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Can Madison Cawthorn Be Blocked From the North Carolina Ballot as an Insurrectionist?

By **Roger Parloff** Wednesday, February 16, 2022, 2:55 PM

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In January, a group of North Carolina voters filed a 34-page petition to block Rep. Madison Cawthorn's name from appearing on the 2022 primary ballot. They asked the state elections board to disqualify him under Section 3 of the 14th Amendment for having "engaged in insurrection" by helping to incite the Jan. 6 Capitol riot. It was likely the first invocation of that clause in more than a century.

Then, just last week, a candidate in Indiana filed another Section 3 challenge, a one-page objection leveled at Rep. Jim Banks of Indiana.

Ever since the attack, many had foreseen Section 3's revival. Yet few had guessed that Cawthorn or Banks would be the first targets.

Section 3, of course, is the gnarly provision that, among other things, disqualified Confederates who had held any of a list of state and federal posts before the Civil War from holding any of a slightly different list of state and federal posts *after* it.

But while that was the immediate purpose of the section—drafted in 1866 and ratified in 1868—its broad terms unquestionably applied also to those who "engaged in insurrection or rebellion" in the future.

Accordingly, as soon as the bear spray cleared, constitutional lawyers and historians unleashed a flurry of op-eds and blog entries exploring whether and how the long-dormant paragraph might be resuscitated. *Lawfare* contributed to these discussions.

The experts found much to puzzle over. The U.S. Supreme Court has never heard a Section 3 case, and all of the lower court precedents are well over 100 years old. What exactly is an "insurrection"? What does it mean to "engage in" one? Who is empowered to enforce the section? And given the section's constitutional status, is it constrained by the First Amendment, the Bill of Attainder Clause, and the Ex Post Facto Clause—or does it transcend them all?

At that time, the scholars were focused mainly on whether the section barred the 45th president from ever running for office again. But they saw that the section might also impact state and federal officeholders, too, depending on how close to the flames they had flown. One West Virginia state lawmaker, for instance, had actually stormed the Capitol. (He is expected to plead guilty to a felony.) But he resigned the day after his arrest, mooting—unless he ever runs again—his Section 3 issues.

So it was no surprise that at least some member of Congress would face a Section 3 challenge. But why Cawthorn—let alone Banks? The conduct of Reps. Mo Brooks of Alabama and Paul Gosar and Andy Biggs of Arizona has drawn far more scrutiny. Just Security has assembled a nearly book-length timeline of Brooks's pre- and post-Jan. 6 conduct. For instance, Brooks's House of Representatives colleague Eric Swalwell, of California, has sued Brooks (and three others) under the Ku Klux Klan Act of 1871 in a case stemming from the Capitol siege. (Brooks has denied "encouraging anyone to engage in violence.")

Cawthorn threw a curveball of his own when he unveiled his initial defense. In an interview with the New York Times in January, Cawthorn's lawyer, James Bopp Jr.—after denouncing the petition as "the most frivolous case I've ever seen"—advanced a startling claim that had been largely overlooked by the scholarly commentary to that point.

Bopp asserted that the Amnesty Act of 1872—a partial amnesty in which Congress absolved certain categories of Confederate officeholders from Section 3 disabilities while passing over others—had had *prospective* effect. Thus, even assuming for the sake of argument that any member of Congress *had* engaged in insurrection on Jan. 6 (or might do so tomorrow in an even bloodier rebellion), he or she would have already been relieved of Section 3 disability by the 42nd Congress.

This claim—which Cawthorn's team has since briefed in a federal suit seeking to block the voters' petition—is purely textualist. Bopp does not suggest that any member of Congress in 1872 ever imagined such a result. Rather, his key citation is to a definition of the "future perfect tense" that appears on the website of a former teacher who now sells grammar books. ("I'm Elizabeth O'Brien," she writes, "and my goal is to get you jazzed about grammar.")

In this post, I will explore the amnesty defense, among others. But, first, let's go through the specifics and procedural posture of the petition against Cawthorn and why he was likely targeted first. I will then explore the key arguments for and against letting the elections board hear the petition and, if it is allowed to, how it might decide the matter.

(I will not dwell on the petition against Banks. Indiana permits any registered voter to challenge a candidate's qualifications by filing a one-page form. One of Banks's three Democratic opponents, Aaron Caskins, did so, reportedly entering into a blank the words: "violation of the 14th Amendment supporting an insurrection." In an email, Caskins says that his petition, which Banks has called "absurd," is based on the congressman's having voted against certifying the 2020 Electoral College results. The Indiana Election Commission will hear the challenge Friday, Feb. 18—one of 26 candidate challenges on its agenda that day—and the loser can appeal to the state court system.)

Why Cawthorn?

Though the petition against Cawthorn poses a legion of fascinating constitutional questions of first impression, most of them will likely remain unanswered. Since his early Times interview, Cawthorn's counsel has developed at least one additional argument that would allow courts to dodge all those thorny issues. That contention, based largely on a 2015 law review article by professor Derek T. Muller of the University of Iowa College of Law, maintains that, generally speaking, under Article I, Section 5 of the Constitution, only Congress can determine its members' qualifications.

Although there are strong responses to Muller's argument—as I'll also discuss below—that one could well carry the day.

In any case, even if the petition against Cawthorn vaults that hurdle, its prospects for disqualifying him are dim. While the events of Jan. 6 probably qualify as an "insurrection," discovery would have to turn up something far more damning than the petitioners have alleged so far to establish that Cawthorn "engaged in" it.

At the same time, this petition may be more about discovery than disqualification. The depositions and subpoenas authorized by North Carolina's unusual election-challenge rules offer the prospect of a major breakthrough to those digging into the causes of the insurrection. The petitioners in this case could possibly force Cawthorn to become the first member of Congress to testify about the siege.

The full text of Section 3 reads:

> No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

On Jan. 3, 2021—three days before the Capitol riot—Madison Cawthorn was sworn in as the representative of North Carolina's 11th Congressional District. Accordingly, he took a triggering "oath" that at least brought him within Section 3's ambit.

Last December, Cawthorn filed to run again in the 2022 midterms. Since the state had recently redrawn its district lines, he filed to run in the 13th Congressional District this time.

On Jan. 10, a group of 13 registered voters from that district filed a petition with the North Carolina State Board of Elections challenging Cawthorn's constitutional eligibility to hold office, citing Section 3.

The petitioners' lead counsel is Ronald Fein, the legal director of the nonprofit Free Speech for People. Among other lawyers working on the petition are two former North Carolina Supreme Court justices: Robert F. Orr, a Republican, and former Chief Justice James Exum Jr., a Democrat. Acting as a pro bono consultant on the case is 14th Amendment scholar Gerard Magliocca of the Indiana University School of Law. (With extraordinary timing, on Dec. 29, 2020—eight days before the riot—Magliocca had posted online for comment his draft law review article, "Amnesty and Section Three of the Fourteenth Amendment." It has since been published with minimal changes. Disclosure: Magliocca also wrote on this topic for *Lawfare* shortly after the Capitol siege.)

In an interview, Fein explains that his group and another nonprofit, Our Revolution, have teamed up to launch a project called 14Point3. It aims to enforce Section 3 against those it believes have disqualified themselves from office as a function of their alleged roles in triggering the Jan. 6 insurrection. The project plans to challenge additional members of Congress in the future, Fein says, though he declines to name names. (It is not involved in the petition against Banks.) Last summer, the project also sent letters to the top election officers of all 50 states and the District of Columbia arguing that, should former President Trump run for president in 2024, they must bar him from the ballot under Section 3.

Fein's petition against Cawthorn was filed under certain provisions of North Carolina's election law that are unusually—extraordinarily, really—accommodating to would-be, preelection challengers of a candidate's qualifications. Under those laws (and Cawthorn does not contest this) any registered voter can ask the elections board to keep a candidate's name off the ballot if the voter can present evidence supporting a mere "reasonable *suspicion* or *belief* … that the candidate does not meet the constitutional … qualifications for office" (emphasis added). Precedents cited in the petition suggest that successful challenges have been entertained in the past based on no initial evidence at all.

Once a challenger overcomes that largely notional bar, the burden shifts to the candidate to prove, by a preponderance of the evidence, that he or she *is* eligible for office. The law specifically affords the challenger an opportunity to take discovery of the candidate, including depositions and issuing "subpoenas for witnesses or documents, or both." After discovery, a local elections board panel decides if the candidate is qualified, and its decision can then be appealed up the line to the state elections board; the intermediate appellate court; and, finally, the North Carolina Supreme Court.

The discovery provisions are remarkable. Given how reluctant the House Select Committee has been to subpoena its own members, this statutory framework, if allowed to play out, could generate the very first deposition of any member of Congress about his or her role in the riot. (Rep. Jim Jordan of Ohio refused an invitation to speak to the committee last month.)

The reader can now appreciate why Cawthorn is the first representative targeted under Section 3. It's not so much that what's known about his role is particularly damning. It's that his state's preelection challenge provisions are so astoundingly propitious. (A quick look at the election law of Brooks's home state of Alabama, for instance, turned up no comparable apparatus for a pre-primary challenge. On the contrary, that state seems to give political parties the lead role in policing candidates' qualifications at that stage.)

The petition's factual allegations against Cawthorn should suffice to overcome the pro forma threshold needed to reach the discovery phase. The voters claim to have a reasonable suspicion that Cawthorn "was involved in either planning the attack" or, alternatively, in the "planning of the pre-attack demonstration and/or march on the Capitol with advance knowledge that it was substantially likely to lead to the attack."

For specifics, they point to a variety of news reports. From November 2020 forward, for instance, Cawthorn trumpeted false election-fraud accusations. According to Rolling Stone, Cawthorn was among a handful of members of Congress (or their staffs) who coordinated with "Stop the Steal" rally organizers in the weeks leading up to Jan. 6. The voters also mention Cawthorn's prior relationship with White House Chief of Staff Mark Meadows, who, they note, also reportedly coordinated with Stop the Steal, and who participated in Trump's phone call to Georgia Secretary of State Brad Raffensperger attempting to "intimidate" him "into fabricating votes" in Georgia. From 2015 to 2016, Cawthorn was a staffer for Meadows, who was Cawthorn's predecessor as the 11th Congressional District representative.

As for the period immediately surrounding the attack, the petition mentions the following details. On Jan. 4, 2021, Cawthorn promoted the upcoming Ellipse rally in a tweet, saying that "the future of this Republic hinges on the actions of a solitary few. … It's time to fight." He then spoke at that rally, where others, including Trump, made fiery and bellicose speeches. (Cawthorn's own rhetoric there was heated, but not shocking: "The Democrats, with all the fraud they have done this election, the Republicans, hiding and not fighting, they are trying to silence your voice.")

The day after the riot, Cawthorn disavowed the violence, calling it "disgusting and pathetic." He also noted, however, that he hadn't been afraid because he'd been "armed."

Since then, Cawthorn has become an insurrection apologist. He has described the detained rioters as "political hostages" and "political prisoners," and has said that if he knew where they were incarcerated, he'd like to "bust them out." At a speech last August, he said, according to the petition:

> The second amendment was not written so that we can go hunting or shoot sporting clays. The second amendment was written so that we can fight against tyranny. … [I]f our election systems continue to be rigged, and continue to be stolen, then it's going to lead to one place, and it's bloodshed. … When tyranny becomes law, rebellion becomes your duty. … [W]e all need to be storing up some ammunition.

Where does the petition stand today?

The day after the voters filed their petition against Cawthorn, a state superior court stayed it pending resolution of litigation over the constitutionality of the state's 2021 redistricting.

On Jan. 31, Cawthorn filed suit in federal district court in Raleigh, seeking to enjoin the state elections board from hearing the voters' petition. He claimed, first, that the North Carolina election law violated his First Amendment and due process rights by requiring him to "prove a negative"—that is, that he had not engaged in insurrection—based on such a trivial showing ("reasonable suspicion or belief").

In addition, as noted above, he argued that the North Carolina law "usurped" Congress's exclusive right to judge members' qualifications and that the 1872 Amnesty Act had already absolved him of any even theoretical Section 3 disability. (Obviously, he denies having engaged in insurrection, too. But that claim is factual and would not warrant enjoining North Carolina's whole election-challenge apparatus. And without an injunction, he'd have to submit to discovery.)

Cawthorn's case was assigned to U.S. District Judge Richard E. Myers II, a Trump appointee. Myers placed the matter on a fast track in light of the approaching May 17 primary.

Then, on Feb. 4, the North Carolina Supreme Court tossed a wrench in the gears. It struck down the state's 2021 redistricting map—including the 13th Congressional District that Cawthorn had filed to run in—as an "unlawful partisan gerrymander" in violation of the state constitution. The court ordered the state legislature to draw a new map by Feb. 18.

On Feb. 7, the petitioners challenging Cawthorn moved to intervene in Cawthorn's federal suit and filed a brief opposing the preliminary injunction. The elections board also filed its own brief in opposition.

What happens now?

Myers has not yet decided whether to request oral argument and, if so, when.

For the moment, the novel constitutional issues lie buried beneath a host of perfunctory procedural ones. Foremost among these is whether Myers or the state elections board should decide the case.

Both the board and the petitioners claim that Myers must dismiss Cawthorn's federal suit for lack of constitutional ripeness. Cawthorn has not yet suffered any concrete injury, they say. The elections board has not disqualified him and may never do so. In addition, now that the redistricting map has been scrapped, no one knows what district Cawthorn will be running in and—theoretically at least—whether any residents of *that* district will step forward to challenge him.

In addition, under principles of "comity," "federalism," and the so-called *Younger* doctrine, federal courts are generally supposed to avoid—or "abstain" from—enjoining state proceedings. For that reason, Myers would ordinarily be expected to send the case back to the elections board (and, eventually, the reviewing state appellate courts) with the expectation that those bodies would be just as competent as he is to rule on all the federal constitutional issues presented.

Even so, given the pressing timetable and the fact that Cawthorn's having to submit to discovery might be considered an injury in itself, maybe Myers will hear the case.

If he does, he'll reach the Qualification Clause and Amnesty Act issues. (I'll skip over Cawthorn's grievances with North Carolina's election-challenge procedures. It seems unlikely that a federal judge will want to torpedo a long-standing state statutory scheme that is used frequently without incident. The state board asserts that it has adjudicated 12 candidate challenges in the past four years and that the system serves "the critical purpose of ensuring that only qualified candidates appear on the ballot and are voted on by the electorate.")

The Qualifications Clause Argument

Article I, Sections 4 and 5, of the Constitution provide, in relevant part:

> Section 4: The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof[.]
>
> Section 5: Each House shall be the judge of the elections, returns and qualifications of its own members[.] …
>
> Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Cawthorn argues, following the reasoning of Muller's law review article, that the North Carolina statutory scheme would "usurp" Congress's "exclusive" powers to police the qualifications of its own members.

In an email, Muller encapsulates his argument this way:

> Congress holds the exclusive power to review qualifications. Courts that have been asked to review the qualifications of congressional candidates have … said they lack the jurisdiction to investigate them. That should be especially true with the disqualification for insurrectionists: Congress has the authority to remove the disability, and a state disqualification months before the election is premature.

The two precedents cited in Cawthorn's brief come from the New Mexico Supreme Court and a federal district judge in Louisiana (adopting the recommendation of a magistrate judge). But neither of those is binding on either Myers or the North Carolina state courts.

Both the petitioners and the state elections board argue that, across the nation, it's quite routine for states to police the qualifications of candidates—minimum age, citizenship, and habitancy requirements—before putting them on a ballot.

The Constitution gives states the right to do that for U.S. senators and representatives, the board claims, under Article I, Section 4, which lets them set the "times, places and manner of holding elections" for those posts.

The U.S. Supreme Court, moreover, has "approved the States' interests in avoiding 'voter confusion, ballot overcrowding, or the presence of frivolous candidacies,' in 'seeking to assure that elections are operated equitably and efficiently,' and in 'guarding against irregularity and error in the tabulation of votes,'" the board continues.

Finally, the petitioners deny any "usurpation" of Congress's role, since each chamber can still exercise that authority *after* the election. "*In extremis*," the petitioners argue, the House "retains … the power to void congressional elections if it disagrees with a State's determination of candidate eligibility."

In 1972, for instance, U.S. Sen. Vance Hartke argued that it would violate the Constitution's Qualifications Clause for Indiana to perform a recount after he'd won a close election contest. The Supreme Court rejected Hartke's claim because, after the recount, the Senate could still exercise "its independent final judgment." It would still be "free to accept or reject the apparent winner."

Magliocca (who, remember, is consulting pro bono for the plaintiffs) puts the petitioners' argument this way in an interview:

> Say [Cawthorn is] disqualified in North Carolina, and someone else is elected. Cawthorn can show up [at Congress] and say it shouldn't seat the person who was elected and that the election result should be thrown out and a new election held. Congress ultimately could decide whether North Carolina is correct by saying, "We're not going to accept North Carolina's decision."

In my view, the Qualifications Clause argument is the critical one in the Cawthorn case. It will be a tough call. On the one hand, if Cawthorn were disqualified from appearing on the primary ballot—which is what could theoretically happen here—the House's power to reverse the board's judgment would become highly attenuated. Imagine, for instance, that Cawthorn were disqualified, a different Republican ran as a result, and that *that* Republican ended up winning in the general election. In that event, House members would have little incentive to refuse to seat that person regardless of whether they felt Cawthorn had been wrongly disqualified.

On the other hand, it's eminently sensible for states to winnow out ineligible candidates before putting their names on printed ballots. Why should they waste resources holding elections that must later be voided because the winners are ultimately found to have been ineligible to have ever run in the first place?

At this point, some readers may want to interject still another response to Muller's Qualifications Clause argument—one that the petitioners have not made. Given that Section 3 postdates the Qualifications Clause—and has equal constitutional status—these readers might ask why everyone is assuming that Section 3 must comply with the Qualifications Clause. Maybe it trumps that clause.

This is a recurring genre of question that Section 3 spurs and that scholars have wrestled with in other contexts. Must Section 3 comply with the First Amendment or the Bill of Attainders Clause since Section 3 postdates them, too? The Bill of Attainders question was actually debated—inconclusively—by Section 3's drafters, according to constitutional historian Mark Graber.

But it's likely that most judges will not want to venture into such treacherous waters. The First Amendment and Attainders Clause are so fundamental to the nation's freedoms and notions of fairness that judges will try to harmonize Section 3 with them. Chief Justice Salmon Chase, acting as a circuit judge in *Griffin's Case*, interpreted Section 3 so as to comply with the Attainders Clause in that matter. By analogy, it's likely that most judges will want to interpret Section 3 so as to comply with the Qualifications Clause, too.

As judges grapple with how to apply the Qualifications Clause to Cawthorn's situation, the decisive factor may prove to be expediency. If courts want a way out of novel, messy, and politically explosive Section 3 litigation, the Qualifications Clause offers them a respectable off-ramp.

The Amnesty Act Argument

The Amnesty Act of 1872 provided that:

> all political disabilities imposed by the third section of the fourteenth amendment to the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

The main beneficiaries of this partial amnesty were former state officeholders. But the act also lifted disabilities from members of Congress who didn't fall within the carve-out for the 36th and 37th Congresses (1859-1863). As Magliocca explains in his pre-insurrection law review article, the carve-out was likely crafted to withhold amnesty from Jefferson

Davis, the president of the Confederacy. (By contrast, the Confederacy's vice president, Alexander Stephens, received amnesty under the law and returned to the House in 1873.)

Later, in 1898, Congress granted amnesty to those who had fallen through the cracks of the first amnesty law—though only a few hundred such people were still alive. That law provided that:

> the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.

Cawthorn argues that the "plain" meaning of the broad "all persons whomsoever" language in the 1872 law reached into the future and now protects him, since he was not a member of either the 37th or 38th Congress. (He's a member of the 117th.)

Here's the key passage of Cawthorn's brief:

> Section Three does not specify Congress only has the power to remove past disabilities, it specifies Congress has the power to remove "such disability." "Such disability" refers to the disability of someone who has previously taken an oath as a member of Congress who "shall have engaged" in insurrection from taking office. "Shall have" followed by a past participle forms the future perfect tense and shows an action will occur before another action in the future.[3] The grammatical reading of Section Three means that Congress had the power to remove "such disability" for both Members who had incurred the disability and those who had not incurred such disability, but could if they engaged in the applicable prohibitions in the future. [Footnote 3 links to the previously mentioned grammar teacher's definition of the future perfect tense.]

The petitioners call Cawthorn's invocation of the Amnesty Act of 1872 "novel and bizarre." Their first argument is textualist. The 1872 act says that "political disabilities imposed" by Section 3—past tense—"are hereby removed. … That necessarily means disabilities already imposed, not disabilities the amendment might impose in the future."

To read the provision to apply prospectively would essentially render Section 3 "nugatory," they argue—a remarkable result not explicitly required by the statute's language. Such a reading, they continue, would violate the principle that Congress does not "hide elephants in mouseholes," as Justice Antonin Scalia once put it. The petitioners also claim that Cawthorn's reading would come perilously close to issuing prospective pardons or to allowing one Congress to bind future ones—acts that are presumed to be unconstitutional.

Finally, they note, the legislative history of the 1872 law is rife with references to ex-Confederates while evincing no solicitude whatever about the fate of insurrectionists of the future.

Doubtless one reason few commenters have advanced Cawthorn's argument previously is that Congress rejected a similar argument in 1919. But that situation is murky and doesn't fit snugly into either side's narrative.

Victor Berger, an Austrian-born Socialist from Milwaukee, won election to the House for a single term in 1910. Then, in 1918—while under indictment for violating the Espionage Act—he won again. His non-interventionist advocacy during World War I was seen as seditious at the time. (Berger's story is told well in a law review article about Section 3 by attorney Myles Lynch. Like Magliocca's, Lynch's work was fortuitously completed in December 2020—a month before the Capitol riot.)

When Berger showed up to take his seat in Congress—by which time he had been convicted—he was rebuffed. By a 311-1 vote, the House specifically found him ineligible under Section 3. It also rejected an amnesty argument similar to Cawthorn's. The House committee report explained:

> Congress has no power whatever to repeal a provision of the Constitution by a mere statute, and … no portion of the Constitution can be repealed except in the manner prescribed by the Constitution itself. While under the provisions of section 3 of the fourteenth amendment Congress was given the power, by a two-thirds vote of each House, to remove disabilities incurred under this section, manifestly it could only remove disabilities incurred previously to the passage of the act, and Congress in the very nature of things would not have the power to remove any future disabilities. This was plainly recognized when the words "heretofore incurred" were placed in the act itself.

Strangely, however—and as the last quoted sentence reveals—the House committee was focusing on the *1898* amnesty law, not the *1872* one. (The 1898 act includes the "heretofore incurred" language, while the 1872 act does not.) Cawthorn argues that the absence of that phrase in the 1872 act further establishes that the "plain language" of the 1872 act requires prospective application.

Finally, there is yet another layer of obscurity to Berger's case, as Lynch points out. In 1923, after the Supreme Court had overturned Berger's Espionage Act conviction (on procedural grounds) and Berger had been reelected, he was allowed to take his seat without comment. This was so even though Congress never lifted, by the requisite two-thirds vote of both chambers, the Section 3 disability that the House had found to exist in 1919.

In any case, accepting Cawthorn's Amnesty Act position would seem to lead to very odd results. It would mean that those categories of officers who were granted amnesty in 1872 (mainly those whose triggering oaths were taken as state officials or members of Congress) are currently exempt from Section 3, while those categories that were passed over in 1872 (like federal judicial and military officers) are still subject to them. It would then follow, for instance, that Derrick Evans, the aforementioned West Virginia delegate who stormed the Capitol, would face no Section 3 issues after all. In contrast, the more than 80 U.S. military veterans charged with storming the Capitol might face such bars, depending on their rank and how "officer" is interpreted.

Such a fork in Section 3's applicability would be ahistorical, arbitrary and inequitable. Yet it's a conceivable outcome, I suppose.

Was the Capitol riot an insurrection, and, if so, did Cawthorn "engage in" it?

My decision tree is nearing its finale. To complete it, I'll assume that (a) a new challenge petition is filed against Cawthorn in whatever district he ends up running in; (b) Judge Myers abstains from hearing, or dismisses, Cawthorn's federal suit; and (c) the elections board and reviewing state courts reject Cawthorn's qualifications clause and Amnesty Act arguments. If so, what then?

The remaining questions are: Was the Jan. 6 Capitol riot an insurrection, and, if so, did Cawthorn engage in it?

The petitioners have laid out some arguments on these subjects, both in their petition and in a document titled "Myths and Reality about the 14.3 Insurrectionist Disqualification Clause" available on their lawyers' website.

Cawthorn, by contrast, has not yet had occasion to brief these issues. So I am doubtless shortchanging arguments that he would advance if he ever gets to this stage.

Still, a number of independent authorities have weighed in on these issues, both before and since the attack. Based on all of these materials, I think it's likely that the Capitol riot would be considered an insurrection.

Obviously, the Section 3 precedents of the 19th century didn't ask that question, since everyone knew that violent secession from the Union more than qualified as "rebellion."

But definitions of insurrection from other sources—19th-century dictionaries, 19th-century criminal cases and even modern-day insurance cases—all trend in the direction of encompassing the recent attack.

Under a grand jury instruction on criminal insurrection, for instance, approved by a federal circuit court in Illinois in 1894, the Capitol riot would easily qualify:

> Insurrection is a rising against civil or political authority,-- the open and active opposition of a number of persons to the execution of law in a city or state. … It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States.

In his overview of Section 3 for *Lawfare* last year, University of Chicago law professor Daniel Hemel opined that modern-day insurance cases provided useful guidance. In 1974, for instance, the U.S. Court of Appeals for the Second Circuit—interpreting a 1954 First Circuit case—defined "insurrection" in a way that would also encompass the attack on the Capitol. The 1954 case involved "a little band of extremists" who, calling themselves the Nationalist Party, had burned buildings and raised their flag over several towns in Puerto Rico for a day. In reviewing the earlier holding, the Second Circuit wrote with approval:

> "Insurrection" presents the key issue because "rebellion," "revolution," and "civil war" are progressive stages in the development of civil unrest, the most rudimentary form of which is "insurrection." … [First Circuit] Judge [Calvert] Magruder … held that if the Nationalist leaders had the "maximum objective" of overthrowing the government, then a jury might find that the loss was caused by an insurrection. … Under [Magruder's holding], the revolutionary purpose need not be objectively reasonable. Any intent to overthrow, no matter how quixotic, is sufficient.

Fast forwarding to the present day, the Capitol riot itself has been categorized as an "insurrection" in several contexts that are pertinent and telling, if not precedential in the conventional sense. In a published ruling in March 2021, for instance, concerning whether a defendant charged in the attack was entitled to pretrial release, two U.S. Court of Appeals judges for the District of Columbia Circuit described the event as an "insurrection," albeit in passing and without analysis.

More important, last year's article of impeachment against President Trump—endorsed by bipartisan majorities of both houses of Congress—accused him of "incitement of insurrection." Even one of Trump's attorneys at the proceeding, Michael van der Veen, stated, "The question before us is not whether there was a violent insurrection of [sic] the Capitol. On that point, everyone agrees."

The dauntingly higher hurdle would be proving that Cawthorn "engaged in" insurrection. What's been shown so far—pre-discovery—does not seem to meet that burden.

Maybe the most pertinent definition of "engaged in" is provided in an 1869 North Carolina Supreme Court ruling. It defined the phrase as meaning:

> Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of anything that was useful or necessary in the Confederate service.

A similar jury charge defining "engaged in" was issued by the U.S. Circuit Court for North Carolina in 1871. The instruction came in a criminal case arising from a federal law that had made it a crime for state officials to hold office in violation of Section 3. That court wrote:

> We are of opinion, gentlemen, that the word "engage" implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination [that is, successful from the perspective of the insurrectionists] ….

So far, Cawthorn's known conduct does not reach this level. He is accused only of irresponsible, reckless, dishonest, and provocative speech, and of helping to organize rallies to vent and promote such speech. While there are a few precedents in which people incurred Section 3 disability from speech alone, most commenters are unwilling to follow them, given that those precedents precede modern-day First Amendment doctrine. The case of Victor Berger—the member-elect who was excluded from the House for opposing U.S. involvement in World War I—is the preeminent example. Hemel provides another example in his Lawfare post. That instance involved a House member-elect from Kentucky, John Young Brown, who was excluded from the 40th Congress (1867-1869). Young was found, Hemel writes, to have "written a letter to a local newspaper vowing to resist the Union Army 'unto the death' and adding that anyone from Kentucky who volunteers for the Union Army ought to be 'shot down before he leaves the State.'"

Brown's extreme words might possibly be actionable even by today's standards. But nothing Cawthorn is known to have said rises to that level.

At this juncture, once again, some readers may want to raise an argument that the petitioners have not. Even if Cawthorn didn't "engage in" insurrection, they might ask, didn't he give "aid or comfort to the enemies" of the United States, which also triggers Section 3 disabilities?

The "aid or comfort" language closely resembles the "aid and comfort" language of the Treason Clause of the Constitution. I found no precedents interpreting the "aid or comfort" language in the Section 3 context. So I asked a treason scholar, Carlton Larson of the University of California at Davis School of Law, how he would read Section 3's "aid or comfort" clause. In an email, he responded:

> Under well-established case law, "enemies" [in the treason context] referred only to foreign nations or groups with whom the United States was in a state of open war. So when Section Three says "*or* given aid or comfort to the enemies thereof" it seems to be referring to this distinct form of external treason.
>
> Thus, I don't think the "aid or comfort" language has any relevance to the "rebellion or insurrection" language. They are completely distinct offenses and if I were trying to disqualify someone for rebellion or insurrection I would be very careful not to rely on the aid and comfort language.

I might add that if one did read the "aid or comfort" language to, in effect, broaden the "engaged in" language relating to "insurrection," then Section 3's boundaries begin to get very fuzzy indeed and may start to encroach on modern First Amendment jurisprudence. I doubt contemporary judges will want to venture off in that direction.

The chances of disqualifying Cawthorn are, therefore, slim. The petition against him stands a realistic possibility, however, of generating valuable discovery about a dark event of surpassing importance in the nation's history. It might also establish precedents that could provide helpful guidance for future, weightier Section 3 challenges.

Conversely, however, it could inadvertently occasion hostile precedents that could all but preclude future challenges. And as more far-fetched challenges begin to be filed—like the one lodged last week against Rep. Banks—adverse precedents become more probable. Judges will be increasingly tempted to clear their dockets by interpreting Section 3 out of existence.

(Jaime Luis López, a student at Georgetown University Law Center, assisted in the research for this post.)

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