

SOME PERSONAL REFLECTIONS ON THE RECENT LITIGATION INVOLVING SECTION THREE OF THE FOURTEENTH AMENDMENT

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INTRODUCTION

My participation in recent academic writing and litigation involving Section 3 was not planned long in advance. It was fortuitous. Had the events of January 6, 2021 not happened, I doubt my publications would have touched on this constitutional provision in any substantial way. But January 6, 2021 *did* happen, and as a result, I, like many others, began to add to the ongoing

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legal and political discussion.¹ Professor Josh Blackman² was my co-author on most of these publications,³ and later amicus briefs.⁴ Most, but not all.⁵ And although most of our publications and briefs supported⁶ or were, at least, consistent with positions argued by then former⁷ President Trump's counsel⁸ and his political allies,⁹

¹ See, e.g., Josh Blackman & Seth Barrett Tillman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?*, 2021 U. ILL. L. REV. ONLINE 190 (2021); see also Josh Blackman & Seth Barrett Tillman, *Is the President an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1 (2021) [hereinafter *Is the President an "Officer"?*].

² Centennial Chair of Constitutional Law, South Texas College of Law Houston.

³ See, e.g., Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350 (2024) [hereinafter *Sweeping and Forcing*]; see, e.g., sources cited *supra* note 1. I thank Professor Blackman for his substantial efforts to shoulder the burden across many of our joint publications and briefs.

⁴ See, e.g., Brief for Professor Seth Barrett Tillman as *Amicus Curiae* in Support of Petitioner, *Trump v. Anderson*, 601 U.S. 100 (2024) (No. 23-719), 2024 WL 184282 (filed by Professor Josh Blackman, Robert W. Ray, Esq., of Zeichner Ellman & Krause LLP, et al.), https://www.supremecourt.gov/DocketPDF/23/23-719/295290/20240109145107356_23-719%20Amicus%20Brief%20Professors%20Barrett%20and%20Tillman%20Final.pdf [https://perma.cc/D3RV-PNNV]; Brief Submitted by Professor Seth Barrett Tillman as *Amicus Curiae* in Support of Intervenor-Appellant/Cross-Appellee Donald J. Trump, *Anderson v. Griswold*, 543 P.3d 283 (Colo. 2023) (No. 2023SA00300), 2023 WL 8188397 (filed by Professor Josh Blackman, and R. Scott Reisch, Esq. and Jessica L. Hays, Esq., of the Reisch Law Firm, LLC); see also Brief Submitted by Professor Seth Barrett Tillman as *Amicus Curiae* 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. 2023) (Nos. 368615 & 368628), 2023 WL 9289767 (filed by Professor Josh Blackman and C. Thomas Ludden, Esq., of Lipson Neilson P.C.). In all these amicus briefs, local counsels' advice and efforts were essential.

⁵ Seth Barrett Tillman, *Not a Panacea: Trump Disqualification and Plea Bargains*, LAWFARE (Sept. 20, 2022, 8:31 AM), <https://www.lawfaremedia.org/article/not-panacea-trump-disqualification-and-plea-bargains> [https://perma.cc/Z8T3-8USC].

⁶ See sources cited *supra* notes 1, 3-4 (collecting Tillman publications and briefs generally supporting Trump-45's legal position).

⁷ As I finalize this essay during December 2024 and early 2025, former President Trump (Trump-45) has already been re-elected by the voters and the presidential electors, and he has already begun his second term of service as President (Trump-47).

⁸ See, e.g., President Trump's Reply in Support of his Opening Brief at 7 n.17, *Anderson v. Griswold*, 543 P.3d 283 (Colo. 2023) (No. 2023SA00300), 2023 WL 9602648 (citing Blackman & Tillman, *Sweeping and Forcing*, *supra* note 3, at 98-100).

⁹ See, e.g., Brief of *Amici Curiae* Republican National Committee et al. at 11, 14, *Anderson v. Griswold*, 543 P.3d 283 (Colo. 2023) (No. 2023SA00300), 2023 WL 8259221 (first citing Blackman & Tillman, *Sweeping and Forcing*, *supra* note 3; and then citing

some of our publications came out the other way.¹⁰ Indeed, one Blackman and Tillman publication reproduced decade-old correspondence, in my (Tillman's) personal files, from Justice Scalia, o.b.m., to me (Tillman).¹¹ We explained how Scalia's views, in the letter, contradicted Tillman's position.

This is not to say that I had not touched on Section 3 before. I had.¹² But I had only done so as part of my larger project and set of publications, which had begun circa 2007,¹³ on the Constitution's

Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TEX. L. REV. 349, 423 (2023)).

¹⁰ See, e.g., Josh Blackman & Seth Barrett Tillman, *Why the Manhattan DA 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/2LCT-LQDM>]; see also Tillman, *supra* note 5 (taking a position orthogonal both to Trump's interest and to his opponents' position).

¹¹ See Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TEX. L. REV. 349, 444-48 (2023) (reproducing a Scalia-to-Tillman correspondence). On *Lawfare*, Roger Parloff wrote that Blackman and I were "amaze[d]" that, in 2014, Scalia "wrote back" in response to my inquiries. Roger Parloff, *What Justice Scalia Thought About Whether Presidents Are "Officers of the United States"*, LAWFARE (Jan. 24, 2024, 9:01 AM), <https://www.lawfaremedia.org/article/what-justice-scalia-thought-about-whether-presidents-are-officers-of-the-united-states> [<https://perma.cc/AY6M-NAWR>]; *id.* (reproducing a 2014 Scalia-to-Tillman letter). Parloff's statement is patently incorrect. Blackman may have been amazed, but I was not. After all, Scalia and I had regularly corresponded prior to this particular occasion. See Seth Barrett Tillman, *A Letter from the Grave: Scalia to Tillman, September 13, 2010*, NEW REFORM CLUB (Apr. 13, 2016, 5:24 AM), <https://reformclub.blogspot.com/2016/04/a-letter-from-grave-scalia-to-tillman.html> [<https://perma.cc/VJH8-SJZ4>] (reproducing a 2010 Scalia-to-Tillman letter); Seth Barrett Tillman, *How Seth Barrett Tillman has from Time to Time Been the Recipient of Undeserved Goodwill for Being Irish*, NEW REFORM CLUB (May 10, 2017, 6:12 AM), <https://reformclub.blogspot.com/2017/05/how-seth-barrett-tillman-has-from-time.html> [<https://perma.cc/822M-PMQM>] (reproducing a 2012 Scalia-to-Tillman letter).

¹² See, e.g., Seth Barrett Tillman, *Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar—Contradictions and Suggested Reconciliation* 69-70 n.119 (Feb. 14, 2012) (unpublished manuscript), <https://ssrn.com/abstract=1970909> [<https://perma.cc/JU5W-YYUC>] (citing 1878 source explaining that the text of Section 3 is "very peculiar").

¹³ My 2007 efforts were and remain working papers. See Seth Barrett Tillman, *Legislative Officer Succession to the Presidency* (2007) (unpublished manuscript) (available at <https://ssrn.com/abstract=978878> [<https://perma.cc/P78X-MPBM>], https://works.bepress.com/seth_barrett_tillman/29/ [<https://perma.cc/D5SY-X2R9>], and https://works.bepress.com/seth_barrett_tillman/30/ [<https://perma.cc/DY7P-2WZJ>]). My first bona fide publications were published in 2008. See Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's*

“office”- and “officer”-language. Because Section 3 uses “officer of the United States”- and “office . . . under the United States”-language, I believed then, as I do now, that I had something to add to the academic and wider public discourse.¹⁴ At least one state supreme court Justice¹⁵ and at least one state trial court judge¹⁶ agreed with the legal positions my co-author and I had put forward and which he and I continue to put forward. Some others agreed too—albeit, having independently arrived at conclusions similar to my own.¹⁷ But certainly not all agreed, and my best guess is that the positions I put forward were in the minority. Certainly, those

Incompatibility Clause, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 1 (2008); Seth Barrett Tillman & Steven G. Calabresi, Debate, *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, 146-53 (2008) (pagination reflecting Tillman’s contribution to a four-part exchange); cf. Steven Calabresi, Letters, *President Trump Can Not Be Disqualified: Prof. Steven Calabresi Changes His Mind*, WALL STREET JOURNAL (Sept. 12, 2023, 4:30 PM), <https://wsj.com/articles/trump-can-not-be-disqualified-14th-amendment-calabresi-16657a1b> [<https://perma.cc/P8J3-6ZVT>] (adopting Tillman’s position).

¹⁴ See Charlie Savage, *Offbeat Interpretation From Legal Outsider Could Shape Election*, NEW YORK TIMES, Feb. 8, 2024, A21 (collecting third parties’ views), also reported at https://www.nytimes.com/2024/02/07/us/politics/tillman-constitution-trump-colorado-ballot.html?unlocked_article_code=1.Tk0.8VLD.lkfVuRDHWfs0 [<https://perma.cc/43TE-UMZX>]; see also Adam Liptak, *‘Lonely Scholar With Unusual Ideas’ Defends Trump, Igniting Legal Storm*, NEW YORK TIMES, Sept. 26, 2017, Section A, page 17, also reported at <https://www.nytimes.com/2017/09/25/us/politics/trump-emoluments-clause-alexander-hamilton.html?mtrref=Undefined> [<https://perma.cc/HK2N-G7N2>].

¹⁵ See *Anderson v. Griswold*, 543 P.3d 283, 348, 351 n.7, 356 (Colo. 2023) (Samour, J., dissenting) (citing favorably Blackman & Tillman, *Sweeping and Forcing*, *supra* note 3), *rev’d* *Trump v. Anderson*, 601 U.S. 100 (2024) (per curiam).

¹⁶ See *Anderson v. Griswold*, Case No. 2023CV32577, 2023 WL 8006216, at *43-46 (Dist. Ct., Denver Cnty., Colo., Nov. 17, 2023) (Wallace, J.) (holding that a president is not an “officer of the United States” for the purposes of Section 3 of the Fourteenth Amendment), *rev’d* *Anderson v. Griswold*, 543 P.3d 283 (Colo. 2023) (per curiam), *rev’d* *Trump v. Anderson*, 601 U.S. 100 (2024) (per curiam); see also Order re: Donald J. Trump’s Motion to Dismiss Filed September 29, 2023, *Anderson v. Griswold*, Case No. 2023CV32577, 2023 WL 7017745, at *9 (Dist. Ct., Denver Cnty., Colo., Oct. 25, 2023) (Wallace, J.) (citing Blackman & Tillman, *Sweeping and Forcing*, *supra* note 3).

¹⁷ Michael B. Mukasey, *Was Trump “an Officer of the United States”?*, WALL ST. J. (Sept. 7, 2023, 12:59 PM), <https://wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26> [<https://perma.cc/XP5G-VL7V>] (arriving, independently, at the same position as Blackman and Tillman).

who disagreed were neither shy nor quiet about voicing their disagreement in the most direct and strong terms.¹⁸

What follows is not specifically an attempt to reargue the merits of disputes between my interlocutors and myself, but an attempt to explain my personal experience in attempting to debate a set of intellectual points—points which I had developed since circa 2007 and refined in cooperation with Professor Blackman since 2017.¹⁹ Although I make no claim to objectivity among competing views, I hope to show that traditional academic and professional norms remain worthy aspirational goals, even where unmet.

I. CONTINUITY OF MEANING & CAPITAL LETTERS

Judge Luttig is a retired federal judge. He served on the United States Court of Appeals for the Fourth Circuit. There was a time, not so long ago, that he would have been on a Republican President's short list for a vacancy on the Supreme Court.²⁰ During

¹⁸ For Professor Akhil Amar's comments, see Akhil Amar, *An Officer and a President*, AMERICA'S CONST., at 1:08:50 (Sept. 12, 2023), <https://amaricasconstitution.podbean.com/e/an-officer-and-a-president/> [<https://perma.cc/5RWP-DA7Q>] (discussing former Attorney General Mukasey's position and Tillman's position, and asserting, without evidence, that Mukasey had been influenced by my arguments or publications). See generally Seth Barrett Tillman, Re: Application for a Lateral Position at Yale Law School (Sept. 14, 2023) (unpublished manuscript) (collecting Professor Amar's profundities) (available at <https://ssrn.com/abstract=5070417> [<https://perma.cc/4EHT-TZRN>]). But cf. Savage, *supra* note 14 (interviewing Professor Akhil Amar in 2024 and offering Amar's more generous subsequent assessment of Tillman's scholarship).

¹⁹ See, e.g., Motion for Leave to File Brief of Scholar Seth Barrett Tillman as *Amicus Curiae* in Support of the Defendant, Citizens for Resp. and Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Dec. 21, 2017) (filed by Josh Blackman and Robert W. Ray, Esq., of Thompson & Knight LLP) (filed while Abrams, J. was assigned this case; however, this case was subsequently transferred and decided by Daniels, J.), ECF No. 37, 2017 WL 2692500, <https://ssrn.com/abstract=2985843> [<https://perma.cc/8UAQ-QDXK>]; Josh Blackman & Seth Barrett Tillman, *The "Resistance" vs. George Washington*, WALL ST. J. (Oct. 15, 2017, 6:13 PM), <https://www.wsj.com/articles/the-resistance-vs-george-washington-1508105637> [<https://perma.cc/FUH3-KA4M>]; Josh Blackman & Seth Barrett Tillman, *Yes, Trump Can Accept Gifts*, NEW YORK TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/opinion/trump-france-bastille-emoluments.html> [<https://perma.cc/YFF8-HB34>]; see also sources cited *supra* note 13 (collecting early Tillman publications on the scope of the Constitution's "office"- and "officer"-language).

²⁰ See Tim Grieve, *The Supreme Court Short List*, SALON (Feb. 22, 2005, 9:16 PM), <https://www.salon.com/2005/02/22/sct/> [<https://perma.cc/C66V-MKL7>]; Holly Manges Jones, *Judges Alito, Luttig Reportedly Top New Supreme Court Short List*, JURIST (Oct.

the Section-3 ballot-access cases, e.g., *Trump v. Anderson*, he contributed to public discussions on social media. Here are Luttig's tweets from January 4, 2024.²¹



Judge Luttig's position is that "Officer[] of the United States" in the Appointments Clause²² is not co-extensive with "officer of the United States" in Section 3 of the Fourteenth Amendment.²³ Luttig's position is a possibility; it is conceivable.

The earlier language in the Appointments Clause was part of the original Constitution as ratified in 1788, and the latter language from the Fourteenth Amendment was ratified in 1868. There are 80 years between the two ratifications. Thus, it is possible that whatever "Officer[] of the United States"-language meant to

30, 2005, 9:58 AM), <https://www.jurist.org/news/2005/10/judges-alito-luttig-reportedly-top-new/> [https://perma.cc/2VQR-YT3K].

²¹ J. Michael Luttig (@judgeluttig), X (Jan. 4, 2024, 7:07 PM), <https://x.com/judgeluttig/status/1742986055853478257> [https://perma.cc/56ZL-V7QJ].

²² See U.S. CONST. art. II, § 2, cl. 2.

²³ See U.S. CONST. amend. XIV, § 3.

the 1787–1788 Framers (that is, members of the Federal Convention), ratifiers (in the state conventions), and the reasonably well informed public of the original Constitution, the same language *may* have meant something different to the 1866 Framers (that is, members of Congress), the 1866–1868 ratifiers (in the state legislatures), and the reasonably well informed public of the Fourteenth Amendment. However, that an interpretation is conceivable or possible does not make it a known fact or even likely. Indeed, given that the words in the two provisions are identical, one could reasonably argue that a continuity of meaning was intended and so understood. As the Supreme Court has observed, in the statutory context, when text is “transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”²⁴

Luttig rejects continuity of meaning. His position is that because the 1788 provision uses a capital “O” in “Officer[]”, and the 1868 provision uses a lower case “o” in “officer,” the 1868 “officer” language cuts more broadly. Luttig’s view is somewhat mysterious. First, we would need an agreed authoritative source as to the Constitution’s precise text.²⁵ That is: What case—capital letter or small—was used in the “official” version of each of these two provisions? Finding such an agreed constitutional text is more tricky than most know. Second, if we expand our textual window just a bit, the 1788 provision speaks to “*all* other Officers of the United States”²⁶ and the 1868 provision only speaks to “*an* officer of the United States.”²⁷ Thus, perhaps, contra Luttig, the 1788

²⁴ Hall v. Hall, 584 U.S. 59, 73 (2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)); see also Biden v. Nebraska, 143 S. Ct. 2355, 2378–79 (2023) (Barrett, J., concurring) (“It is also well established that ‘[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it.’” (quoting *George v. McDonough*, 596 U.S. 740, 746 (2022))).

²⁵ See Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment* 97 YALE L.J. 281 (1987) (asserting that the signed, engrossed constitution is not the actual ratified legally in-force Constitution); Josh Blackman & Seth Barrett Tillman, *A Reply to Peter Keisler and Richard Bernstein, and Michael Luttig, on Section 3*, REASON: VOLOKH CONSPIRACY (Feb. 7, 2024, 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/5TWA-S2HF>] (commenting on Luttig’s use of capital letters in the Constitution, and the difficulties in identifying the official text of the Constitution).

²⁶ U.S. CONST. art. II, § 2, cl. 2 (emphases added).

²⁷ U.S. CONST. amend. XIV, § 3 (emphasis added).

provision's "Officers"-language, which was preceded by "all" and used the plural, was the more expansive language.

What is most troubling about Luttig's position is his willingness to draw *determinate* conclusions based on the presence or absence of capital letters in the Constitution's text. He characterizes his conclusion as "obvious[],"²⁸ "unmistakabl[e],"²⁹ and "clear."³⁰ To me at least, this seems incorrect. I suggest that for Luttig to assert that his position is "obvious," he should be able to point to some actual, traditional support. Such as:

- ❖ Is there a rich history of case law where the United States Supreme Court or other courts of record have based their interpretations of disputed constitutional text on whether or not a capital letter was used?
- ❖ Can Luttig point to a coordinate rich history of Executive Branch memoranda or Executive Branch practice recommending or engaged in an interpretive project along the lines he suggests?
- ❖ Does Luttig's interpretive maneuver cohere with express rules of construction found in congressional statutes or in the Office of Law Revision Counsel's code?
- ❖ Is Luttig's position supported by any scholarship—modern or contemporaneous with the ratification of the Fourteenth Amendment?
- ❖ Is Luttig's position supported by any public debate in Congress or in the state legislatures or among the public during or after congressional passage and subsequent state ratification of the Fourteenth Amendment?

²⁸ J. Michael Luttig (@judgeluttig), X (Jan. 4, 2024, 7:07 PM), <https://x.com/judgeluttig/status/1742986063734513767> [https://perma.cc/ZXQ8-54LB].

²⁹ J. Michael Luttig (@judgeluttig), X (Jan. 4, 2024, 7:07 PM), <https://x.com/judgeluttig/status/1742986067031228441> [https://perma.cc/EA8B-8C5W] (using "unmistakably" twice).

³⁰ J. Michael Luttig (@judgeluttig), X (Jan. 4, 2024, 7:07 PM), <https://x.com/judgeluttig/status/1742986074383843349> [https://perma.cc/Z7CM-D3V2].

As far as I know: the answer to these questions was and remains: no, no, no, no, and no. Yet, here we have a retired federal circuit judge saying the counter-position—that is, his position—is “obvious[].”

Unsurprisingly, no party wishing to remove Trump from the 2024 ballot, nor amici in support of such removal, used the capital-letter logic Luttig propounded on social media. We all make mistakes, and social media has the effect, on some, in encouraging less than the “better angels of our nature.” Perhaps, that will move Judge Luttig, and others similarly placed, to consider whether it is wise for a retired judge to use “judge” in their X handle,³¹ and whether it makes sense to personalize disputes about how to interpret constitutional text?³²

Had the Supreme Court ruled for those who opposed Trump’s being on the ballot—that is, had the Supreme Court ruled for Anderson in *Trump v. Anderson*, I do not believe that civil war would have been the next step. But one reason violence was averted is that most of the key players involved in the litigation adhered to traditional procedures and norms—including the norms of legal interpretation.³³ Had Luttig’s social media position been adopted by the Court, or, indeed, by any court of record, the results in our streets might have been otherwise.

II. *MISSISSIPPI V. JOHNSON* & THE NON-SELF-EXECUTING NATURE OF SECTION 3

Judge Carpenter is an Alabama state trial court judge with jurisdiction over *criminal* matters. His Twitter handle is @davidocarpenter, but under his profile, he is identified as “Judge David Carpenter.” He too had a contribution during the Section-3 ballot-access cases. He regularly chided members of the public for

³¹ See, e.g., J. Michael Luttig (@judgeluttig), X (Jan. 28, 2024, 3:40 PM), <https://x.com/judgeluttig/status/1751722041881797057> [<https://perma.cc/DR4E-YB8Q>].

³² *Id.* (referring to “Blackman’s and Tillman’s tattered basket of constitutional interpretation”).

³³ In *Trump v. Anderson*, 601 U.S. 100 (2024) (per curiam), all nine members of the Court either joined the majority’s per curiam opinion or otherwise concurred in the judgment. See generally *id.* However, some commentators have strongly criticized the Court’s decision and reasoning. See, e.g., William Baude & Michael Stokes Paulsen, *Sweeping Section Three under the Rug: A Comment on Trump v. Anderson*, 138 HARV. L. REV. 676 (2025).

misunderstanding Section 3 and for misunderstanding relevant case law. Here is a tweet chain from November 21, 2023. Carpenter is responding to and, apparently, advising petitioners who had filed their Colorado Supreme Court opening brief on November 20, 2023.³⁴ At this juncture, petitioners had yet to file their reply brief. His tweets are below.³⁵



What is Carpenter's advice? He criticizes the brief writer in an active litigation for failing to cite *Mississippi v. Johnson*.³⁶ Why? Because that Supreme Court case "repeatedly refers to the President as an 'officer of the US.'" It is true that *Mississippi v. Johnson* was a Supreme Court case. But the phrase "officer of the United States" (or "officers of the United States") does not appear repeatedly. Rather, that phrase only appears a single time. More importantly, in the one place that phrase appears, it is *not* in the Court's opinion. Rather, that language appears in an editor's

³⁴ See generally Opening Brief of Petitioners, *Anderson v. Griswold*, 543 P.3d 283 (Colo. 2023) (No. 2023SA300), 2023 WL 8190892, https://www.citizensforethics.org/wp-content/uploads/2023/11/2023-11-20-19-53-59-20231120-FINAL-CO-SCT-Opening-Petr-Brief_Redacted.pdf [<https://perma.cc/3JXT-53ZK>].

³⁵ David O. Carpenter (@DavidOCarpenter), X (Nov. 21, 2023, 2:44 PM), <https://x.com/DavidOCarpenter/status/1727065536926757057> [<https://perma.cc/J5YM-T2B4>].

³⁶ *Mississippi v. Johnson*, 71 U.S. 475, 478-79 (1866) (Chase, C.J.).

summary of an attorney's argument. As for Carpenter's referring to "chief executive officer of the government" that phrase appears twice, but in both instances, it is *not* in the Court's opinion. Here too, the language Carpenter focuses on appears only in an editor's summary of an attorney's argument.

Carpenter sought to illustrate to the parties or the public, or both, how to advance the parties' Section-3 case against Trump-45 by establishing that the Supreme Court had held, at about the time that the Fourteenth Amendment was passed by Congress and ratified by the States, that "officer of the United States"-language included the presidency. But all Carpenter showed is that he, like many others, struggles in regard to how to read old precedents.³⁷

When some on social media and elsewhere offered the view that Section 3 was not self-executing, Carpenter, again, had something to say and was ready to scold the public for disagreeing with his views. Consider:³⁸



³⁷ Seth Barrett Tillman, *Practice Tip: Citing Older U.S. Cases—State and Federal*, NEW REFORM CLUB (Dec. 7, 2023, 7:16 AM), <https://reformclub.blogspot.com/2023/12/practice-tip-citing-older-us-casesstate.html> [https://perma.cc/4PXF-WG6J]. I do not want to be overly harsh on Judge Carpenter. Many people have made this or a similar mistake in regard to reading old case law which regularly reported lawyer's arguments. I have made this sort of mistake on one occasion. The difference is that I made timely efforts to retract, and in making my initial claim, I was not using legal authority to bash or correct others.

³⁸ David O. Carpenter (@DavidOCarpenter), X (Jan. 13, 2024, 5:54 PM), <https://x.com/DavidOCarpenter/status/1746319725242531936> [https://perma.cc/48UU-MEQW].

What about *Griffin's Case*, which was decided by the Chief Justice of the United States?³⁹ It is well known that in *Griffin's Case* the federal circuit court held that provisions of the Fourteenth Amendment and Section 3, in particular, were neither self-enforcing nor self-executing. As Chief Justice Salmon Chase explained: "There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but there is no one [section] which more clearly requires legislation in order to give effect to it."⁴⁰

³⁹ *In re Griffin* (hereinafter *Griffin's Case*), 11 F. Cas. 7, 15 (C.C.D. Va. 1869) (No. 5815) (Chase, C.J.). Chase sat alone in *Griffin's Case*—he was not part of any multi-member panel. *See id.*

⁴⁰ *Id.* at 26. Professor Somin rejects *Griffin's Case's* holding and reasoning, in part, because, he says, that there were "many cases where ex-Confederates were presumed to be disqualified *even before enforcement legislation was enacted*." Ilya Somin, *A Lost Opportunity to Protect Democracy Against Itself: What the Supreme Court Got Wrong in Trump v. Anderson*, in 23 CATO SUP. CT. REV. 2023–2024, at 319, 336 (Thomas A. Berry ed., 2024) (emphases added). However, Somin cites to no cases in support of his position, and, surprisingly, he instead cites to a Blackman-Tillman publication and to a publication by Professor Kurt Lash—absent any pin cites. *Id.* at 336 n.70 (citing *id.* at 335 n.66). Somin is the proponent of a case-law related claim. He should put forward some cases supporting his position, particularly where, as here, he asserts that there are "many" such cases, and particularly where, as here, the Supreme Court's per curiam *Anderson* opinion, as I understand it, rejected his position. *See Trump v. Anderson*, 601 U.S. 100 (2024) (per curiam):

Although the Fourteenth Amendment restricts state power, nothing in it plainly withdraws from the States this traditional [pre-Fourteenth Amendment] authority [to disqualify state positions]. And after ratification of the Fourteenth Amendment, States used this [traditional pre-Fourteenth Amendment] authority to disqualify state officers in accordance with state statutes. *See, e.g., Worthy v. Barrett*, 63 N.C. 199, 200, 204 (1869) (elected county sheriff); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 631–633 (1869) (state judge).

Anderson, *supra* note 40, at 111. Furthermore, Somin expressly flagged these two cases to the Supreme Court in his *Anderson* amicus brief. *See* Brief of Amicus Curiae Professor Ilya Somin in Support of Respondent at 6 n.4, *Trump v. Anderson*, 601 U.S. 100 (2024) (No. 23-719), 2024 WL 457107, https://www.supremecourt.gov/DocketPDF/23/23-719/299426/20240131152417959_23-719%20Amicus%20BOM%20Somin%20PDFA.pdf [<https://perma.cc/869G-YPCJ>]. These cases were also flagged to the Court in briefs by the parties and by other amicus briefs. *See, e.g.,* Brief on the Merits for *Anderson* Respondents at 5, *Trump*, 601 U.S. 100 (2024) (No. 23-719), 2024 WL 371148, https://www.supremecourt.gov/DocketPDF/23/23-719/298854/20240126115645084_23-719%20Anderson%20Respondents%20Merits%20Brief.pdf [<https://perma.cc/786W-XX4R>]; Brief for Professor Seth Barrett Tillman as Amicus Curiae in Support of Petitioner at 5-6, *Trump*, 601 U.S. 100 (2024) (No. 23-719), 2024 WL 184282,

Subsequently, *Griffin's Case* was cited favorably by the Supreme Court and many other federal and state courts of record for this,⁴¹ as well as for other⁴² points of law. Indeed, until circa 2020, I do not believe that this case had ever been criticized by another court of record or in any academic articles. *Griffin's Case* has been cited favorably in foreign judicial decisions and other foreign sources⁴³—no mean result for a non-U.S. Supreme Court decision. For 150 years, *Griffin's Case* was settled law—that is as good a record as any case, even if Judge Carpenter was (and, perhaps, remains) unfamiliar with it.

This is not to suggest that *Griffin's Case* should be or has been reported absent criticism⁴⁴—albeit, such criticism only began in

https://www.supremecourt.gov/DocketPDF/23/23-719/295290/20240109145107356_23-719%20Amicus%20Brief%20Professors%20Barrett%20and%20Tillman%20Final.pdf [<https://perma.cc/D3RV-PNNV>]. The Court's interpretation of these Louisiana and North Carolina cases is hardly unique. *Id.* at 5-6 (discussing *State v. Lewis*, 22 La. Ann. 33 (1870); *Sandlin v. Watkins*, 21 La. Ann. 631 (1869); *Downes v. Townes*, 21 La. Ann. 490 (1869); *In re Tate*, 63 N.C. 308 (1869); *Worthy v. Barrett*, 63 N.C. 199 (1869)).

⁴¹ See, e.g., *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (citing *Griffin's Case* for its self-execution discussion); *In re Brosnahan*, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring); *State v. Buckley*, 54 Ala. 599, 616 (1875) (Stone, J.); see also Letter from Mark R. Herring, Att'y Gen. of Va., to Lee J. Carter, Member of the Va. House of Delegates (Jan. 22, 2021) (available at <https://www.oag.state.va.us/files/Opinions/2021/21-003-Carter-issued-1-22-21.pdf> [<https://perma.cc/N24H-4BAE>]) (“[T]he weight of authority appears to be that Section 3 of the Fourteenth Amendment is not ‘self-executing’—put another way, it is possible that Congress may need to pass implementing legislation to make this provision operative.”). It appears *Buckley* remains good law in Alabama, where Judge Carpenter presides. Likewise, *Cale* remains good law in the United States Court of Appeals for the Fourth Circuit, where Judge Luttig served prior to his retirement. It is interesting to note that neither judge appears to be aware of the contrary precedent from the court system they serve or served. See also Trump, 601 U.S. at 109 (quoting *Griffin's Case* approvingly).

⁴² See, e.g., *Ex parte Ward*, 173 U.S. 452, 455-56 (1899) (citing *Griffin's Case* favorably); see also Blackman & Tillman, *Sweeping and Forcing*, *supra* note 3, at 486-87 n.585 & nn.587-94 (collecting case law citing *Griffin's Case* favorably).

⁴³ *Re Toronto R.R. Co. and City of Toronto*, [1918] 46 D.L.R. 547, 553 (Ont. App. Div. of Sup. Ct.) (Meredith, C.J.O.) (citing *Griffin's Case* favorably in regard to habeas law), *rev'd on other grounds*, *Toronto R.R. Co. v. City of Toronto* [1920] 51 D.L.R. 69 (J.C.P.C.); *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, 705 (J.C.P.C.) (citing *Griffin's Case* favorably, in argument by Senior Counsel Kentridge). *But see* Athelstane Aamodt, *Can Donald Trump Stand Again?*, 173(8048) NEW L.J. 7, 7 (2023) (citing *Griffin's Case* unfavorably, in this 2023 article in a U.K. law journal).

⁴⁴ There have been a few thoughtful and even-handed efforts to discuss and criticize *Griffin's Case*. See, e.g., Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT 87 (2021); see also Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January*

earnest circa 2020. My point is that Judge Carpenter's intervention on social media cannot withstand scrutiny. In my opinion, he was plainly incorrect. That said: my criticism here is not directed against Carpenter's error. We all make errors. Nor am I criticizing his tone. It is more than tone. Unlike Judge Luttig who commented only after retiring from the bench, Judge Carpenter is and remains an active judge with a criminal docket. Carpenter's reaching out to correct and instruct parties and litigators in the midst of litigation in another court, i.e., the U.S. Supreme Court, and doing so in a way that is something substantially less than well informed, can only undermine his standing in the wider community, among the bar, and with the public which comes in contact with his court and the other courts in Alabama. I am not saying Carpenter violated the relevant judicial code of conduct—as I expect that his First Amendment rights to comment on the issues of the day go about as far as everyman's. But everyman is often prudent enough to speak cautiously about issues that deeply interest the polity. When a judge does not exhibit such caution, the respect for the judiciary is undermined.

III. THE *BALKINIZATION* POST

On January 10, 2024, Professor Mark Graber published an extensive blog post on *Balkinization*, which is a widely read and influential legal blog. So impressive was this post, as some saw it, that it was reproduced the next day by Professor William Baude on *Reason: Volokh Conspiracy*, where it remains unchanged from its original text.⁴⁵ It is a long post: I reserve this analysis to what I believe are its most important points.

6th, 25 U. PA. J. CONST. L. 1059 (2023); cf. Tom Ginsburg et al., *Democracy's Other Boundary Problem: The Law of Disqualification*, 111 CAL. L. REV. 1633 (2023); Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153 (2021).

⁴⁵ Compare Will Baude, *Professor Mark Graber Responds to Blackman & Tillman on the 1868 Louisville Daily Journal*, REASON: VOLOKH CONSPIRACY (Jan. 11, 2024, 10:38 AM), <https://reason.com/volokh/2024/01/11/professor-mark-graber-responds-to-blackman-and-tillman-on-the-1868-louisville-daily-journal/> [https://perma.cc/5S94-844V], with Mark Graber, *Eureka Not: The President is an Officer of the United States Redux*, *Redux . . .*, BALKINIZATION (Jan. 10, 2024, 8:42 PM), <https://balkin.blogspot.com/2024/01/eureka-not-president-is-officer-of.html> [https://perma.cc/5FYP-95QQ]. You can find the original post reproduced on *Volokh*, *Westlaw* and *LexisNexis*, where Graber wrote about “the impeachment of Andrew

In prior publications, Blackman and I wrote:

There is additional evidence that the phrase “officer of the United States” in Section 3 does not extend to the presidency. Furthermore, this evidence is roughly contemporaneous with the 1868 ratification of the Fourteenth Amendment. In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, “the President is not an officer of the United States.” Instead, Booth stated, the President is “part of the Government.”

Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that “[i]t is obvious that . . . the President is not regarded as ‘an officer of, or under, the United States,’ but as one branch of ‘the Government.’”⁴⁶

Jackson.” Will Baude, *Professor Mark Graber responds to Blackman & Tillman on the 1868 Louisville Daily Journal*, THOMAS REUTERS: WESTLAW PRECISION (Jan. 11, 2024), [https://perma.cc/4XA2-SH9N] (available at 2024 WLNR 1024368); Will Baude, *Professor Mark Graber responds to Blackman & Tillman on the 1868 Louisville Daily Journal*, LEXIS+ (Jan. 11, 2024, 3:38 PM), [https://perma.cc/GSD4-SQFP]. That is the language Baude copies without noting the error. Subsequently, Graber’s post on *Balkinization* was corrected—it now references “the impeachment of Andrew Johnson”—absent any indication of an update—just as Baude’s reproduction of Graber’s post lacks a *sic*. Perhaps all this can be credited to simple inadvertent error which anyone could have made, or perhaps, this is indicative of a rush to judging *others’* scholarship. Compare Evan Bernick (@evanbernick.bsky.social), BLUESKY (Feb. 22, 2024, 7:51 AM), https://bsky.app/profile/evanbernick.bsky.social/post/3klz4y2yjis27 [https://perma.cc/24UG-65PE] (“The claim that either [Professor] Graber or [Professor] Mikhail are engaging in ‘rushed scholarship’ is so risible as to almost be not worth even flagging but I can’t resist . . .”), with John Mikhail, *Our Correction and Apology to Professor Tillman*, BALKINIZATION (OCT. 3, 2017, 8:30 PM), https://balkin.blogspot.ie/2017/10/our-correction-and-apology-to-professor.html [https://perma.cc/TGE7-3T2M]. Still, one might imagine the criticism that would have been directed *my* way if I had made such an error. Actually, one does not have to imagine it. See *id.*; Jed Shugerman, *An Apology to Tillman and Blackman*, SHUGERBLOG (Sept. 23, 2017), https://shugerblogger.com/2017/09/23/an-apology-to-tillman-and-blackman/ [https://perma.cc/88KL-V72G].

⁴⁶ Blackman & Tillman, *Is the President an “Officer”?*, *supra* note 1, at 30-31 (footnotes omitted). Boutwell’s statement can be found in *Congressional Record containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap, Late Secretary of War, on the Articles of Impeachment Exhibited by the House of*

In his blog post, Graber responded with:

They correctly point out that two members of Congress stated that the president was not an *officer of the United States*. One of them, George Boutwell, was a member of the Joint Committee on Reconstruction, although a scholar might have pointed out that Boutwell in his autobiography claimed the president was a civil officer of the United States (who has time for historical research?).⁴⁷

As I have done, the reader also should look past Graber's casual slights—"who has time for historical research?" and "a scholar might . . ."—as they distract from what is really going on here.⁴⁸ I put forward evidence, to known sources and with actual quotations from those sources. By contrast, Graber asserts that counter-evidence exists (i.e., Boutwell's autobiography) and that he (Graber) has reviewed it. But he fails to put forward the name of that source or to quote from it. I brought this issue up at the

Representatives, 44th Cong. 145, 1st Sess. (Washington, Government Printing Office 1876) (reproducing May 27, 1876 statement of Newton Booth, Senator from California), <https://tinyurl.com/4c7kxmn4> [<https://perma.cc/733C-WPKC>]. McKnight's statement can be found in: DAVID A. MCKNIGHT, *THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT* 346 (Philadelphia, J.B. Lippincott & Co. 1878), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015003509588&seq=352> [<https://perma.cc/6H9J-29NF>].

⁴⁷ Graber, *supra* note 45 (emphasis added). I see no good support for Graber's position here. The member who asserted that the President was not an "officer of the United States" was Senator Newton Booth (Independent Republican-California), not Senator George Boutwell (Republican-Massachusetts). See text accompanying *supra* note 46; see also *Speech Delivered at Sacramento, Oct. 20, 1886*, in NEWTON BOOTH OF CALIFORNIA: HIS SPEECHES AND ADDRESSES 260, 260 (Lauren E. Crane, ed., N.Y., G.P. Putnam's Sons 1894) ("The approaching election is important. It involves the choice of the Governor and *all* the State officers" (emphasis added)), <https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t21c2451k&seq=9&q1=officers+of+the+united> [<https://perma.cc/5VCA-MECV>]. "*All*," not "*all other*." *Id.*

⁴⁸ See also Lincoln in Lincoln-Douglas Senate-Seal Debate (Ottawa, Ill., Aug. 21, 1858), in NAT'L PARK SERV., <https://home.nps.gov/liho/learn/historyculture/debate1.htm> [<https://perma.cc/4NJ9-QTAD>] (last updated Apr. 10, 2015) ("When a man hears himself somewhat misrepresented, it provokes him—at least, I find it so with myself; but when misrepresentation becomes very gross and palpable, it is more apt to amuse him.").

Mississippi Law Journal's Fourteenth Amendment conference, but I have yet to receive a reply.

Absent Graber's putting forward some proper bibliographic information, or an actual quotation, or a link, I cannot be sure what source he reviewed. It seems Graber's source was George S. Boutwell's *Reminiscences of Sixty Years in Public Affairs*.⁴⁹ But that would be odd. Graber starts his *Balkanization* post by suggesting that sources relevant to understanding the Fourteenth Amendment's meaning should be within "ten years of the [amendment's] framing."⁵⁰ Boutwell's *Reminiscences*, from 1902, is more than 30 years from the framing. More importantly, the phrase "officer of the United States," which is the coordinate language in Section 3 of the Fourteenth Amendment, is used some three times in this source,⁵¹ but I have found no use of this phrase where Boutwell suggests that the President falls into this category. If you would like to check for yourself, Boutwell's autobiography is available on the HathiTrust website, where it is fully searchable.⁵²

I do not write further to convince Graber. The core problem here is not Graber—the problem here is all those who all too willingly accepted Graber's many unsourced and bold claims at face value. When one academic states that he has found evidence flatly contradicting the writings of another academic, that is *Eureka*-level and *Eureka*-clear counter-evidence, it is customary for the interlocutor to produce that source, or a copy, or a link—or, at the

⁴⁹ See generally 1 & 2 GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS (1902), <https://babel.hathitrust.org/cgi/pt?id=yale.39002006066238&seq=9> [<https://perma.cc/HEP2-LX9G>].

⁵⁰ Graber, *supra* note 45. Graber has had occasion to cite Boutwell-authored sources before the Section-3 ballot-access cases. See Mark Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 639 n.163 (2014) (citing GEORGE S. BOUTWELL, THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY 389 (1895)); see also BOUTWELL, *supra* note 49, at 389 ("There are no longer any persons living on whom the provisions of section three can operate." (emphasis added)), <https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t9r20v62s&seq=411&q1=griffin> [<https://perma.cc/5P5P-J74Z>]. Again, this source is cited by Graber long after ten years had elapsed since ratification of the Fourteenth Amendment.

⁵¹ 2 BOUTWELL, *supra* note 49, at 103, 114, and 294. I have searched using both "officer of the United States" as well as "officers of the United States." This is the language in Section 3 and in Graber's post. See Graber, *supra* note 45.

⁵² See generally BOUTWELL, *supra* note 49.

very least, to show a full citation so that interlocutor's evidence can be verified. Graber's online scholarship comes absent anything like that.

The problem here is not that Graber is wrong, and I do think he was wrong, but that his hyperbolic style has the effect of distracting and, thereby, frustrating third-parties' verifying (and interest in verifying) his claims. In that situation, if a third party accepts such claims at face value, that willingness to do so is, in my view, less than good judgment on their part. And all too many academics were willing to do just that—even a few whose names you might very well recognize.⁵³ Furthermore, when academics adopt such unverifiable positions, participate in pile-ons,⁵⁴ and

⁵³ See Julian David Mortenson (@jdmortenson), X (Jan. 11, 2024, 8:43 AM), <https://x.com/jdmortenson/status/1745456320545968480> [<https://perma.cc/GNS2-VJ5Q>] (“Graber’s!! <https://balkin.blogspot.com/2024/01/eureka-not-president-is-officer-of.html>” (citing Graber, *supra* note 45)); Jed Shugerman (@jedshug), X (Feb. 13, 2024, 8:02 PM), <https://x.com/jedshug/status/1757586161038438420> [<https://perma.cc/D6HS-XQJ2>] (“If this is their best evidence, it’s clear that they don’t have evidence.” (citing Graber, *supra* note 45)); Laurence Tribe (@tribelaw), X (Jan. 11, 2024, 7:37 AM), <https://x.com/tribelaw/status/1745439824801112269> [<https://perma.cc/E7ZY-UM72>] (“This research by @mgraber_ so thoroughly devastates the idiotic claim that the presidency isn’t an ‘office under the United States’ that anyone on Earth 1.0 would expect never to see that claim again.” (citing Graber, *supra* note 45)); Eric Segall (@espinsegall), X (Jan. 11, 2024, 7:44 AM), <https://x.com/espinsegall/status/1745441441126474086> [<https://perma.cc/UGK8-27PV>] (“I look forward to many changes in the Supreme Court’s jurisprudence based on how white supremacists and former rebels described the post-Civil War Amendments.’ Great stuff!” (citing Graber, *supra* note 45)); Daniel B. Rodriguez (@DBRodriguez5), X (Jan. 11, 2024, 10:44 AM), <https://x.com/DBRodriguez5/status/1745486976449753451> [<https://perma.cc/ZC2D-C42N>] (“Wow, quite a takedown.” (responding to Segall, *supra*)); Eric Segall (@espinsegall), X (Jan. 11, 2024, 10:53 AM), <https://x.com/espinsegall/status/1745489061261828576> [<https://perma.cc/AS82-THAE>] (“There is no question @mgraber_ can bring it!” (responding to Rodriguez, *supra*)). If it helps, I am not asking for any “accountability” in regard to Graber or those others with whom I have voiced disagreement or who have voiced disagreement with me. My voicing disagreement is “accountability.” Seth Barrett Tillman, *Professor Shugerman (et al) vs. Professor Prakash (et al)*, NEW REFORM CLUB (Jan. 17, 2025, 9:28 AM), <https://reformclub.blogspot.com/2025/01/professor-shugerman-et-al-vs-professor.html> [<https://perma.cc/Q2FE-PYM9>] (criticizing Professor Shugerman for asserting the existence of documents which he does not produce, does not put forward full bibliographic information for, and does not link to); Seth Barrett Tillman, *Part II—Professor Shugerman (et al) vs. Professor Prakash (et al)*, NEW REFORM CLUB (Jan. 21, 2025, 6:48 AM), <https://reformclub.blogspot.com/2025/01/part-ii-professor-shugerman-et-al-vs.html> [<https://perma.cc/786B-RZEC>].

⁵⁴ See sources cited *supra* note 53.

themselves embrace hyperbolic language,⁵⁵ I think they do a disservice to their students—who, being less sophisticated, might copy their professors' example.⁵⁶

Nor are the difficulties I described above a one-off. For example, what follows is the opening to Graber's post:

A long exhaustive search has finally found an article published within ten years of the framing of the Fourteenth Amendment that declares that the President is not an officer of the United States. Congratulations to Josh Blackman and Seth Barrett Tillman for unearthing the *Louisville Daily Journal's* series of pieces claiming, contrary to what President Andrew Johnson said about his job description, that Johnson was not an officer of the United States. Of course, the comment was not made in respect to Section Three of the Fourteenth Amendment, but apparently that is a trifle. A source does exist. Eureka.

Maybe not. An historian might ask, how representative is the *Louisville Daily Journal* and what is the *Louisville Daily Journal* representative of? With respect to the second question, a little newspaper search revealed that the *Louisville Daily Journal* was a Democratic party newspaper bitterly

⁵⁵ *Id.*

⁵⁶ Josh Blackman & Seth Barrett Tillman, *Professor Akhil Amar, On His Podcast, Responds to Attorney General Mukasey and the Tillman-Blackman Position*, REASON: 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/6U8D-5LPU]:

[Professor Akhil] Amar is a full professor with tenure at a law school with a sizable endowment. For him, there are no downside consequences to using strong language. In fact, there is only an upside for him personally. We worry that some law students, and perhaps others, who are young, and less sophisticated than Amar, might emulate this behavior. Later in life, they may discover that future would-be employers, including government employers, will check would-be employees' social media footprints. Many employers will shy away from candidates who use such language. As a result, these people may find themselves disadvantaged for doing what Amar has done. We hope we are wrong about this, but we fear that we are right.

opposed to the Fourteenth Amendment, the impeachment of Andrew Johnson, and the possible presidency of radical Republican Senator Benjamin Wade of Ohio, the probable president if Johnson was impeached (unless Senators were not officers of the United States). Before Donald Trump was subject to disqualification, originalists thought that the Republicans who voted for the Fourteenth Amendment were the authoritative source on the original meaning of that text. Now apparently Democrats are the higher authority. I look forward to many changes in the Supreme Court's jurisprudence based on how white supremacists and former rebels described the post-Civil War Amendments (hint, black rule is constitutionally mandatory).⁵⁷

⁵⁷ Graber, *supra* note 45; *see also supra* note 45 (discussing whether Graber was speaking to the impeachment of President Jackson (who was censured by the Senate) or President Johnson (who was impeached by the House, but not convicted by the Senate)). *Contra* Graber's characterization, Blackman and I did not "unearth[]" the *Louisville Daily Journal* series of articles. The find in the *Louisville Daily Journal* was reported in a recently posted working paper. *See generally* John Connolly, *Did Anyone in the Late 1860s Believe the President was not an Officer of the United States?* (Dec. 20, 2023), <https://ssrn.com/abstract=4658473> [<https://perma.cc/MTG4-7YKT>]. Of course, Blackman and I unearthed other evidence. *See* GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* xxxviii (2d ed. 1876), <https://babel.hathitrust.org/cgi/pt?id=uiuo.ark:/13960/t4rj95n64&seq=7> [<https://perma.cc/9WGD-SEUZ>] (opining, in 1876, within ten years of ratification, that the Article VI oath and Section 3 apply to "precisely the same class of officers" (emphasis added)); *id.* at 494, §§ 510-511 (noting that the "persons included in this [Section 3] disability clause are the same who had taken an official oath under clause 3 of Article VI"). Paschal was a Texas Unionist who, during the Civil War, was jailed for his Unionist politics. *See* Amelia W. Williams, *Paschal, George Washington (1812-1878)*, TEX. STATE HIST. ASS'N (updated July 13, 2023), <https://www.tshaonline.org/handbook/entries/paschal-george-washington> [<https://perma.cc/T7KJ-4SQH>] ("[Paschal] was one of Sam Houston's supporters in opposition to secession and during the Civil War was jailed, threatened by a mob, and held for trial by a court-martial because of reports of his Unionist sympathies. . . . He became identified with the Republican party and worked diligently for the Fourteenth Amendment . . ."). The position appearing in the *Louisville Daily Journal* was hardly unique even among sources from within ten years of ratification. Moreover, discussion of Paschal was in the literature prior to Graber's January 10, 2024 *Balkinization* post. *See, e.g.*, Brief Submitted by Professor Seth Barrett Tillman as *Amicus Curiae* in Support of Intervenor-Appellant/Cross-Appellee Donald J. Trump, *Anderson v. Griswold*, 543

Here too, I urge the reader to ignore Graber's distractions, his mocking tone, his faux "congratulations," and his claim to expertise ("An historian might ask"). Rather, focus on his actual argument.⁵⁸

Blackman and I put forward evidence for our position. We noted that, prior to ratification of the Fourteenth Amendment, "[i]n April 1868, the *Louisville Daily Journal* published a series of articles contending the President is not an 'Officer of the United States' as that phrase is used in the Constitution. Albeit, these newspaper articles did not address the meaning of that phrase with respect to Section 3."⁵⁹ Graber's response is, in part, that this source is a newspaper affiliated with the Democratic Party, and that this newspaper did not support the Fourteenth Amendment. At most, Graber's critique goes to the weight, and not the admissibility of this evidence. Still, I do not think Graber's critique says even much about the weight of this evidence. In terms of original public meaning, I am interested in how widely read was this series of articles, and more importantly, how persuasive the articles were. That means reading the articles and the responses thereto and judging who had the better the position. In other words, persuasion based on public reason is favored over mere conclusory assertions about the public's legal expectations or intuition.

But Graber goes further. In opposition to the *Louisville Daily Journal's* series of articles, he asserts that President Johnson took a contrary position: that is, Johnson took the position that the President was an "officer of the United States."⁶⁰ So how does

P.3d 283 (Colo. Nov. 27, 2023) (No. 2023SA00300), 2023 WL 8188397, at *20 n.17 (quoting Paschal). Modern commentators, having different political and legal persuasions and perspectives, prior to *Trump v. Anderson*, had come to the same conclusion as Paschal. See, e.g., GARRETT EPPS, *AMERICAN EPIC: READING THE U.S. CONSTITUTION* 177-78 (2013); Christopher R. Green, *Our Bipartisan Due Process Clause*, 26 GEO. MASON L. REV. 1147, 1202 (2019) (noting that "section 3 of the Fourteenth Amendment is *limited* to those rebels who broke Article VI oaths" (emphasis added)).

⁵⁸ See also NAT'L PARK SERV., *supra* note 48.

⁵⁹ Josh Blackman & Seth Barrett Tillman, *Louisville Daily Journal* (April 1868): *The President is not an "Officer of the United States"*, REASON: 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/P5NF-X2K4].

⁶⁰ See Graber, *supra* note 45 ("Congratulations to Josh Blackman and Seth Barrett Tillman for unearthing the *Louisville Daily Journal's* series of pieces claiming, contrary to what President Andrew Johnson said about his job description, that Johnson was not an officer of the United States.").

Graber's position cohere? All know that Johnson's primary party affiliation over the course of his long career was the Democratic Party. All know that Johnson opposed the Fourteenth Amendment. His opposition to the amendment was one of the reasons some struggled to impeach and remove him. So why is it less than reasonable for me (Tillman) to put the *Louisville Daily Journal's* series of articles forward, but entirely reasonable for Graber to take the position that Johnson's position is good counterevidence?

Graber does not say that the *Louisville Daily Journal* was owned by white supremacists and that its editorial content supported white supremacy; perhaps, that is what he meant. But Graber's tone does make clear he is opposed to using "white supremacists and former rebels" as sources to understand "the post-Civil War Amendments." That's an interesting rule—which Graber would apply to my publications. But is this a rule which Graber applies to his own publications?

For example, in an amicus brief bearing his name, submitted in Section-3 ballot-access litigation, Professor Graber states: "State courts decided whether individuals were disqualified from holding office because they participated in the insurrection. Courts disqualified several officeholders."⁶¹ In support of this proposition, Graber cites to: *Sandlin v. Watkins*.⁶² The author of the *Sandlin* opinion was Louisiana Supreme Court Justice Taliaferro, who "owned 4, 13, and 27 slaves in 1840, 1850, and 1860, respectively. Taliaferro sat out the Civil War, kept a deer as a pet, and after the

⁶¹ Brief of *Amicus Curiae* Constitutional Law Professor Mark Graber in Support of Petitioners-Appellants Norma Anderson, et al. at 6, *Anderson v. Griswold*, 543 P.3d 283 (Colo. 2023) (No. 2023SA300), 2023 WL 8190200 (footnote omitted). I also note that Graber's brief, as well as his publications, cite to blog posts. So let us have no talk, from Graber or those supporting his position, that it is mistaken in principle for third parties to rely on an academic's blog post. See *id.* at 18 n.49 (citing Gerard N. Magliocca, *Confederate Presidential Electors*, PRAWFSBLAWG (Oct. 17, 2023), <https://prawfsblawg.blogs.com/prawfsblawg/2023/10/confederate-presidential-electors.html> [<https://perma.cc/KSB9-H7QB>]); see also Mark A. Graber, *Section 3 of the Fourteenth Amendment: Is Trump's Innocence Irrelevant?*, 84 MD. L. REV. 1, 33 n.174, 38 n.211, 39 n.214, 41 n.229 (2024) (citing *Prawfsblawg* and *Balkinization* in four footnotes). In short third-parties' reliance on signed blog posts (or where the post's author is otherwise identified) as sources is standard practice: we can rely on the example set by Professor Graber and others.

⁶² Brief of Professor Mark Graber, *supra* note 61, at 6 nn.12 & 13 (citing *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (1869) (Taliaferro, J.)). Just to be clear: I believe Graber has misread *Sandlin*, but that is not the issue of interest here.

war ran for Lieutenant Governor of Louisiana on an overtly racist platform—i.e., against political equality and suffrage for freedmen.”⁶³

Compared to Graber’s citing Justice Taliaferro, I am not embarrassed—at all—to quote from Republican Party affiliated sources,⁶⁴ and I am not embarrassed—at all—to quote the *Louisville Daily Journal*—a Reconstruction Era newspaper generally supporting the Democratic Party. My point here is not that Graber’s *rules for thee, but not for me* behavior is hypocritical.⁶⁵ Rather, my point here is that Graber is not engaged in legal or historical scholarship in the traditional sense.⁶⁶ He is not trying to understand the past or Section 3 by building an argument or by persuading with evidence. Rather, he is trying to build support by criticizing the credibility, professionalism, and morality of his intellectual opposition and their sources. His tone is not an afterthought or an affectation—it is his core position.

The analogy is often made in competitive sports: a player’s role is to *play the ball, not the man*.

IV. THE “BONKERS” *GRIFFIN’S CASE*

In *Griffin’s Case*, Chief Justice Chase expressed the view: “It is true that in the judgment of some enlightened jurists, [the] legal effect [of Section 3 of the Fourteenth Amendment] was to remit *all other punishment*. And such certainly was its practical effect”⁶⁷ In other words, Chase asserted that Section 3’s disqualification provision barred all other punishments, including treason

⁶³ Brief Submitted by Professor Seth Barrett Tillman as *Amicus Curiae* 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 *supra* note 4, at 9 & n.12 (first citing *Platform of the National Conservative Union Party*, NEW ORLEANS TIMES, Oct. 17, 1865, at 2, and then citing Wynona Gillmore Mills, James Govan Taliaferro (1798–1876): Louisiana Unionist and Scalawag, at 8, 25–46, 48, 52 (Master’s Thesis, Dep’t of History, Louisiana State University 1965), https://repository.lsu.edu/cgi/viewcontent.cgi?article=9334&context=gradschool_disstheses [<https://perma.cc/T256-53FQ>]).

⁶⁴ See sources cited *supra* note 57 (quoting George Washington Paschal’s treatise).

⁶⁵ See, e.g., sources cited *supra* notes 49 & 50 (illustrating Graber’s citing sources discussing the Fourteenth Amendment well after ten years had elapsed since ratification).

⁶⁶ Still some were persuaded by Graber. See sources cited *supra* note 53.

⁶⁷ *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5815) (emphasis added).

prosecutions in civilian courts based on federal statutes. In our world of zealous prosecutors, with omnipresent over-charging alleged felons under multiple statutes, Chase's policy appears both liberal and naïve. Certainly, Chase presents his position absent any supporting authority.

Professor Baude and Professor Paulsen characterized Chase's position. In *Penn Law Review*, they stated: "this supposedly enlightened argument was . . . *bonkers*. The enactment of a constitutional rule of disqualification from office does not remotely suggest a supersession or repeal of criminal-law punishment for treason."⁶⁸ I have found no other use of "bonkers" in prior issues of *Penn Law Review* or in any of Baude's or Paulsen's prior publications. That's an unusual characterization of a Chief Justice's handiwork.⁶⁹

There are certainly arguments *against* the Chief Justice's position—which Baude and Paulsen put forward. But there are also weighty arguments *for* the Chief Justice's position. The same position Chase put forward in *Griffin's Case* was announced by, at least, two senators during congressional debate on Section 3. Senator John Sherman (Republican-Ohio) stated:

[A]fter the attempted revolution in England in 1745 . . . all the pains and penalties imposed by Great Britain on [the Pretender's] adherents were removed, except the power to hold office . . . [S]ection [three] is simply to remove all the penalties that rest on these men for treason except the power to hold office⁷⁰

⁶⁸ William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 654 (2024) (emphasis added).

⁶⁹ As a note, much of Part IV relies on materials first reported in Blackman & Tillman, *Sweeping and Forcing*, *supra* note 3, at 506-15.

⁷⁰ CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866); *see also* Barbara Donagan, *Atrocity, War Crime, and Treason in the English Civil War*, 99 AM. HIST. REV. 1137, 1139 (1994) ("In a civil war, laws of war came into conflict with laws of peace that punished taking arms against authority as treason. When fighting began in [the English Civil War in] 1642, the status of the conflict as war was not self-evident. The history of the English civil war is in part a history of why it was fought as a foreign war and of lapses from that mode."); *id.* at 1141 ("Despite difficulties, however, the principle had been made explicit:

Senator James Doolittle (Republican-Wisconsin) stated:

[Section 3] is in the nature of a bill of pains and penalties, imposed by constitutional enactment it is true, but it is a punishment different from the punishment now prescribed by law. What is the effect of adopting it? What is the legal effect of adopting a new punishment for an offense which has already been committed? It repeals the old punishment, and that cannot be inflicted. If today the punishment for the crime of murder is death, and tomorrow you change your punishment to imprisonment for life, the old penalty is repealed; it cannot be inflicted upon a culprit who has been guilty previous to the passage of the law. Such has been decided by the courts many times to be the law; and if by a constitutional amendment you impose a new punishment upon a class of offenders who are guilty of crime already, you wipe out the old punishment as to them, not as to those who are not embraced within this.⁷¹

My point is not that the extracts from senate debate prove that Chase was correct and that Baude and Paulsen were incorrect. My point is only that Chase's position has contemporaneous authoritative support. Who is correct here is the sort of mundane jury-like question about which reasonable people can and frequently disagree. It is one of the primary roles of courts to adjudicate such disagreements about the meaning or content of our law. For these reasons, and others, I disagree with Baude and Paulsen's characterization of Chase's position as "bonkers".

It is also worth adding that Chase's position is consistent with public international law norms. For example, in response to disturbances along the United States-Upper Canada frontier

the laws of war rather than the laws of the civil state were applicable, and Englishmen confronted each other [not as prosecutor and traitor, but] as 'lawful enemies.'").

⁷¹ CONG. GLOBE, 39th Cong., 1st Sess. 2900 (1866). Perhaps, Senator Sherman and Senator Doolittle, both Republicans, were Chase's "enlightened jurists"? *But see* Baude & Paulsen, *supra* note 68, at 654 (asserting that Chase's use of "enlightened jurists" was self-referential).

during the Rebellions of 1837–1838 and the 1838 Patriot War, law officers of the crown furnished the (United Kingdom) Secretary of State for War with a legal opinion. The law officers wrote:

Where an insurrection against a Government has become so formidable as to assume the aspect of an equally balanced civil war, the laws of war are to be observed between the Government and the insurgents; and [even] native-born subjects taken prisoners could not be tried [under the criminal law] as traitors.⁷²

When was this crown law officers' opinion first made public? I cannot be entirely sure, but the legal opinion was reproduced in a treatise published in 1869—the same year *Griffin's Case* was adjudicated.⁷³

Likewise an 1862 American treatise announced a position in harmony with Chase's view. Professor Joel Parker stated:

[I]n proportion to the magnitude and gravity of the warfare [during an insurrection], it gradually loses, in the public mind, its distinctive character as an insurrection, being known as a civil war; and then it is hardly expedient to insist upon the enforcement of the extreme penalties of treason⁷⁴

In short, there is much good evidence supporting Chase's position, and academics' characterizing his position as “bonkers,” at best, amounts to misplaced hyperbole.

⁷² 2 INTERNATIONAL LAW OPINIONS: PEACE 146, 147-48 (Lord McNair ed., 1956), <http://tinyurl.com/5h58ktbj> [<https://perma.cc/YQ8X-29S3>] (reproducing the August 21, 1838 opinion from crown law officers).

⁷³ See WILLIAM FORSYTH, CASES AND OPINIONS ON CONSTITUTIONAL LAW 199, 202 (London, Stevens & Haynes 1869), <https://babel.hathitrust.org/cgi/pt?id=coo.31924021832294&seq=1> [<https://perma.cc/J2GH-3QRT>]. Perhaps, the law officers, who were identified by name in the treatise, were Chase's “enlightened jurists”? *But see* Baude & Paulsen, *supra* note 68, at 654 (asserting that Chase's use of “enlightened jurists” was self-referential).

⁷⁴ JOEL PARKER, THE DOMESTIC AND FOREIGN RELATIONS OF THE UNITED STATES 19 (Welch, Bigelow, and Co. 1862). Parker was a former Chief Justice of the New Hampshire Supreme Court (1838–1848). See Oliver Wendell Holmes, *The Use of Law Schools*, in SPEECHES 28, 35 (Boston, Little, Brown, and Company 1896) (“I think [Parker] was one of the greatest of American judges . . . who showed in the [academic] chair the same qualities that had made him famous on the bench.”),

CONCLUSION

It is said that at the negotiations at Appomattox Courthouse—Lee and Grant were both frank and civil during the course of discussing the surrender of Lee’s Army of Northern Virginia. Afterwards, Grant sent food to Lee to feed his (and, then, their) nation’s former enemy soldiers. Celebrations for Grant’s soldiers came only later—not while Lee’s soldiers remained present. Again, in ending active hostilities, the first step towards national reconciliation was frank and civil discourse.

I do not think our present and future is or will be as difficult as was Grant and Lee’s. But we too have to think about national reconciliation. It seems to me that the first steps in that direction involve frank and civil discussion,⁷⁵ absent hyperbole, and absent

[https://www.google.ie/books/edition/Speeches_by_Oliver_Wendell_Holmes/TcoWAAAAAYAAJ?hl=en&gbpv=1&dq=Holmes,+Speeches+\(1934\).&pg=PT6&printsec=frontcover](https://www.google.ie/books/edition/Speeches_by_Oliver_Wendell_Holmes/TcoWAAAAAYAAJ?hl=en&gbpv=1&dq=Holmes,+Speeches+(1934).&pg=PT6&printsec=frontcover) [https://perma.cc/FS9R-RW42]; Professor Washburn, *Memoir of the Hon. Joel Parker, LL.D.*, in PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 172-74 (Cambridge, John Wilson & Son 1876), <https://archive.org/details/proceedingsofmas114mass/page/n11/mode/1up> [https://perma.cc/E25T-CEP7]. At Harvard University, Parker held the Royall Professorship of Law from 1847 through 1868. Parker became the fifth person to hold that chair. See generally Janet Halley, *When Brands Go Bad: The Rise and Fall, and Re-Rise and Re-Fall, of Isaac Royall, Jr.*, in ACADEMIC BRANDS: DISTINCTION IN GLOBAL HIGHER EDUCATION 160 (Mario Biagioli & Madhavi Sunder eds., 2022), <https://escholarship.org/content/qt9b39f4zm/qt9b39f4zm.pdf> [https://perma.cc/ZM67-PFSM]. Is it possible that Chief Justice Joel Parker was one of Chase’s “enlightened jurists”? But see Baude & Paulsen, *supra* note 68, at 654 (asserting that Chase’s use of “enlightened jurists” was self-referential).

⁷⁵ For a very different point of view, see Evan D. Bernick, *The Anti-Constitutional Attack on Birthright Citizenship*, LAW & POL. ECON. PROJECT (Jan. 30, 2025), <https://lpeproject.org/blog/the-anti-constitutional-attack-on-birthright-citizenship/> [https://perma.cc/99UJ-7HMK]:

Scholars who suggest that arguments for the constitutionality of the [Trump’s executive] order deserve a serious hearing are—whether they realize it or not—providing cover for the *enemies* of the Fourteenth Amendment, and indeed of republican freedom. These arguments have been heard for far too long. They should not be heard again.

Id. (emphasis added) (first linking to Ilan Wurman (@ilan_wurman), X (Jan. 23, 2025, 1:12 PM), https://x.com/ilan_wurman/status/1882506699963253196 [https://perma.cc/8XT9-7V2C]; then linking to Kurt Lash (@kurtlash1), X (Jan. 25, 2025, 9:38 AM), <https://x.com/kurtlash1/status/1883177625268466060> (responding to and agreeing with Ilan Wurman, *supra*); and then linking to Randy Barnett (@RandyEBarnett), X (Jan. 25, 2025, 10:20 AM),

name calling.⁷⁶ If federal judges, state judges, and legal academics are not up to that task, then that is just another institutional and cultural problem crying out for reform and renewal.

Likewise, our domestic law schools are supported by taxes, tuition, and donations. If universities and academics only further burden American society by casting aside our free speech traditions and actively engage in just another front in our culture wars, then wider society might very well choose to withhold support. Perhaps this process has already begun?

<https://x.com/RandyEBarnett/status/1883188304147042530> [https://perma.cc/9DKQ-X366] (responding to and agreeing with Kurt Lash, *supra*)).

⁷⁶ Perhaps we should also extend this kindness to long dead historical figures who have done nothing to cause today's problems or to inspire the ire of those who have "suffered" recent and unexpected losses in the political process and in court cases? Undertheorized and unsupported claims of wrongdoing by judges might be fairly characterized as Trumpian. *See, e.g.*, *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring) (asserting that Chief Justice Chase labored under "obvious conflicts of interest" in regard to *Case of Jefferson Davis*, 7 F. Cas. 63 (C.C.D. Va. 1868) (No. 3621a) (Chase, C.J.) or *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5815) (Chase, C.J.) or both); Baude & Paulsen, *supra* note 68, at 654 (asserting that Chase's use of "enlightened jurists" was self-referential); *cf., e.g.*, Seth Barrett Tillman, *2024 Inaugural Tillman Award (UPDATE)*, NEW REFORM CLUB (Dec. 24, 2024, 5:23 AM), <https://reformclub.blogspot.com/2024/12/2024-inaugural-anti-tillman-award.html> [https://perma.cc/7U65-NZYR] (collecting authority). When reading Judge Richardson, Professor Baude and Professor Paulsen, and all too many others, Justice Scalia's *Morrison* dissent comes to mind. *See Morrison v. Olson*, 487 U.S. 654, 731-32 (1988) (Scalia, J., dissenting) (explaining that special-purpose or single-defendant-defined independent counsels run the risk of developing a sort of *show me the man and I will show you the crime* or Inspector Javert attitude in the prosecutor's single-minded pursuit of the defendant the prosecutor was commissioned to investigate).