Trump, Insurrection, and Disqualification

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One is easily overwhelmed by the fatuity and even imbecility of the politically motivated drivel which has inundated, and continues to flood, the Internet concerning Mr. Trump's supposed disqualification for the office of President of the United States under the Fourteenth Amendment to the Constitution of the United States because of his alleged participation in the so-called "January Sixth Insurrection". One wonders whether any of the self-satisfied gurus, talking-heads, and other pundits breathlessly pontificating on this subject have ever actually read, let alone carefully studied, the entire Constitution of the United States, or pondered how it must be construed and applied according to the tenets of constitutional interpretation with respect to this matter in particular. For, when all of that effort is expended, it becomes beyond dispute that, even if the "January Sixth Insurrection" were an "insurrection" (an extremely doubtful assumption at best), at this point in time Mr. Trump could not possibly, let alone even arguably, be disqualified for the office of President. And, one may confidently predict, the Supreme Court will soon so hold. Actually, the explanation for that expectation is easy to understand.

In pertinent part, the relevant portions of the Fourteenth Amendment read as follows:

“Section 3. No person shall * * * hold any office, civil or military, under the United States, * * * who, having previously taken an oath * * * as an officer of the United States * * * to support the Constitution of the United States, shall have engaged in insurrection * * * against the same * * * . But Congress may by a vote of two-thirds of each House, remove such disability.”

“Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

I. First, in fairness to Mr. Trump’s opponents, it would be well to dispose of some really ridiculous contentions which a few of his more deluded supporters have advanced: namely, (i) that a President is not “an officer of the United States”; and (ii) that as President Mr. Trump never took “an oath as an officer” – so that even if he had actually “engaged in insurrection” during his first term in the Presidency he could not be disqualified from seeking election to, and serving in, a second term.

1. The Constitution – each of the provisions of which must be construed consistently in light of and in consonance with all of the others – itself eliminates any possible doubt that the Presidency is an “office” and the President is “an officer of the United States”:

> a. Compare Article I, Section 7, Clause 3 (“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”) with Article II, Section 4 (“The President * * * of the United States, shall be removed from Office on Impeachment”).
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> b. Consider Article II, Section 1, Clause 1 (“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of

four Years”).

c. Consider Article II, Section 1, Clause 4 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years”).

d. Consider Article II, Section 1, Clause 5 (“In Case of the Removal of the President from Office, or Inability to discharge the Powers and Duties of said Office, the Same shall devolve in the Vice President”). And

e. Consider Article II, Section 1, Clause 7 (“Before he enter into the Execution of his Office, he shall take the following Oath or Affirmation: — ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States”).

When the Constitution, including all of the foregoing provisions, was ratified in 1788, “office” meant “a public employment”, and “officer” meant “a man in office”. Noah Webster, A Compendious Dictionary of the English Language (1806), at 207. So “office” and “officer” were inextricably linked. No basis exists for any contention that the Fourteenth Amendment in 1868 radically transmogrified the English language so as to preclude (or even raise any doubt as to) the conclusion drawn from the original Constitution that an individual who holds an “Office” is an “Officer”, by definition. Moreover, Section 1 of Amendment XXV, ratified in 1967, also refers to the Presidency as an “office” (“In the case of the removal of the President from office”), proving that between 1788 and 1967 (at least) no one ever imagined that the Presidency might be something other than an “office”, and therefore the President someone other than the unique “officer” in that “office”.

2. It has also been contended that, the niceties of the English language aside, several provisions of the original Constitution do, in fact, indicate that the President, although incumbent in an "Office", is nonetheless not an "Officer". Namely,

a. Under Article II, Section 2, Clause 2, "by and with the Advice and Consent of the Senate, [the President] shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not otherwise provided for, and which shall be established by Law". Apparently, the argument here is that, if the President "shall appoint * * * all other Officers", he himself cannot be an "Officer" or he would have the self-contradictory power to appoint himself. This is an especially stupendous piece of self-evident stupidity, because the President need not and cannot appoint himself pursuant to the authority granted in Section 2 of Article II, in as much as his "Appointment[ ] * * * herein" (that is, within the Constitution) has "otherwise [been] provided for, and * * * established by Law" in Section 1 of that Article (which, of course, precedes Section 2).

b. Under Article II, Section 3, the President "shall Commission all the Officers of the United States". Here, too, the contention is that, were the President an "Officer[ ]", he would be authorized to "Commission" himself. The obvious rejoinder is that this Section, in the exercise of common sense, must be read as "all the Officers of the United States [other than himself]", or it would directly conflict with Section 1 of that Article, which (as with any other purported conflicts among constitutional provisions) is a legal impossibility. And

c. Under Article II, Section 4, "The President * * * and all civil Officers of the United States, shall be removed from Office on Impeachment". This supposedly creates a

dichotomy between the President and "all civil Officers", excluding him from that class of persons. Besides not taking into account that precisely because the President "shall be removed from Office" he must be the "civil Officer[ ]" in that "Office" to begin with (as explained above), this contention requires one to disregard the obvious reading of the phrase "all civil Officers of the United States" to import "all [other] civil Officers of the United States" – that is, other than the President, he having already been explicitly singled out in that very sentence.

3. Finally, it has even been argued that Article VI, Clause 3 of the Constitution proves that the President is not an "Officer", because that Clause mandates that "all executive * * * Officers * * * of the United States * * * shall be bound by Oath or Affirmation, to support this Constitution", whereas the "Oath or Affirmation" of the President in Article II, Section 1, Clause 7 goes far beyond the simple words "support this Constitution" – and Section 3 of the Fourteenth Amendment refers simply to persons "who, having previously taken an oath * * * as an officer of the United States * * * to support the Constitution of the United States, shall have engaged in insurrection". But why the expansive words of the President's special "Oath or Affirmation", being explicitly mandated by the Constitution, do not in substance constitute an "Oath or Affirmation, to support this Constitution" no one has ever explained. Surely to "preserve, protect and defend the Constitution of the United States" (the "Oath or Affirmation" in Article II, Section 1, Clause 7) amounts to, and indeed greatly exceeds, "support[ing] this Constitution" (the "Oath or Affirmation" in Article VI, Clause 3). And surely someone who, as President, has taken the more extensive "Oath or Affirmation", and then "engaged in insurrection", is arguably even more blameworthy and subject to disqualification from office than someone who has taken only the simple "Oath or Affirmation, to support this Constitution".

II. Second, having disposed of the absurdity that the President is not "an officer of the United States", analysis can turn to the question of how, if at all at the present time, Mr. Trump could be disqualified for the office of President under Sections 3 and 5 of the Fourteenth Amendment. The answer to that question is that his disqualification is constitutionally impossible.

1. The key operative terms in Section 3 are "engaged in insurrection * * * against the [United States]". Because the Fourteenth Amendment is a provision of the Constitution of the United States, not of the laws of any of the several States, the definitions of these terms must be uniquely constitutional —that is, to use the adjective common in legal parlance, uniquely "federal" in nature. Unless the Constitution is misconstrued as a formula for legal and political chaos, there cannot be up to fifty different definitions each of "insurrection" and "engaged in", depending on the particular State in which the issue might arise, with any or all of such definitions being in one way or another inconsistent with "federal" definitions. For, under Article VI, Clause 2, "[t]his Constitution * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution and Laws of any State to the Contrary notwithstanding". The several States' constitutions, laws, and judicial decisions – let alone determinations by their administrative agencies – can have nothing whatsoever to do with it.

Plainly, too, these uniquely "federal" definitions must be derived from common legal usage as of July 9, 1868, when the Fourteenth Amendment was ratified. And as to "insurrection" specifically, the definition must be consistent with the meaning of that term as of June 21, 1788, when the Constitution was ratified, containing the delegation to Congress of the power "[t]o provide for calling forth the Militia to * * * suppress Insurrections", in Article I,

Section 8, Clause 15. For there is no reason to believe that the Fourteenth Amendment adopted some new, idiosyncratic definition of "insurrection" at odds with the purport of that noun in the original Constitution. This, of course, excludes all of the politically motivated pseudo-definitions being proposed today to twist the Constitution out of shape in order to inculpate Mr. Trump.

Moreover, these uniquely "federal" definitions must be circumscribed by the Bill of Rights, which the Fourteenth Amendment was never intended to disregard or limit (but rather, as the Supreme Court has long maintained, to "incorporate"). In particular here, these definitions must take into account the strictures of the First Amendment, which guarantees in principle and protects in practice the freedoms of speech, petition, assembly, and association, even with respect to advocacy and activities verging on a true "insurrection". See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (individual who advocates the violent overthrow of the government); and contrast Scales v. United States, 367 U.S. 203 (1961), with Noto v. United States, 367 U.S. 290 (1961) (differently situated members of an organization which advocates the violent overthrow of the government).

2. The uniquely "federal" definitions of "insurrection" and "engaged in" must be applied by "federal" officials through some uniquely "federal" process, not potentially fifty or more different legislative, judicial, or even administrative processes conducted by various officials of the States (unless, perhaps, Congress were to provide otherwise through the exercise of its unique power under Section 5 of the Fourteenth Amendment, which it has not done).

> a. "Insurrection" has always been deemed an "infamous crime" – that is, a "felonious offense". For that reason, under "federal" law an alleged "insurrection" must always be the subject of a criminal prosecution, not mere civil litigation, let alone some administrative procedure.

b. Because “insurrection” is an “infamous crime”, under the Fifth Amendment an alleged perpetrator “shall [not] be held to answer * * * unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”.

c. As to a “criminal prosecution[ ]” for alleged “insurrection”, under Article III, Section 2, Clause 3 of the Constitution “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed in any State, the Trial shall be at such Place or Places as the Congress may by Law have directed”. Moreover, under the Sixth Amendment “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses to his favor; and to have the assistance of counsel for his defense”. As the supposed “January Sixth Insurrection” occurred in the District of Columbia, obviously a trial cannot be held in any State (unless Congress were to so provide, which it has yet to do).

d. In any “federal” criminal trial involving “insurrection”, “federal” evidentiary substantive standards and procedural rules must apply as to: (i) which facts are relevant, (ii) discovery as to such facts, as for example under the rule of Brady v. Maryland, 373 U.S. 83 (1963), (iii) how such facts may be proved to the jury or the court, (iv) the degree of certainty to which proof must rise (“beyond a reasonable doubt”), and so on.

e. All of this will require various “federal” statutes making “insurrection” a “federal” crime, to be enforced

according to appropriate “federal” rules of Grand Jury practice, of criminal procedure at trial, of appellate review, and so on. These particulars must be provided by Congress, which under Section 5 of the Fourteenth Amendment exercises the exclusive “power to enforce, by appropriate legislation, the provisions of [Section 3]”. In principle, Congress could enact a statute which permitted the States’ courts to enforce the “federal” statute making “insurrection” a “federal” crime. In practice, however, Congress has done the very opposite. Specific “federal” statutes make “insurrection” a crime, and define it as a “felony”. Title 18, United States Code, Sections 2383 and 3559(a)(3). But these statutes cannot be enforced in the States’ courts. Title 18, United States Code, Section 3231.

3. In sum, as a matter of “federal” law applicable to Section 3 of the Fourteenth Amendment, Mr. Trump: (i) has not been arrested for the “federal” crime of “insurrection”, (ii) has not been formally charged with and arraigned for “insurrection”, (iii) has not been indicted by a “federal” Grand Jury for “insurrection”, (iv) has not been convicted of “insurrection” in a criminal prosecution in a “federal” court, and (v) has not unsuccessfully exhausted all possible appeals or other post-trial remedies which might result in reversal or negation of a conviction. Therefore, Mr. Trump is not, and cannot be, the subject of a disability which might derive from Section 3 of the Fourteenth Amendment that could prevent him from once again holding the office of President of the United States.

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