor and litigator." I had first met Liptak in 2009, while I was waiting overnight for a ticket to hear oral argument in *McDonald v. Chicago*. He quoted my boasting about my Supreme Court fantasy league.[277] Liptak would later offer kind praise about my first book on the Affordable Care Act litigation.[278]

Another Tillman-profile was published in the *New York Times* on February 7, 2024, on the eve of oral argument in *Trump v. Anderson*. This piece, authored by Charlie Savage, had a similar theme: *A Legal Outsider, an Offbeat Theory and the Fate of the 2024 Election*.[279] Sensing a pattern? For some time, Tillman's theories have been outside the mainstream, and his ideas were not widely accepted, even though they had an impact on the significant legal

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[275] Sarah Diamond, *A History of 'Record' in the Newspaper of Record*, N.Y. TIMES (May 21, 2023), https://www.nytimes.com/2023/05/21/insider/a-history-of-record-in-the-newspaper-of-record.html [https://perma.cc/PB8E-AA7Q].

[276] Adam Liptak, *'Lonely Scholar with Unusual Ideas' Defends Trump, Igniting Legal Storm*, N.Y. TIMES (Sept. 25, 2017), [https://perma.cc/L756-Q8FQ].

[277] Adam Liptak, *Tailgating Outside the Supreme Court, Without the Cars*, N.Y. TIMES (March 2, 2010), [https://perma.cc/G6GV-L7UF].

[278] Tony Mauro, *'Unprecedented' 2012 Health Care Ruling Still Reverberates*, SUP. CT. INSIDER (Sept. 18, 2013, 1:53 PM), http://joshblackman.com/blog/wp-content/uploads/2013/09/SCI-Unprecedented.pdf [https://perma.cc/ZD4H-T6KB] ("Liptak jokingly recalled first meeting Blackman some years ago when Blackman was a George Mason University School of Law student waiting on line for a Supreme Court argument. Blackman came across as 'a little goofy and not likely to amount to anything,' said Liptak, whose opinion has long since changed.").

[279] Savage, *supra* note 173.

disputes. I realized this facet about Seth and his scholarship more than a decade ago, and it continues to be an honor to ride the Tillman Express. Savage's profile began:

> In the world of American legal scholarship, Seth Barrett Tillman is an outsider in more ways than one. An associate professor at a university in Ireland, he has put forward unusual interpretations of the meaning of the U.S. Constitution that for years have largely gone ignored — if not outright dismissed as crackpot.
>
> But at 60, Professor Tillman is enjoying some level of vindication. When the U.S. Supreme Court considers on Thursday whether former President Donald J. Trump is barred from Colorado's primary ballot, a seemingly counterintuitive theory that Professor Tillman has championed for more than 15 years will take center stage and could shape the presidential election. . . .
>
> Professor Tillman, heavily bearded with black-rimmed glasses and a bookish demeanor, flew to the United States this week to watch the arguments. With Josh Blackman, who teaches at South Texas College of Law Houston, Professor Tillman submitted a friend-of-the-court brief and asked to participate in arguments, but the court declined.[280]

The article quotes, among others, Akhil Amar, former-judge Michael Luttig, and William Baude. At the time, I wrote that Savage "really captured Seth's essence."[281] I added, "It has been the honor of a lifetime to work so closely with Seth."

That morning, Seth and I took photographs on the steps of the Supreme Court. Shortly thereafter, Seth's profile made it to the top, left-hand column of the Drudge Report.[282] Nora, Seth's wife, was

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[280] *Id.*

[281] Josh Blackman, *Tillman in the Times: "A Legal Outsider, an Offbeat Theory and the Fate of the 2024 Election*," VOLOKH CONSPIRACY (Feb. 7, 2024, 10:42 AM), https://reason.com/volokh/2024/02/07/tillman-in-the-times-a-legal-outsider-an-offbeat-theory-and-the-fate-of-the-2024-election/ [https://perma.cc/DWU9-RL5D].

[282] *MAGA Down: RNC Chair Out*, DRUDGE REP., https://www.drudgereportarchives.com/data/2024/02/07/20240207_141757.htm [https://perma.cc/SGD2-MCVX] (last visited Apr. 28, 2025).

pleased to see Seth's scholarship being covered by the media.[283] On the afternoon of February 7th, Blackman appeared on a panel at the Heritage Foundation on the Section 3 case.[284] But our day was still not done. Later that evening, after dinner at one of Washington's best kosher restaurants, Tillman and I did what we always did: write. We were up till nearly 11:00 p.m. finishing a blog post that responded to some recent claims made by Luttig and others.[285] We were reasonably confident that the post would not affect the litigation, but we are committed to the exchange of ideas and reasoned discourse, even till the end. And unlike our usual virtual discourse which spans two continents and six time zones, on this evening we were able to work in person. We still paced back and forth as we argued with each other, fighting over nearly every word. (Nora jokes that Seth has dug a trench into his carpet with all the pacing that occurs during our hour-long chats).

About eleven hours later, oral argument would begin.

XVIII. SEATED AT THE SUPREME COURT

Both Seth and I were able to reserve tickets to attend oral argument—thankfully, we did not have to wait outside on the line. I was seated in the Supreme Court bar section, right next to the press box where the reporters sit. Seth was seated in the general section.

I had attended nearly twenty oral arguments over the years, but none were quite like this. First, the stakes were very high. The Supreme Court was being asked to disqualify a leading presidential candidate from the ballot. Of course, it was widely assumed that the Supreme Court would reverse the Colorado Supreme Court, but

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[283] The Tillman-Blackman world tour would continue. In June 2024, Nora would kindly accompany us to Ft. Pierce, Florida, where Blackman would present argument on behalf of Tillman in the special counsel case. *What We Did and Did Not Argue in* United States v. Trump, HARV. J. L. & PUB. POL'Y (July 16, 2024), [https://perma.cc/58MF-QDPE].

[284] Josh Blackman, *Video: Heritage Panel on Section 3 Case*, VOLOKH CONSPIRACY (Feb. 7, 2024, 2:47 PM), https://reason.com/volokh/2024/02/07/video-heritage-panel-on-section-3-case/ [https://perma.cc/P2PT-XN6A].

[285] Josh Blackman & Seth Barrett Tillman, *A Reply to Peter Keisler and Richard Berstein, and Michael Luttig, on Section 3*, VOLOKH CONSPIRACY (Feb. 7, 20204, 10:45 PM), https://reason.com/volokh/2024/02/07/a-reply-to-peter-keisler-and-richard-bernstein-and-michael-luttig-on-section-3/ [https://perma.cc/QT3E-K4LW].

Seth and I took nothing for granted. Trump's lawyer would still have to make the case. Second, I had worked on many Supreme Court cases over the years, but none as closely as *Trump v. Anderson*. Almost every facet of the litigation was covered in our *Sweeping and Forcing* article, which was written and posted online several months before the Colorado Supreme Court ruled. A number of the arguments in Trump's brief had their genesis in our scholarship. And third, despite our earlier interactions with Trump's lawyers, we did not attend any of Mitchell's moots, and were waiting with bated breath to see what his positions would be. All we could do was sit back, relax, and hear what the Justices had to ask.

XIX. ORAL ARGUMENT

Oral arguments would stretch about two hours. The arguments can be divided into four themes. First, Justice Gorsuch seemed to understand that the phrase "Officers of the United States" refers to appointed position. Second, Justice Jackson contended that the President was not an "Office under the United States." Third, Justice Sotomayor seemed to deride "some scholars"—likely Tillman and me—who thought the case should be determined based on the "office" issue. Fourth, Justice Kavanaugh articulated the importance of *Griffin's Case*.

A. Justice Gorsuch gets "Officers of the United States"

Justice Gorsuch understood the textual arguments we put forward. [286] He asked careful questions about the Commissions Clause, Appointments Clause, and more.

[286] Josh Blackman, *Oral Arguments in* Trump v. Anderson *Part I: Justice Gorsuch Gets "Officers of the United States*," VOLOKH CONSPIRACY (Feb. 9, 2024, 12:20 PM), https://reason.com/volokh/2024/02/09/oral-arguments-in-trump-v-anderson-part-i-justice-gorsuch-gets-officers-of-the-united-states/ [https://perma.cc/2G87-L7YJ].

> Justice Gorsuch asked Jonathan Mitchell to offer a "*theory . . . from an original understanding or a textualist perspective why those two terms ['Officer of the United States' and 'Office under the United States'], so closely related, would carry such different weight?*" Later, Gorsuch asked, "*Is there anything in the original drafting, history, discussion that you think illuminates why that distinction would carry such profound weight?"*
>
> Mitchell was unable to provide an answer.
>
> He replied that there was no such history "*of which we're aware . . . We aren't relying necessarily on the thought processes of the people who drafted these provisions because they're unknowable."* These sources exist. They are knowable. Mitchell, for reasons that are not clear, just chose not to mention them.

Gorsuch explained why a position consistent with what Tillman has argued may seem "odd," but remains persuasive:

> *So maybe the Constitution to us today, to a lay reader, might look a little odd in distinguishing between "office" and "officer" . . . . But maybe that's exactly how it works.*
>
> Justice Gorsuch got it.

B. Justice Jackson gets "Office under the United States"

Nearly twenty-four minutes would elapse before anyone mentioned the "Officer" issue. And it came up in a very unusual exchange. The transcript does not do it justice. Justice Jackson asked a question about holding office, and then tried to pivot.

> JUSTICE JACKSON: *All right. Can I ask you —I'm just —now that I have the floor—*
>
> MITCHELL: *Yes.*
>
> JUSTICE JACKSON: *—can I ask you to address your first argument, which is the office/officer point?*

As soon as she said that, my ears perked up. Finally, someone would ask about Mitchell's lead argument. What happened next was bizarre.

Justice Kagan quickly turned around, looked at Jackson, and interrupted her and said "*Could—Could…*" It seemed as if she was telling Jackson to not ask that question now, but to ask it later. Chief Justice Roberts chimed in, "*Yeah, why don't we?*" Kagan continued, *"Is that okay if we do this and then we go to that?*" In other words, the Court would continue asking about whether Section 3 was self-executing now, and turn to the officer issue later. Jackson, as if she had forgotten the plan, said, *"Sure, sure, sure, sure*." Jackson said "*sure*" four times. It was awkward. Kagan replied, "*You know, but-*." Jackson yielded, "*Go ahead*." Kagan looked to the Chief Justice, and said, "*Will there be an opportunity to do 'officer' stuff, or should we…*" Roberts smiled, chuckled, and said, "*Absolutely. Absolutely*." Kagan then pivoted back to the execution issue.

At the 29:00 mark, Chief Justice Roberts deemed it appropriate to talk about the "officer" stuff. Again, as if there was some kind of plan, he said, "*why don't we move on to the officer point.*" Mitchell said, "*Certainly*." The Chief looked at Justice Jackson, and said "*Justice Jackson, I think you*." Justice Jackson proceeded.

Justice Jackson, the newest member of the Court, asked perhaps the most surprising questions.[287] Though she is a progressive, she has shown a keen interest in originalism and textualism.[288] Justice Jackson seemed frustrated that Mitchell's brief did not make an argument concerning the meaning of "Office under the United States."

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[287] Josh Blackman, *Oral Arguments in* Trump v. Anderson *Part II: Justice Jackson Gets "Office under the United States,"* VOLOKH CONSPIRACY (Feb. 9, 2024, 2:37 PM), https://reason.com/volokh/2024/02/09/oral-arguments-in-trump-v-anderson-part-ii-justice-jackson-gets-office-under-the-united-states/ [https://perma.cc/UZQ4-MBS6].

[288] Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, HERITAGE FOUND. (May 12, 2022), https://www.heritage.org/the-constitution/lecture/originalism-and-stare-decisis-the-lower-courts [https://perma.cc/YBD3-Y8SE].

> If you want proof of this victory, look no further than across the street at the Supreme Court confirmation hearings that concluded today. Judge Ketanji Brown Jackson was asked how she interprets the Constitution. She said—I'm going to read you the quote, I didn't make this up, I swear—"'I'm looking at original documents. I am focusing on the original public meaning because I am constrained to interpret the text.'" Amazing. She was asked, Is there a living constitution? She said, "'I do not believe there is such a thing as a living constitution.

Id.

> Jackson correctly observed, *"I don't see that in your brief. I see a lot of focus on the second ['Officer of the United States'] but not on the first ['Office under the United States']".* . . . What happened next was unexpected. Justice Jackson pushed back [against Mitchell]. She asked, "*Why? It seems to me that you have a list and president is not on it*." This argument would apply to both the first and [second] sentence. That is, the President is not an "Officer of the United States" and not an "Office under the United States." Mitchell replied, "*that's certainly an argument in our favor*."

Despite these favorable questions from Justice Jackson, Mitchell seemed hesitant to present any argument on the meaning of "Office under the United States."

> Mitchell said, "*we did point out in our opening brief that there are potential issues if this Court were to rule on 'office under' because that phrase appears in other parts of the Constitution, including the [Foreign] Emoluments Clause, the Impeachment Disqualification Clause*."

As I sat there in the Court, with my mouth agape, I turned to the person next to me, a member of the Supreme Court press corps, and said, "Who is he representing?" These are points you begrudgingly argue if pressed. . . . Why give away arguments? . . .

I could not believe what I was hearing. President Trump's lawyer was dismissing favorable questions from Justice Jackson by citing those who seek to remove Trump from the ballot.

Justice Kagan then asked a question.

> In light of (what Kagan perceived as) an empty historical record, Kagan suggested a different inquiry [for the officer issue]: *is Mitchell's proposed "rule a sensible one?"* . . . He gave into Justice Kagan. He said, "*Yeah. I don't think there is a good rationale . . . .*"

Again, there were very good rationales Mithcell could have cited, but he chose not to.

During the seriatim round of questioning, Justice Jackson said she was *"a little surprised at [Mitchell's] response to Justice Kagan because I thought that the history of the Fourteenth Amendment actually provides the reason for why the presidency may not be*

included." Here, Jackson invoked the arguments presented by Professor Kurt Lash.[289]

How did Jonathan Mitchell respond?

> "*There is some evidence to suggest that, Justice Jackson, but . . . .*" He was about to parry to explain why KBJ was wrong. I was shocked. Jackson tried again, "*Is there any evidence to suggest that the presidency was what they were focused on*?" Again, the answer is "*Yes*." Mitchel mustered, "*There is some evidence of that*." Some. But Mitchell proceeded to undermine Jackson's argument with the Jefferson Davis horrible.[290] "*There were people saying we don't want Jefferson Davis to be elected president*."

From where I was sitting, Mitchell was petrified of the [Foreign] Emoluments Clause and the Impeachment Disqualification Clause. He wouldn't even let those issues be at play. Our brief devoted an entire section to those two provisions quite deliberately. And our motion for leave to participate at oral argument was framed, in part, to address those two clauses, which the Petitioner would refuse to address. At this moment, it should have become clear why we had good reason to file the motion we did.

C. Justice Sotomayor talks about "Some Scholars"

Justice Sotomayor objected to Mitchell's argument concerning "Officers of the United States." She said, "*A bit of a gerrymandered rule, isn't it, designed to benefit only your client?*" As it turns out, Trump would be the only President in American history, other than Washington and (perhaps) Adams, who had not taken an oath that would subject him to Section 3. Mitchell replied, "*I certainly wouldn't call it gerrymandered. That implies nefarious intent.*" Sotomayor interrupted him. "*Well, you didn't make it up. I know some scholars have been discussing it*."

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[289] Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J. L. & PUB. POL'Y 309 (2024), https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2024/10/04-Lash.pdf [https://perma.cc/5WQZ-P4KG].

[290] The fear that Jefferson Davis might become President. Blackman & Tillman, *supra* note 205.

(Some scholars? I think, included at least Tillman and me). I smiled in the gallery and waved at the bench. And no, we did not gerrymander this argument up for Trump. Tillman has been writing on this topic since 2008.

Justice Sotomayor continued, *"But just so we're clear, under that reading, only the Petitioner is [not?] disqualified because virtually every other president except Washington has taken an oath to support the Constitution, correct?"*

Mitchell gave a candid response about the implications of his position: "*it does seem odd that President Trump would fall through the cracks in a sense, but if 'officer of the United States' means appointed officials, there's just no way he can be covered under Section 3. The Court would have to reject our officer argument to get to that point*." On that much, I agree. You have to bite this bullet.

D. Justice Kavanaugh gets Griffin's Case

Justice Sotomayor tried to diminish the relevance of [Chief Justice] Chase's opinion [in *Griffin's Case*].[291] She described it as a "*non-precedential decision that relies on policy, doesn't look at the language [of the Fourteenth Amendment], doesn't look at the history, doesn't analyze anything [other] than the disruption that such a suit would bring*." She asked, Mitchell "*you want us to credit [Griffin's Case] as precedential?"*

I got the distinct sense that Jonathan Mitchell did not really believe *Griffin's Case* was correctly decided. He said a few times, very deliberately, that *Griffin's Case* was "correct." But at other times, he hedged. For example:

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[291] Josh Blackman, *Oral Arguments in* Trump v. Anderson *Part III: Justice Kavanaugh Gets* Griffin's Case *and Justice Barrett gets FedCourts*, VOLOKH CONSPIRACY (Feb. 9, 2024, 4:28 PM), https://reason.com/volokh/2024/02/09/oral-arguments-in-trump-v-anderson-part-iii-justice-kavanaugh-gets-griffins-case-and-justice-barrett-gets-fedcourts/ [https://perma.cc/9B6R-CRTP].

> And the answer to all three of those questions turns on *whether* this Court agrees with the holding of Griffin's Case. *If* Griffin's Case is the proper enunciation of the law, then a state cannot do any of the things Your Honor suggested unless Congress gives it authority to do so through implementing legislation.

This defense of *Griffin's Case* is tepid. And Mitchell went out of his way to acknowledge deficiencies in the case. For example, Justice Kagan pointed out that if Congress can lift the disability by a 2/3 majority, "*then surely it can't be right that one House of Congress can do the exact same thing by a simple majority*," and not enacting enforcement legislation. Rather than disputing the premise, Mitchell responded, "*Yeah, there certainly is some tension, Justice Kagan, and some commentators have pointed this out. Professor Baude and Professor Paulsen criticized Griffin's Case very sharply*." Kagan ran with it, and said "Then I must be right." As I sat in the Courtroom, I asked myself, who is Mitchell representing here? He favorably cited the *leading* proponents the other side relied on. I understand advocates have to acknowledge weaknesses in a position, but you don't have to go out of your way to credit opponents.

At another point, Sotomayor described Chief Justice Chase's opinion in Griffin's Case this way:

> *Griffin* was not a precedential Supreme Court decision. It was a circuit court decision by a justice who, when he becomes a justice, writes in the Davis case, he assumed that assumed that Jefferson Davis would be ineligible to hold any office, particularly the presidency.

This point is so confused I barely know where to begin. First, the *Case of Jefferson Davis* came before *Griffin's Case*. Second, Chase did not "become a Justice" after *Davis's Case*. Chase, a Lincoln appointee, decided both cases while riding circuit. Third, the Case of *Jefferson Davis* had nothing to do with whether Davis could be President. I think Sotomayor confused the Jefferson Davis case with the discussion of "office under the United States" and the Jeferson Davis horrible. It is difficult to pack so many errors in a single sentence.

The strongest defender of *Griffin's Case* was Justice Kavanaugh. He did not necessarily defend the case as having been correct as an original matter, but rather explained that *Griffin's Case* settled the matter. Indeed, he viewed *Griffin's Case* as indicia that was "highly probative" of the "original public meaning" of Section 3's "otherwise elusive language."

Did Mitchell agree that *Griffin's Case* was "highly probative." No. He only said it was "probative," and explained he did not rely on it "too heavily" because of Chief Justice Chase's decision in the *Jefferson Davis* case. He warned "*that argument could potentially boomerang on us, which is why we didn't push it very hard in our briefing*." He worried about a similar "boomerang" from the Foreign Emoluments Clause. As I sat there in the Court, I was stunned. Justice Kavanaugh was handing him an engraved invitation on a silver platter and Mitchell rejected it.

Mitchell returned to this theme later. He said *Griffin's Case* was *"relevant and probative for sure, but I think there is other evidence too that might perhaps undercut the usefulness of trying to characterize Griffin's Case as completely emblematic of the original understanding*." Again, whose side was he on? These are points you can respond to in rebuttal, not volunteer. You don't concede their weakness in a softball question from a favorable Justice without even offering a contrary argument.

Later, Justice Kavanaugh tried to salvage Mitchell's argument about *Griffin's Case*. Kavanaugh explained that *Griffin's Case* is "*reinforced because Congress itself relies on that precedent in the Enforcement Act of 1870 and forms the backdrop against which Congress does legislate*." Kavanaugh continued, "*So whether that's a Federalist 37 liquidation argument, it all reinforces what happened back in 1868, 1869, and 1870*." Kavanaugh asked, "*Do you want to add to that, alter that*?" Thankfully, Mitchell accepted Kavanaugh, and said "no."

The Tillman brief described *Griffin's Case* in very similar terms:

> This Court should follow *Griffin's Case*. This decision, and its progeny, settled the meaning of Section 3 . . . . Although not binding, courts at all levels have seen *Griffin's Case* as persuasive. *Griffin's Case* has settled the meaning of Section 3. See *Federalist No. 37* (Madison) (discussing liquidation).[292]

During the Respondents' argument, Justice Kavanaugh repeated his understanding of *Griffin's Case*: "I think the reason it's been dormant is because there's been a settled understanding that Chief Justice Chase, even if not right in every detail, was essentially right, and the branches of the government have acted under that settled understanding for 155 years." Liquidation is like a form of stare decisis on steroids. Even if the Court is not bound by *Griffin's Case*, 155 years has sufficiently settled the matter to follow Chase.

XX. FROM D.C. TO SAN DIEGO

As Seth and I left the Court, we took a picture with a man holding a sign that said: "Trump's violation of the 14th Amendment 'couldn't be any clearer.' Judge Luttig." It would seem that the Supreme Court did not agree with Judge Luttig. Shortly after the argument wrapped, I wrote a short post with my immediate reaction:

> The arguments did not go exactly as I expected, but it was a very rewarding experience. And I suspect that Trump will win big league.[293]

In that photograph, I had a suitcase. Once again, I was on the move. The very next day, I would participate in the University of San Diego Originalism Works in Progress Conference. I was slated to debate Baude & Paulsen on Section 3. On the evening of February 8, I flew from Washington, D.C. to Houston, Texas. I was able to spend one night at home and see my family. The next morning, I was off for another flight from Houston to San Diego.

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[292] Brief for Professor Seth Barrett Tillman as *Amicus Curiae* in Support of Petitioner, *supra* note 252.

[293] Josh Blackman, *Attending Oral Argument in* Trump v. Anderson, VOLOKH CONSPIRACY (Feb. 8, 2024, 2:37 PM), https://reason.com/volokh/2024/02/08/attending-oral-argument-in-trump-v-anderson/ [https://perma.cc/Z8DP-M26T].

Yet, my travel time would not be wasted. In the span of about six hours, I wrote four detailed posts breaking down the oral argument the day before.[294]

My debate with Baude and Paulsen was nuanced, sophisticated, and engaged.[295] Indeed, we talked about the deep legal issues that the Supreme Court only tap danced around. If ever there was a thorough vetting of the Section 3 issues, it occurred in San Diego, rather than in Washington.

In the wake of oral argument, Tillman and I would go on to write several more replies to posts that other scholars wrote.[296] But we were primarily waiting for the decision to drop.

XXI. SUPER MONDAY

On Sunday, March 3, roughly one month after oral argument, the Supreme Court posted an announcement for the following day, Monday, March 4: "The Court may announce opinions on the homepage beginning at 10 a.m. The Court will not take the Bench."[297] The timing here seemed right for *Trump v. Anderson*. Colorado would hold its primary on Super Tuesday, March 5.

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[294] Blackman, *supra* note 285; Blackman, *supra* note 286; Blackman, *supra* note 290; Josh Blackman, *Oral Arguments in* Trump v. Anderson *Part IV: Justice Sotomayor and Kagan get the Line Between National Power and Federalism*, VOLOKH CONSPIRACY (Feb. 9, 2024, 6:48 PM), https://reason.com/volokh/2024/02/09/oral-arguments-in-trump-v-anderson-part-iv-justice-sotomayor-and-kagan-get-the-line-between-national-power-and-federalism/ [https://perma.cc/9PLJ-RKL4].

[295] Josh Blackman, *Blackman & Baude & Paulsen at San Diego Originalism Works-in-Progress Conference*, VOLOKH CONSPIRACY (Feb. 11, 2024, 1:01 AM), https://reason.com/volokh/2024/02/11/blackman-baude-paulsen-at-san-diego-originalism-works-in-progress-conference/ [https://perma.cc/5RXZ-WJB9]; *see generally* Center for the Study of Constitutional Originalism, *04 Special Two Paper Session on Section 3 of the 14th Amendment*, YOUTUBE (Apr. 11, 2024), https://www.youtube.com/watch?v=_pSVpLEs6JU [https://perma.cc/Q5U6-9MGP].

[296] Josh Blackman, *A Reply to Sam Bray: The Drafting History of the Impeachment Clause*, VOLOKH CONSPIRACY (Feb. 11, 2024, 1:28 AM), https://reason.com/volokh/2024/02/11/a-reply-to-sam-bray-the-drafting-history-of-the-impeachment-clause/ [https://perma.cc/4MRM-5QBG]; Josh Blackman & Seth Barrett Tillman, Griffin's Case *(1869) and the Enforcement Act of 1870*, VOLOKH CONSPIRACY (Feb. 19, 2024, 11:14 AM), https://reason.com/volokh/2024/02/19/griffins-case-and-the-enforcement-act-of-1870/ [https://perma.cc/X86P-SAAE].

[297] Josh Blackman, *SCOTUS will Announce Opinions on Monday "on the Homepage,"* VOLOKH CONSPIRACY (Mar. 3, 2024, 2:00 PM), https://reason.com/volokh/2024/03/03/scotus-will-announce-opinions-on-monday-on-the-homepage/ [https://perma.cc/T7WE-TBDF].

As predicted, on March 4, the Supreme Court decided *Trump v. Anderson*.[298] All nine Justices voted to reverse the Colorado Supreme Court. Justice Barrett wrote a concurrence. Justices Sotomayor, Kagan, and Jackson, wrote a joint concurrence. (Though if metadata is to believed, the concurrence was initially styled as a partial dissent).[299] The gravamen on the per curiam opinion was that a State lacks the power to enforce Section 3 against candidates for federal positions. Rather, only Congress could pass such appropriate legislation.

First, the Court agrees with Chief Justice Chase's decision in *Griffin's Case*. Indeed, the Court arguably amplifies Chase's reasoning:

It is therefore necessary, as Chief Justice Chase concluded and the Colorado Supreme Court itself recognized, to "'ascertain[] what particular individuals are embraced'" by the provision. Chase went on to explain that "[t]o accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable."[300]

From the very beginning, we have led off with Chase's opinion. We wrote about it in the *New York Times* regarding Madison Cawthorn.[301] It was the lead argument in our article, *Sweeping and Forcing*. And it was Roman numeral I in every amicus brief we filed. All the efforts by legal professors, academics in other fields, and others to attack Chase, his decision, and his credibility have failed. The most that the Sotomayor-Kagan-Jackson opinion can summon to criticize Chase was to point out that Trump's counsel, Jonathan Mitchell, "distanced himself from fully embracing" *Griffin's Case*. Chase and his legal craftsmanship has been again vindicated, as it has been on many occasions in the past.

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[298] Trump v. Anderson, 601 U.S. 100 (2024).

[299] Mark Joseph Stern, *Supreme Court Inadvertently Reveals Confounding Late Change in Trump Ballot Ruling,* SLATE (Mar. 4, 2024, 4:58 PM), https://slate.com/news-and-politics/2024/03/supreme-court-metadata-sotomayor-trump-dissent.html [https://perma.cc/S87F-VXTH].

[300] *Trump*, 601 U.S. at 109 (alteration in original) (citations omitted) (citing *Griffin's Case*, *supra* note 97, at 26).

[301] Blackman & Tillman, *supra* note 95.

Second, the Court agreed with our position that state positions stand in a different position than federal positions. Law professors roundly rejected this distinction. Indeed, Trump's own counsel resisted this argument. Justice Barrett asked Mitchell, "Why don't you have an argument that the Constitution of its own force, that Section 3 of its own force, preempts the state's ability not necessarily, I think, not, to enforce Section 3 against its own officers but against federal officers, like in a *Tarble's Case* kind of way." Mitchell responded, "there could also be an argument that's more limited. You're suggesting there may be a barrier under the Constitution to a state legislating an enforcement mechanism for Section 3 specific to federal officers." Justice Barrett responded incredulously: "Well, why aren't you making those arguments?" In fact, it was this argument that carried the day.[302]

Third, none of the Justices addressed the "office"- and "officer"-related arguments. Perhaps in several decades, when the papers are released, we will gain some insights into how this opinion came together in its final form. Discussions of the Constitution's and Section 3's "office"- and "officer"-language led to probing questioning by Justices Jackson and Gorsuch during oral argument.

Several weeks after the Court's decision, *Tablet Magazine* published a profile of Tillman, titled "A thinker whose mind hasn't been corrupted by politics."[303] I think the author really captured Seth's essence. Seth, more than anyone else I've ever met, challenges everything. And I don't mean that in the cliché sense of "think critically." He challenges every assumption, no matter how widely adopted, by bringing forward the positions of intellectual communities that have long since faded away. Seth has done this in more contexts than I can count. And in each context, he has clashed with those who seek to perpetuate established narratives—especially where that assumption is essential to their scholarship.

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[302] Blackman, *supra* note 293.

[303] Armin Rosen, *The Outsider Legal Genius Who May Rescue Trump*, TABLET (Mar. 21, 2024), https://www.tabletmag.com/sections/news/articles/outsider-legal-genius-seth-tillman-trump [https://perma.cc/8P6Z-ZAJ3].

CONCLUSION

Between September 2023 and March 2024, there was a concerted effort to ensure that Americans could not vote for Donald Trump. Perhaps with the benefit of hindsight, it should have been obvious that the Supreme Court would never allow Trump to be disqualified. But these sorts of things cannot be predicted with certainty. Perhaps if the Justices thought differently about the legal issues, the case very well might have come out the other way. Baude and Paulsen provided all of the legal scholarship needed to reach such a result. I suspect if the Supreme Court had affirmed the Colorado Supreme Court, Trump would not have appeared on any ballots, and we would likely have a different President today.

But we know how everything turned out. In November 2024, Donald Trump prevailed in the presidential election. And on January 6, 2025, Congress held a joint session. Not a single objection was raised based on Section 3. And now, nearly three months into the new administration, there have been no challenges based on Section 3.

Most people would probably rather forget about the Section 3 litigation, but I am not likely to do so. This article, I hope, encapsulates the role that Tillman and I played in this process.