Is Trump Constitutionally Ineligible to Serve as President?

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Professors Will Baude and Michael Paulsen have written an article called *The Sweep and Force of Article 3*, which basically says that Trump is ineligible to serve as President. While the piece has attracted a fair amount of press, including in The New Yorker and The Atlantic, I haven't yet seen a useful analysis of what the authors actually say. I predict that the dynamics they discuss could create various kinds of chaos; in particular they could create a real challenge to Democrats and other Trump-opposers, and potentially to the Department of Justice. It is thus useful to parse through their analysis.

Their point of departure is Article 3 of the Fourteenth Amendment, which provides in pertinent part that "[n]o person shall … hold any office, civil or military, under the United States, or any state, 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 or rebellion against the same …."

The Baude/Paulsen article basically does three things that I will discuss[1]:

1. It offers a definition of "insurrection" and "rebellion"
2. It argues that Article 3 is in an important but very limited sense "self-executing"
3. It argues that what Trump demonstrably did was an "insurrection."

I believe the article raises many further questions, principally among them:

4. What is likely to happen in the runup (or possibly even after) the 2024 election with respect to these issues?

1. Definition

One of the most important and key points the authors make is that "insurrection" and "rebellion" are quite different. Based on what appears to be thorough research, they define "insurrection" as follows:

> Insurrection is best understood as concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect. The term "insurrection" connotes something more than mere ordinary lawbreaking. It suggests

[1] The article, which clocks in at 126 pages, also exhaustively addresses a number of other issues including the principal potential arguments against their analysis.

> an affirmative contest with, and active resistance to, the authority of the government. It is in that sense more than just organized resistance to the laws—more than just a protest, even one involving civil disobedience. Rather, it is organized resistance to the government. Insurrection is also more than mere "protest" in that it implies some element of forcible resistance. It is something more than a mere spontaneous, disorganized "riot." Insurrection suggests at least some degree of coordinated, concerted action. The term also implies something more than acts of solitary individuals: to qualify as an insurrection the acts in question must involve some form of collective action, even if not an advance plan.

They then argue that "rebellion" is something different:

> Rebellion is thus closely related to insurrection, but perhaps not quite identical in meaning. A rebellion is arguably broader in its reach than an insurrection: rebellion implies an effort to overturn or displace lawful government authority by unlawful means. (In the case of secession, or a declaration of independence, the rebellion is an effort to free those engaged in rebellion from the authority of the existing lawful government.) Rebellion is something beyond mere resistance to government authority in a particular instance or set of instances. A rebellion seeks to replace the existing regime, not just resist its law-executing authority.

They give the somewhat simplistic but useful example that the firing on Fort Sumpter, by itself, amounted to "insurrection" even before, and independently of, the separate act of "rebellion" by the declaration of secession.

Their point is that what Trump did amounted to insurrection even though it fell short of rebellion. A problem is that while this definition of "insurrection" makes sense and appears to have a secure historical basis, it does not correlate with the federal criminal statutes actually in play against Trump and others.

- 18 USC § 2383 which is a true insurrection statute, says that "[w]hoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States of the law thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned by more than ten years, or both; and shall be incapable of holding any office under the United States."
- 18 USC § 2384, which is known as the "seditious conspiracy" statute, makes it a crime for "two or more persons" [to] "conspire to overthrow, put down, or to destroy by force the Government of the United States… or delay the execution of any law of the United States;" it provides a maximum sentence of 20 years, but notably does not have a disqualification provision.

This is important for two reasons:

- As many have noted, Garland/Smith have NOT charged any of the January 6 participants, including Trump, with "insurrection" under Section 2383[2], and rather have used against some defendants other than Trump – successfully, so far – the seditious conspiracy provision of Section 2384, but
- Acts constituting seditious conspiracy and other charges actually brought against Trump and others would appear to constitute "insurrection" under Article 3 as defined by the authors even though neither Section 2384 nor any of the statutes on which the Trump indictment is based use that word.

What this means is that as the criminal trials go forward, they may provide a somewhat perplexing situation where the facts may well show an "insurrection" capable of triggering Section 3, but where Trump can argue that neither he nor any of his supporters have even been charged with, let alone convicted of, that crime.

2. Self-execution

A point heavily emphasized by the authors is that Article 3 is "self-executing, operating as an immediate disqualification from office…" They argue that based on Trump's status as an insurrectionist, he simply *is* ineligible to serve as President. They compare Article 3 to the provisions of the Constitution requiring that a President be at least 35 years old and a citizen, and note that a youth or non-citizen is just flat-out ineligible, without the need for any procedure to make a factual finding.

What they really mean by "self-executing," however, is limited: their point is simply that no affirmative legislative structure needs to be adopted by Congress to effectuate the Article. Their argument on this is perfectly reasonable, although not without doubt; among other things, they go to some length to distinguish (or, really, to argue the error of) a fascinating opinion to the contrary in 1869 by Chief Justice Salmon Chase sitting as a Circuit Judge.

My problem with this conclusion is that the authors are both expansive but very vague on the procedures that would need to be followed to really effectuate Article 3. If Trump is nominated and elected President, Article 3 will not be "self-executing" in the sense that absent some affirmative step being undertaken and successfully completed, he would be sworn in on January 20, 2025 (subject, perhaps, to subsequent removal from office under Article 3, a possibility that the authors acknowledge). As noted in the next section, the authors believe that the known facts constitute an Article 3 "insurrection" by Trump, but neither Trump nor a quite sizable portion of the citizenry agree with that; more fundamentally, common sense and justice require that if the country elects Trump as

[2] Part of their reasoning may have been that a Section 2383 indictment might have appeared unduly "political" by having as its apparent purpose the disqualification of the current President's likely 2024 opponent. Notably, the federal "January 6" indictment against Trump charges him under neither Section 2383 nor 2384.

President, some transparent and authentic procedures must be followed to deny him and his voters his right to serve.

The authors offer no specific set of procedures. Rather, they raise the possibility of a number of different events that could arise. In their analysis of "self-execution," for example, they state:

> Section Three's disqualification is constitutionally automatic whenever its terms are satisfied. Section Three requires no legislation or adjudication to be legally effective. It is enacted by the enactment of the Fourteenth Amendment. Its disqualification, where triggered, just *is*. It follows that Section Three's disqualification may and should be followed and carried out by all whose duties are affected by it. In many cases, Section Three will give rise to judiciable controversies in the courts. In others it will be enforceable by state and federal officials. But no prior judicial decision, and no implementing legislation, is required for Section Three to be carried out by officials sworn to uphold the Constitution whose duties present the occasion for applying Section Three's commands. Section Three is ready for use.

The key problem here, of course, is the authors' condition that Article 3 "is constitutionally automatic <u>whenever its terms are satisfied</u>" because the satisfaction of the Article will depend on hotly contested evidence, without an existing set of procedures to find the facts and make a legal evaluation of their sufficiency. Instead, the authors reference, but do not really explore or analyze, several ways in which a Section 3 disqualification could, at least in part, occur. As noted in the paragraph quoted above, they argue that Article 3 is binding on everyone engaged in the election process, possibly raising the specter that State and Federal officials may refuse to take a step necessary to allow Trump to run for, or be installed as, President. They also note that the presidential elections are in large part governed by State laws and run by State officials, and that several States have citizen-standing and other procedural mechanisms that could allow a challenge to Trump to be brought in State court. (They give as an example the removal of a participant in the January 6 riot from State office in New Mexico pursuant to a citizen complaint). The breadth of possible actions the authors contemplate is nothing short of breath-taking:

> We submit that all such [State] officials—administrators, executives, legislatures—possessing legal authority concerning such [election] matters likewise possess the authority (and duty) to interpret, apply, and enforce Section Three's disqualification in the course of exercising that legal authority. And once again: if such determinations are judicially reviewable under state law, the courts likewise possess the authority and duty to interpret, apply, and enforce Section Three.

What the authors do not do – and as my last section below will suggest <u>must</u> be done – is think through exactly how such challenges to Trump might arise. At a minimum, any such procedures would raise thorny federalism issues: while State procedures (and standing principles) may apply, the ultimate meaning and effect of Article 3 is a matter of federal law,

ultimately subject to Supreme Court review. Whether *Younger* or other forms of abstention would apply, whether State courts could grant interim relief, and whether some form of removal to federal court might exist are simply a few of the potentially manifold legal issues that may well arise.

3. Did Trump engage in insurrection

Toward the end of their article, the authors succinctly conclude that "if the public record [of Trump's acts] is accurate, the case is not even close" as to whether he has committed "insurrection" within the meaning of Article 3. Their rather short analysis of this simply reviews the "record" of Trump's antics known to all newspaper readers; their conclusion that these amount to "insurrection" is neither new or insightful, nor terribly useful in the absence of an understanding of how the "public record" can be developed into a true factual record subject to real analysis.

4. Next steps – and what is to be done?

The issues raised by Baude and Paulsen present a conundrum for a number of actors, including the Democratic party and the Biden campaign (and more broadly, all citizens horrified by the possibility of second Trump presidency) but also for the Department of Justice.

In the short term, it is clear that neither Democrats acting as such nor the DoJ will take any affirmative steps to bar Trump under Article 3. The DoJ has indicated that it is in essence doing the opposite by pursuing Trump's supporters under Section 2384 rather than Section 2383, and using entirely different statutory bases for their pursuit of Trump. For good and obvious reasons of propriety but also sound politics, President Biden has been eloquent in his silence about Trump's indictment and other legal problems; he and his election campaign are not at all likely to change that stance. They are also not going to urge State election officials to refuse to take steps that might lead to a Trump presidency – which could raise the nightmare of a kind of reverse "stop the steal" political and popular movements with unpredictable but likely unhealthy outcomes.

What emerges from Baude and Paulsen's analysis, however, is the possibility – and, I believe, the near inevitability – that some active citizen in some State will commence an action under permissive State procedures and standing requirements that would trigger an Article 3 analysis. At which point neither Democratic politicians nor the DoJ may be able to continue their silence. The Biden campaign and the Democratic party will face a real need to have some influence on the procedure that could be determinative of the election outcome, and may not be able to get away with a "no comment" on a pending issue of this magnitude. And it would be very likely that in some circumstances a State or federal court may formally ask the DoJ for its views.

The 2024 election cycle already risks an array of scary cataclysms that we cannot even begin to predict. Baude and Paulsen have focused on one particularly disruptive set of such adventures for which it is imperative that the issues be discussed and analyzed to inform some crucial decisions that will almost certainly arise before long.