No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF *AMICI CURIAE* AMERICAN HISTORIANS IN SUPPORT OF RESPONDENTS

JONATHAN B. MILLER
Counsel of Record
JOSHUA A. ROSENTHAL
MICHAEL ADAME
EUSHRAH HOSSAIN
PUBLIC RIGHTS PROJECT
490 43rd Street, Unit #115
Oakland, CA 94609
(510) 738-6788
jon@publicrightsproject.org

Counsel for Amici Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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STATEMENT OF INTEREST

Amici curiae are distinguished scholars whose expertise includes the histories of federal constitutional amendment, the laws of war, and the Civil War and Reconstruction.[1] All *amici* are elected members of the American Academy of Arts and Sciences and winners of either the Pulitzer or the Bancroft Prize or both.

Jill Lepore is the David Woods Kemper '41 Professor of History at Harvard University and director of the Amendments Project, a digital historical archive. Her fourteen books include the internationally acclaimed *These Truths: A History of the United States* (2018).

David Blight is the Sterling Professor of History and African American Studies at Yale University, the author of *Race and Reunion: The Civil War in American Memory* (2011) and winner of the Pulitzer Prize for *Frederick Douglass: Prophet of Freedom* (2018).

Drew Gilpin Faust is President *Emerita* of Harvard University and the Arthur Kingsley Porter University Professor. Her books include *This Republic of Suffering: Death and the American Civil War* (2008), a finalist for the National Book Award.

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[1] No party or counsel for a party authored the brief in whole or in part. No person, other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of the brief. University affiliation of *amici* is provided for identification purposes only.

John Fabian Witt is the Allen H. Duffy Class of 1960 Professor of Law at Yale Law School and the author of *Lincoln's Code: The Laws of War in American History* (2012).

Amici's interest in this appeal arises from the gravity of the case before the Court and the necessity of grounding any decision in a proper historical understanding of Section Three of the Fourteenth Amendment. As eminent American historians with expertise in the relevant era, actors, and events, *amici* are well qualified to assist the Court by establishing the original intent, meaning, and public understanding of the Disqualification Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the aftermath of the Civil War, Congress devised the Disqualification Clause of the Fourteenth Amendment out of concern that office-holders who had violated their oaths to the Constitution would re-assume positions of authority, destabilize state and federal governments, and suppress freedom of speech. The Republican framers of the Amendment believed that anything short of the disqualification of insurrectionists risked surrendering the government to anti-Constitutionalist rebels.[2] In a speech in 1866, Benjamin Butler, soon afterward elected to Congress, declared that secessionists had left their offices "for

[2] *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1989).

the purpose of destroying this government" and "now desire to return to their seats for the same purpose."[3]

"Plainly, the central idea of secession is the essence of anarchy," Lincoln had said in his First Inaugural Address.[4] Five years and seven hundred thousand war deaths later, the framers of the Fourteenth Amendment hoped not only to prevent a resurgence of secessionism but also to protect future generations against insurrectionism. An early draft of Section Three limiting its reach to those who had participated in "the late insurrection" was eliminated in favor of language that disqualified both past and future insurrectionists who had taken an oath to uphold the Constitution. "This is to go into our Constitution and to stand to govern future insurrection as well as the present," said one senator during floor debate.[5]

Without a disqualification clause that would endure, a Congressional committee warned, "flagrant rebellion, carried to the extreme of civil war," would become "a pastime." Future insurrections could be defeated by force of arms but "the battle may be still fought out in the legislative halls of the country."[6] Insurrectionists could take over state legislatures, state houses, Congress, the cabinet, and even the

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[3] WILLIAM NELSON, THE FOURTEENTH AMENDMENT, at 41–42 (1988) (quoting Benjamin Butler, Aug. 1866).

[4] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

[5] Cong. Globe, 39th Cong., 1st Sess., 2900 (1866) (remarks of Sen. Van Winkle).

[6] Report of the Joint Committee on Reconstruction, at xi (1866).

White House. Section Three was meant to prevent that possibility. Its framers intended Section Three: (1) to automatically disqualify insurrectionists; (2) to apply not only to the Civil War but also to future insurrections; and (3) to bar anyone who has betrayed an oath to uphold the Constitution from becoming President of the United States. It remains in place and in force today.

ARGUMENT

I. THE ORIGINS OF SECTION THREE

During the Civil War, concern about Confederate sympathizers in government posts led Congress to conduct investigations, employ oaths and loyalty tests, and remove individuals from office. At the end of the war, as ex-Confederate leaders attempted to assume positions in state and federal governments, Congress considered whether and how to bar them from office.

A. From the Start of the Civil War, the Federal Government Took Steps to Ensure Loyalty and Disqualify Insurrectionists in its Midst

When Abraham Lincoln was elected on November 6, 1860, many Democrats in the South refused to accept the outcome. "The election of Lincoln is the dissolution of the Union," a Charleston, South Carolina, newspaper announced, urging citizens, "the sooner we arm and organize the better."[7] On November 13, the South Carolina legislature called for a convention to consider secession. Constitutional

[7] Charleston Mercury, Nov. 8, 1860.

amendments designed to appease secessionists illustrate their demands. Mississippi senator Jefferson Davis introduced an amendment that would have established owning human beings as a constitutional right, guaranteed the extension of slavery to the territories, and reinforced the Fugitive Slave Clause.[8] Tennessee Congressman Andrew Johnson proposed that half the justices on the Supreme Court should be from slave states, and half from free states.[9] Georgia secessionists demanded a constitutional amendment reading, "No person of African descent shall be permitted to vote for Federal Officers, nor to hold any office or appointment under the government of the United States."[10]

In February of 1861, delegates from seceding states convened in Montgomery, Alabama, formed the Confederate States of America, and elected Jefferson Davis president. They drafted a constitution that, as the Confederacy's vice president Alexander H. Stephens proclaimed, established that "subordination to the superior race" is the "natural and moral condition" of Africans and their descendants.[11] In Washington, on the day slated for the Electoral College certificates to be counted at the

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[8] S. Journal, 36th Cong., 2d Sess. 63 (1860).

[9] Cong. Globe, 36th Cong., 2d Sess. 82–83 (1860).

[10] Journal of the Public and Secret Proceedings of the Convention of the People of Georgia (Milledgeville, GA), Jan. 16, 1861, at 18.

[11] 1 Frank Moore, *Speech of A. H. Stephens in* Rebellion Record: A Diary of American Events, with Documents, Narratives, Illustrative Incidents, Poetry, etc., 45–46 (New York: 1861).

Capitol, a pro-southern mob assembled and there were fears of what the *New York Times* described as "plots to take the city, blow up the public buildings, and prevent the inauguration of Lincoln."[12] Days later, Davis delivered his inaugural address in Montgomery, declaring that the Confederate Constitution differed "only from that of our fathers in so far as it is explanatory of their well-known intent," which he claimed was to sanction slavery.[13]

The outbreak of war in April 1861 raised the question of the loyalty of office-holders. Within weeks of Confederate forces firing on Fort Sumter, Lincoln's attorney general proposed that "all the employees of the Department—from the head Secretary to the lowest messenger, be required to take, anew, the oath of allegiance."[14] Northerners undertook to purge Confederate sympathizers from positions of authority both inside and outside of government and, in mass meetings, called upon Congress to do the same. Newspaper reporters were required to take loyalty oaths; so were telegraph operators. In July, Congress established a committee, headed by Wisconsin Republican John F. Potter, to investigate disloyalty within the federal government. In August, Lincoln signed a bill establishing a new loyalty oath for all civil servants.[15] Yet Frederick Douglass charged that

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[12] N.Y. Times, Feb. 14, 1861.

[13] Jefferson Davis, First Inaugural Address (Feb. 18, 1861).

[14] HAROLD MELVIN HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION, at 1 (1954).

[15] *Id.* at xii–xiv, 1, 2, 13, 18.

many Confederate sympathizers remained within the federal government "where they could be of the utmost service to the rebels."[16] The Potter Committee investigated some 500 federal government employees; many were forced to leave their positions.[17]

After the Committee published its report in January 1862, Congress ruled that "no pension shall be paid … to any person who has engaged in the present rebellion … or who has in any way given aid and comfort to those engaged in the rebellion."[18] In July, Congress passed an act requiring the swearing of a new oath by "every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military or naval department of the public service, excepting the President of the United States." Known as the Ironclad Oath, it read, in part:

> I, A B, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto.[19]

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[16] Frederick Douglass, *The Progress of the War*, IV Douglass's Monthly, Sept. 1861, at 513.

[17] *See* Hyman, *supra* n.14, at 7.

[18] Cong. Globe, 37th Cong., 2d Sess., Appx., 334 (1862).

[19] Act of July 2, 1862, ch. 128, 12 Stat. 502.

Two weeks later, Lincoln signed the Second Confiscation Act. "[E]very person who shall hereafter commit the crime of treason against the United States," the statute provided, "shall suffer death."[20] A second offense outlined in the Act punished persons who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to, any such existing rebellion or insurrection."[21] Finally, the Act provided that "every person found guilty of either of the offenses described in this act shall forever be incapable and disqualified to hold any office under the United States."[22] This language ("incite… assist or engage… give aid or comfort") and these measures established both the meaning and consequences of insurrection.

Questions of loyalty and qualification for office intensified as the war neared its end and Congress considered how to reconstruct the Union. In 1864, Congress passed the Wade-Davis Bill, which would have required a majority of all white men in any state in the former Confederacy to take the Ironclad Oath before readmission to the Union; Lincoln pocket-vetoed the bill. Republicans in Washington remained concerned about ex-Confederates returning to office. "It is our duty to guard the loyalty of this chamber," insisted Massachusetts senator Charles

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[20] Second Confiscation Act, ch. 195, Sec. 1, 12 Stat. 589 (July 17, 1862).

[21] *Id.* at Sec. 2.

[22] *Id.* at Sec. 3.

Sumner.[23] "We can manage the traitors in our front," a Union veteran wrote to Illinois senator Lyman Trumbull, "if you will keep them out of the Legislative Halls of our Government."[24]

B. At the End of the War, Disqualification Became a Pressing Concern as Insurrectionists Were Elected to Congress

After Appomattox, Congress determined to use its power to bring order from chaos. This meant, by design and necessity, the creation of civil and political rights for the freed people, the disqualification of former rebels, and the prevention of future insurrections.

Robert E. Lee surrendered to Ulysses S. Grant on April 9, 1865; days later, Lincoln was assassinated. Union troops captured Jefferson Davis in Georgia in May; he was charged with treason. If Davis could not be convicted of treason, the *Philadelphia Inquirer* remarked, "we may as well ... expunge the word at once from our dictionaries."[25] But Davis's trial was repeatedly delayed, partly out of fear that Davis would use a trial to argue the constitutionality of secession. With his case unresolved, other treason prosecutions were put on hold.[26] After so terrible a

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[23] Charles Sumner, *Oath for Senators in* Works, Jan. 25, 1864 at 8: 53–57.

[24] *See* Hyman, *supra* n.14, at 84 (quoting a letter written by W. F. Munroe to Lyman Trumbull, dated June 18, 1864).

[25] Philadelphia Inquirer, Apr. 2, 1868.

[26] CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS (2017); ROBERT

war, few Americans had an appetite for mass trials and executions. "I would deprive them of power but not of life," wrote abolitionist Lydia Maria Child to a Republican congressman from Indiana.[27] Many also lost their nerve for prosecuting Davis.

While the nation grieved its staggering wartime losses, President Johnson, driven by his bedrock beliefs in states' rights and white supremacy, sought the swift readmission of the former Confederacy and pursued a policy of leniency and pardon.[28] He hoped to convince Congress to abandon the Ironclad Oath, which made making federal appointments in the South nearly impossible. An agent wrote to the President from Wilmington, about men seeking positions, that "like nearly everybody in North Carolina, from 17 to 55 years of age, they may have in some form or other been mixed up with the rebellion."[29]

The more generous Johnson's pardons, and the clearer it became that prominent ex-Confederates were not likely to be prosecuted for treason, the more concerned became Congress about their possible

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ICHENHAUER-RAMIREZ, TREASON ON TRIAL: THE U.S. V. JEFFERSON DAVIS (2019).

[27] WILLIAM A. BLAIR, WITH MALICE TOWARD SOME: TREASON AND LOYALTY IN THE CIVIL WAR ERA, at 268 (2014) (quoting a letter from Lydia Maria Child to George W. Julian dated Apr. 8, 1865).

[28] On the scale and impact of the losses, *see* DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR (2008).

[29] S*ee* Hyman, *supra* n.14, at 55.

return to power. In 1865 and early 1866, reports reached Washington that secession was "rampant again" in the South and that white Southerners were "more out & out rebels than they were in 1861."[30] Ex-Confederates founded the Ku Klux Klan in December 1865. "Treason does, under existing circumstances, not appear odious in the south," former Union major general Carl Schurz reported, and "there is as yet among the southern people an *utter absence of national feeling*."[31] Reports circulated widely about the suppression of freedom of speech. "Northern men have been subjected to the *Gun* knife the *pistol* the rope & tar & feathers for opinion sake all over the South," one correspondent informed Ohio senator John Sherman.[32] Southern states began passing Black Codes, restricting the rights of freed people. Equally common were reports of white Southerners' violent campaign to reduce newly freed Black Americans, as one Union commander testified, "to a condition which will give the former masters all the benefits of slavery."[33]

Disqualification grew in urgency when, in elections held in the fall of 1865, two former

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[30] *See* Nelson, *supra* n.3, at 41 (quoting a letter from William Mithoff to John Sherman, dated Dec. 17, 1865 and a letter from John Kirkwood to Salmon P. Chase, dated Dec. 4, 1865).

[31] S. Exec. Doc., 39th Cong., 1st Sess., No. 2, p. 13 (1866) (report by Gen. Carl Schurz) (emphasis in original).

[32] *See* Nelson, *supra* n.3, at 42 (quoting a letter from M. Stone to John Sherman dated Dec. 27, 1865).

[33] Report of the Joint Committee on Reconstruction at 142 (testimony of General Alfred H. Terry).

Confederate senators and four former Confederate congressmen were elected to the Thirty-Ninth Congress. "The members from the Southern States who will come to Washington asking for seats in Congress next winter, will be in sympathy with all there is left of treason at the South," a Milwaukee newspaper reported.[34] In November, Columbia constitutional law professor Francis Lieber, who had written the laws of war for the Union Army and had also proposed a series of constitutional amendments, wrote to Sumner to sound an alarm by asking whether, in the event that Jefferson Davis were not convicted of treason, "is he not, in that case, completely restored to his citizenship, and will he not sit by your side again in the Senate? And be the Democratic candidate for the next presidency? I do not joke."[35] In January, these fears were all but realized when the Democrat Alexander H. Stephens, the former vice president of the Confederacy, was elected to the U.S. Senate. The clerk of Congress refused to call the names of the ex-Confederates at roll and they were never seated. The Joint Committee on Reconstruction resolved to devise a means beyond the Ironclad Oath to bar "from positions of public trust of, at least, a portion of those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence."[36]

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[34] Milwaukee Sentinel, July 26, 1865.

[35] Francis Lieber, *Lieber to Sumner, November 8, 1865,* Charles Sumner Papers, Houghton Library, Harvard University and available at https://dpul.princeton.edu/microfilm/catalog/dc6m312077g (frames 29–30).

[36] Report of the Joint Committee on Reconstruction, at xviii.

The public, too, clamored for a means to disqualify ex-insurrectionists. Groups of citizens from all over the country presented petitions to Congress urging security "against a renewed attempt to secede," many signed by hundreds of people, including from Illinois,[37] Indiana,[38] Maine,[39] Massachusetts,[40] New Jersey,[41] New York,[42] Ohio,[43] and Wisconsin.[44] One

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[37] Petition, 39th Cong. Feb. 13, 1866; The Amendments Project, edited by Jill Lepore and Tobias Resch, 2023, https://amendmentsproject.org, Record No. p_s58-p42_00017 (last accessed Jan. 28, 2024). Record Source: Blackhawk, M., Carpenter, D., Resch, T. and Schneer, B., *Congressional Representation by Petition: Assessing the Voices of the Voteless in a Comprehensive New Database, 1789–1949*, Legislative Studies Quarterly, 46: 817–49 (2021), https://doi.org/10.1111/lsq.12305]. Unless otherwise indicated, all petitions cited are from this dataset.

[38] Petition, 39th Cong. Feb. 14, 1866, Record No. p_s58-p43_00003.

[39] Petition, 39th Cong., Feb. 19, 1866, Record No. p_s58-p46_00019; Petition, 39th Cong., Apr. 5, 1866, Record No. p_s58-p77_00003.

[40] Petition, 39th Cong., Feb. 20, 1866, Record No. p_s58-p47_00024; Petition, 39th Cong., Mar. 5, 1866, Record No. p_s58-p55_00019.

[41] Petition, 39th Cong., Mar. 5, 1866, Record No. p_s58-p55_00011.

[42] Petition, 39th Cong., Feb. 13, 1866, Record No. p_s58-p42_00024; Petition, 39th Cong., Mar. 19, 1866, Record No. p_s58-p65_00000.

[43] Petition, 39th Cong., Apr. 4, 1866, Record No. p_s58-p76_00020; Petition, 39th Cong., Mar. 16, 1866, Record No. p_s58-p64_00000; Petition, 39th Cong., Mar. 5, 1866, Record No. p_s58-p55_00004.

hundred and fifty-one citizens of Bucksport, Maine, submitted a petition requesting that the House "impose such conditions upon the Rebel States, as shall punish treason—at least with ineligibility to office and loss of power, and reward loyalty with confidence and honor."[45] Other petitions adopted different language, including one asking Congress to devise a constitutional amendment providing "that no person who has been engaged in the late rebellion shall ever be eligible to any office of honor, trust, or profit under the government."[46]

The challenge confronting Congress at the end of the war, according to Massachusetts senator Henry Wilson, was to deprive both the leaders of the former Confederacy and any future insurrectionists of power in such a way, and with such permanence, that "the curse of civil war may never be visited upon us again."[47]

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[44] Petition, 39th Cong., Mar. 23, 1866, Record No. p_s58-p69_00020.

[45] *See* Blair, *supra* n.27, at 296–97 (petition of N. T. Hill and 150 Others, Bucksport, Maine, Mar. 12, 1866, from Chester, Pa., Mar. 5, 1866, and from Lewis Holmes and Others from Bridgewater, Mass., Mar. 2, 1866, RG 233, Committee on the Judiciary, Petitions and Memorials, NARA).

[46] Petition, 39th Cong., Mar. 9, 1866, Record No. p_s58-p59_00003; *see also* Petition, 39th Cong.., Mar. 9, 1866, Record No. p_s58-p59_00005.

[47] Cong. Globe, 38th Cong. 1st Sess., 1203 (1864).

II. THE DRAFTING AND RATIFICATION OF SECTION THREE

After the war, a congressional investigation uncovered substantial and disturbing evidence of continued hostility in the southern states. Congress drafted Section Three out of concern about the security of the republic and, in revision, both strengthened and extended it. The bite of Section Three contributed to the initial refusal of the states of the former Confederacy to ratify the Fourteenth Amendment.

A. A Congressional Inquiry Discovered Widespread Rebelliousness in the South

When the Thirty-Ninth Congress began its second session in December 1865, it immediately confronted the problem of the return to power of ex-Confederates. To address this and other challenges of Reconstruction, including the vital matters of equal citizenship and representation, Congress established a fifteen-man Joint Committee on Reconstruction.[48]

Inquiring into conditions in the South, the Joint Committee heard testimony from 145 witnesses, including military leaders, elected officials, federal judges, former Confederates, and Black freedmen. It sought to determine whether the readmission to the Union of the states of the former Confederacy "should only be granted upon certain conditions and

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[48] *See* BENJAMIN B. KENDRICK, ED., THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865-1867 (1914); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 246–47, 252–61 (1988).

guarantees which would effectually secure the nation against a recurrence of evils so disastrous as those from which it had escaped at so enormous a sacrifice."[49] A representative example from the more than 800 pages of testimony is that of J. W. Alvord, who worked for the Freedman's Bureau. He was questioned about conditions in Virginia and in other southern states.

> Question. Now state what, among the rebel people, is the general feeling towards the Government of the United States.
>
> Answer. It is hostile, as it seems to me, in the great majority of the southern people. I mean that part of them who were engaged in the rebellion. There is evidently no regret for the rebellion, but rather a defence of it. …
>
> Question. What great object do they seem to contemplate in their being readmitted to Congress by their senators and representatives?
>
> Answer. They seem to suppose that by re-admission they can get political power and obtain again the supremacy which they once had, and with the exception of slavery, they expect to be still a prosperous and dominant portion of our government. Slavery they have given up in the old form, but they want

[49] Report of the Joint Committee on Reconstruction, at x.

> to subdue and keep in a low place the negroes, by some compulsion which it seems to me they are trying to effect not only privately but by all the legislation that I learned of or witnessed.[50]

From across the South, the testimony tended in the same direction. To the question, "If they could have their way would the rebel people generally remain in the Union?" a tax commissioner answered, "No; I think they have a stronger aversion and dislike of the Union than when they seceded."[51] Asked what accounted for this aversion in Mississippi, a major general answered, "Their greatest antipathy seems to arise from the fact that the negro has been employed against them, and that they cannot control them now as they please."[52] Even as the hearings took place, members of Congress continued to receive alarming reports from the South. One South Carolinian warned Republican leader Thaddeus Stevens about ex-Confederates, "trust them not, though they be willing to swear fealty and devotion morning, noon and night!"[53]

A prominent member of the Joint Committee, John Bingham, a staunch abolitionist from Ohio, led

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[50] *Id.* at 242–43 (testimony from Virginia, North Carolina, and South Carolina, including the testimony of J.W. Alvord).

[51] *Id.* at 21 (testimony from Virginia, North Carolina, and South Carolina, including testimony of John Hawkshurst).

[52] *Id.* at 5 (testimony from Arkansas, Georgia, Mississippi, and Alabama, including testimony of Major General Edward Hatch).

[53] *See* Nelson, *supra* n.3, at 41 (quoting a letter from S. Cerley to Thaddeus Stevens dated Feb. 6, 1866).

the way in constructing the Fourteenth Amendment.[54] On January 25, 1866, Bingham raised the disqualification of insurrectionists. "There are men now within these walls who may learn, when it is too late, that the ballot in the hand of the conspirator is more dangerous to the safety of the Republic than the bayonet." As they re-imagined the Constitution that winter, Bingham urged his colleagues to not allow the ex-Confederate states to be "restored with the governing power … in the hands of the very men who but yesterday waged war against the life of the Republic."[55]

Bingham spoke for those Republicans who had lived the entire crisis over slavery, its severing of the American political system, the shuddering impact of *Dred Scott*, secession and the war for the Union. All of these revolutionary events had occurred on their watch and they carried the heavy weight of responsibility for their consequences. Bingham named the fundamentals at the core of Section Three. States had "defiantly disregarded" the equal rights of the freedpeople and, for that matter, all citizens,

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[54] *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION, ch. 2 (2019); MANISHA SINHA, THE RISE AND FALL OF THE SECOND AMERICAN REPUBLIC, 1860-1920, ch. 3 (2024).

[55] Cong. Globe, 39th Cong., 1st Sess., 429 (1866) (remarks of Rep. Bingham). *See also* GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT, at 113 (2013); Foner, *supra* n.54, at 82–87.

because of a "want of power in Congress to enforce that guarantee."[56]

Bingham insisted on federal protection of equal rights under law because the "late rebel states" would surely not do it themselves. The former Confederate states, he acknowledged, might not pose an immediate military threat in their defeated condition. "But," Bingham warned, in telling words, "unless you put them in terror of your laws, made efficient by the solemn act of the whole people to punish the violators of oaths, they may defy your restrictive legislative power when reconstructed."[57] In this historical reality and logic Section Three found its place at the heart of the Fourteenth Amendment. Bingham and his colleagues did not intend it as a political measure to fit their historical moment alone. "This legislation will be felt," he said, "by generations of men after we all have paid the debt of nature."[58] And against partisan critics he claimed the Amendment "towers above all party consideration; it touches the life of the Republic, and not the miserable inquiry whether this or that party should be successful in the coming contest."[59] Reconstruction would only be as good or as worthy as its laws, if indeed Constitutional law could be newly forged so as to curb the urges of embittered, defeated men.

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[56] Cong. Globe, 39th Cong., 1st Sess., 429 (1866) (remarks of Rep. Bingham).

[57] *Id.* at 1094.

[58] *Id.* at 1088.

[59] *Id.* at 429.

B. The Development of Section Three Demonstrates Congress's Intent to Make Disqualification Targeted and Permanent

In determining how disqualification might be enacted, Congress looked to earlier measures but largely devised its own. Precedent existed for disqualifying insurrectionists both by constitutional provision and by statute.[60] In 1787, in the aftermath of Shays' Rebellion, an uprising of farmers in western Massachusetts, that state's legislature had passed a law decreeing that for a period of three years those who had participated in the insurrection "shall not serve as Jurors, be eligible to any Town-Office, or any other Office under the Government of this Commonwealth."[61]

Early in 1866, four constitutional amendments either disenfranchising or disqualifying insurrectionists were introduced in Congress.[62] In

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[60] Some early state constitutions provided for disqualification upon impeachment. *See, e.g.*, N.Y. Const. of 1777, art. XXXIII.

[61] Act of Feb. 16, 1787, ch. VI, 1787 Mass. Acts 555.

[62] Bill, 39th Cong., Feb. 16, 1866, The Amendments Project, *supra* n.37, Record No. b039-h18660216cu ("No officer, civil or military, of the so-called southern confederacy, shall ever be eligible to hold any office under this government"); Bill, 39th Cong., Mar. 19, 1866, Record No. b039-h00094 ("No person, except a citizen of the United States who has at all times borne true allegiance thereto, shall ever hold office under the United States"); Bill, 39th Cong., Feb. 19, 1866, Record No. b039-h00070 ("No person shall be qualified or shall hold the office of President or Vice President of the United States, Senator or Representative in the national Congress, ... who has been or shall hereafter be engaged in any armed conspiracy or rebellion

April, the Joint Committee presented a disenfranchisement provision as the third section of an omnibus amendment. This early version read:

> Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.[63]

When Stevens opened the floor for debate on May 8, he suggested about Section Three that "Among the people I believe it will be the most popular of all the provisions," confessing that he himself found it too lenient: "Here is the mildest of all punishments ever inflicted on traitors."[64]

Section Three was the subject of considerable debate. At each stage of revision, Congress chose more narrowly directed and yet harsher and more

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against the Government of the United States … or who has voluntarily aided, or who shall hereafter voluntarily aid, abet, or encourage any conspiracy or rebellion against the Government of the United States"); and Bill, 39th Cong., Mar. 8, 1866, Record No. b039-s00040 ("No person who has been or shall be willingly engaged in rebellion against the United States shall exercise the elective franchise or hold any office under the authority of the United States or any State"); HERMAN V. AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY, 223–24, Appx. A (U.S. Gov. Printing Office, 1897).

[63] Cong. Globe, 39th Cong., 1st Sess., 2545 (1866).

[64] *Id.* at 2460.

enduring measures, eventually abandoning near-universal but temporary disenfranchisement in favor of permanent disqualification of former office-holders, not only for ex-Confederates but also for future insurrectionists. Representative James Garfield of Ohio, for instance, asked what was so magical about the year 1870: "If the persons referred to are not worthy to be allowed to vote in January of 1870, will they be worthy in July of that year?"[65] On May 10, the amendment passed the House, as written, 128-37.[66]

In the Senate, it was re-written. On May 23, Michigan senator Jacob Howard said that he "should prefer a clause prohibiting all persons who have participated in the rebellion, and who were over twenty-five years of age at the breaking out of the rebellion, from all participation in offices, either Federal or State, throughout the United States." New Hampshire senator Daniel Clark proposed limiting the measure to previous oath-takers: "That no person shall be a Senator or Representative in Congress or permitted to hold any office under the Government of the United States who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto."[67]

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[65] *Id.* at 2463.

[66] *Id.* at 2545.

[67] *Id.* at 2768 (remarks of Sen. Clark).

This sharpening of Section Three elicited the suggestion that barring prominent men from office would backfire. Maryland senator Reverdy Johnson asked, "Do you not want to act upon the public opinion of the masses of the South? Do you not want to win them back to loyalty? And if you do, why strike at the men who, of all others, are most influential and can bring about the end which we all have at heart?"[68] To this, those who favored the House draft countered, "Slavery, by building up a ruling and dominant class, had produced a spirit of oligarchy adverse to republican institutions, which finally inaugurated civil war. The tendency of continuing the domination of such a class, by leaving it in the exclusive possession of political power, would be to encourage the same spirit, and lead to a similar result."[69]

Senator Howard introduced what was essentially the final version on May 29:

> 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

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[68] *Id.* at 2898–99 (statement of Sen. Johnson).

[69] Report of the Joint Committee on Reconstruction, at xiii.

> States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof; Congress may by a vote of two-thirds of each House, remove such disability.[70]

The version adopted by Congress declined the invitation of the earlier omnibus amendment to intervene in and regulate the manner prescribed by state legislatures for holding elections of senators or representatives, or for appointing electors for President and Vice-President, by disenfranchising insurrectionists. Instead, the drafters of the final version of Section Three chose to regulate who was eligible to hold state or federal office, a more precisely targeted and stricter measure. They did not place either former presidents or presidential candidates beyond its reach, exceptions that would have defied the logic of Section Three.

C. Southern States Resisted Ratification, in part, Because of the Disqualification of ex-Confederates

The Fourteenth Amendment passed the Senate on June 8 and was concurred in by the House five days later.[71] Nearly all Republicans voted for it and nearly all Democrats against. During the ratification debates, the public avidly inquired into the consequences of Section Three. In February 1867, for instance, an Ohio newspaper noted that not having

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[70] Cong. Globe, 39th Cong., 1st Sess., 2869, 2921 (1866).

[71] *See* Nelson, *supra* n.3, at 58.

Section Three "would render Jefferson Davis eligible to the Presidency of the United States."[72] The Amendment initially fell short of ratification, as every southern state but Tennessee rejected it. Southern legislators objected in particular to Section Three. The Texas legislature decried the Amendment as involving the "loss of our honor as a people, and our self respect as individual men"; the Arkansas legislature complained that Section Three would lead to the disqualification of "many of our best and wisest citizens"; and the North Carolina legislature proposed an alternative amendment, omitting Section Three.[73]

These Southern reactions reflected the emerging ideology of the Lost Cause, a tenet of which was the argument by ex-Confederates that they had never engaged in "rebellion," should never be considered "rebels," and had merely exercised legitimate rights of "sovereignty" with secession and war. Section Three had always been intended to thwart these claims. In March 1867, over President Johnson's veto, Congress passed the Military Reconstruction Act, which stipulated that no state could re-enter the

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[72] Gallipolis Journal, Feb. 21, 1867. *See also* Gerald N. Magliocca, *Shooting Fish in a Barrel: The Presidency and Section 3*, Balkinization (Jan. 2, 2024), https://balkin.blogspot.com/#7674686035441372191.

[73] Joseph B. James, *Southern Reaction to the Proposal of the Fourteenth Amendment*, 22 J. of Southern History 477, 485, 491, 495–96 (1956).

Union without first ratifying the Fourteenth Amendment.[74]

The Fourteenth Amendment was ratified on July 9, 1868. Unlike the Thirteenth and later the Fifteenth Amendment, no overt celebrations ensued in Congress or elsewhere. The Fourteenth Amendment represented a series of compromises, fully satisfying almost no one. But in the Fourteenth Amendment the United States now possessed the blueprint of a new Constitution, a new kind of federalism, a commitment to equality before the law, and a method to legally guarantee the essential results of the Civil War.[75] That blueprint included prohibiting past office-holders from holding federal or state office after engaging in an insurrection against the Constitution.

III. THE PERSISTENCE OF SECTION THREE

The star-crossed prosecution of Jefferson Davis both shaped and illuminated the meaning of Section Three. After the ratification of the Fourteenth Amendment, continued concern about a possible presidential bid by Davis informed subsequent Congressional action on amnesty. Section Three remains in place and in force in the twenty-first century.

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[74] JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY, 313–14 (2012).

[75] *See* Foner, *supra* n.48, at 90–92.

A. The Jefferson Davis Case Showed That Section Three Required No Criminal Conviction and Was Self-Executing

Amici curiae briefs filed in support of the Petitioner by individuals who are not historians claim that "Historical records ... reveal that the Framers and ratifiers of the Fourteenth Amendment were not concerned that a Confederate leader could attain the presidency" and that "No Republican seriously feared that the national electorate would place a former rebel like Jefferson Davis in the White House."[76] These assertions are mistaken.

Obstacles to prosecuting Davis had made it increasingly likely that he would not be convicted on treason charges, thus underscoring the need for Section Three. As Lieber had worried, the failure to convict would mean that Davis would not fall under the disqualification provisions of the Second Confiscation Act. Section Three augmented that Act's disqualification provision by eliminating the need for a treason conviction before a federal jury, at least insofar as prior oath-takers were concerned.[77] Moreover, once underway, the Davis prosecution

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[76] Brief of Former Attorneys General Edwin Meese III, Michael B. Mukasey, and William P. Barr, et al. as *Amici Curiae* Supporting Petitioner, at 3 (Jan. 18, 2024) (No. 23-719) (hereinafter "Br. of Meese et al."); Brief for Professor Kurt T. Lash as *Amicus Curiae* in Support of Petitioner, at 2 (Jan. 16, 2024) (No. 23-719).

[77] By 1866, Lieber discouraged further treason proceedings out of a growing fear that Davis would be acquitted, which made Section Three's disqualification more urgent. *See* Witt, *supra* n.74, at 320–21.

illuminated the meaning of Section Three by showing that lawyers and judges understood it to be self-executing.[78]

A pretrial hearing in the Davis case took place before a circuit court in Richmond in December 1868.[79] Chief Justice Salmon P. Chase, riding circuit, presided over the court alongside U.S. District Court Judge John C. Underwood for the District of Virginia. Underwood had impaneled Black men as potential jurors, which had elicited widespread public outrage in both the North and the South.[80] Davis's lawyer complained, "I find it impossible to believe that we are destined to play parts in a farce so contemptible as a trial before Underwood and a set of recently emancipated Negroes."[81]

This furor contributed to Chase's interest in derailing the trial: his political ambitions made

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[78] Petitioner's *amici* offer Thaddeus Stevens's May 10, 1866 assertion that Section Three "will not execute itself" as evidence that Section Three requires enabling legislation. Br. of Meese et al. at 22 (quoting Cong. Globe, 39th Cong., 1st Sess. 2544 (remarks of Rep. Stevens)). Crucially, though *amici* do not mention it, Stevens's assertion referred to the earlier disenfranchisement version of Section Three, not the amended disqualification version passed by Congress. Even had Stevens's argument applied to the provision at issue here, he offers both federal and state examples of enabling legislation.

[79] Jill Lepore, *What Happened When the U.S. Failed to Prosecute an Insurrectionist Ex-President*, The New Yorker, Dec. 4, 2023.

[80] N.Y. Herald, Nov. 23, 1867; Richmond Dispatch, Nov. 26, 1867.

[81] Nicoletti, *supra* n.26, at 275 (quoting a letter from Charles O'Conor to Varina Davis, dated Oct. 29, 1867).

presiding over the trial a no-win proposition. Privately, he suggested to Davis's attorneys that Davis could no longer be prosecuted for treason because, having been automatically disqualified for office upon the ratification of the Fourteenth Amendment, he had already been punished. Davis's defense made this argument. "It needs no legislation by Congress to give it effect," his lawyer said.[82] The prosecution countered that the Constitution is not a criminal code and that being disqualified for office is not a penalty.[83] Chase agreed with the defense; Underwood agreed with the prosecution.[84]

On February 15, 1869, the prosecution entered a *nolle prosequi*. That May, in *Griffin's Case*, Chase issued an opinion (Section Three is *not* self-executing) that contradicted his view in *Davis* (it *is* self-executing). In *Griffin*, Chase invoked the "inconveniences" that would follow from the retroactive disqualification of judges under a "literal interpretation" of Section Three and crafted an interpretation purpose-built to suit his preferred outcome.[85] It had no effect on Section Three.

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[82] *See* Nicoletti, *supra* n.26, at 293–95. *See also* JEFFERSON DAVIS, 3 JEFFERSON DAVIS, CONSTITUTIONALIST: HIS LETTERS, PAPERS, AND SPEECHES, 199–200 (1923).

[83] *Id.* at 204–08.

[84] *See* DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY, 57–61 (2001) (On the use of the entire affair for an early form of national reconciliation).

[85] *In re Griffin*, 11 F. Cas. 7, 25 (C.C.D. Va. 1869); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Commentary 87, 102–08 (2021).

For decades, Jefferson Davis stood as the cautionary tale through which Congress and the public understood Section Three.[86] No danger better illustrated the peril the nation would have faced without Section Three than the prospect of the leader of an insurrection running for President.

B. Requests for Amnesty Underscore the Broad and Immediate Impact of Section Three

After the Fourteenth Amendment was ratified, ex-rebels petitioned Congress seeking removal of the disabilities automatically imposed by the Disqualification Clause. Congress received hundreds of these petitions before the 1870 Enforcement Act. They came in droves, sometimes nearly a dozen a day.[87] And, because individual petitions were often submitted on behalf of large numbers of people—for example, an 1869 petition for "26 members of the Georgia legislature"—they likely represent thousands of petitioners.[88]

Johnson's successor urged Congress to favor reconciliation. "More than six years having elapsed since the last hostile gun was fired between the armies then arrayed against each other," President Ulysses S. Grant told Congress in 1871, "it may well

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[86] Public Ledger, Oct. 3, 1871. This Memphis newspaper noted that "Fred Douglass might be President" but "Every Southern man who lies under the ban of the Fourteenth Amendment cannot."

[87] *See, e.g.,* H.R. Journal, Jan. 5, 1869, at 100.

[88] H.R. Journal, Feb. 9, 1869, at 306.

be considered whether it is not now time that the disabilities imposed by the Fourteenth Amendment should be removed."[89] By 1872, Congress estimated the number of petitioners at "fifteen or sixteen thousand."[90] When Congress considered a general amnesty bill, some members tried, without success, to attach civil rights provisions. As Black congressman Joseph Rainey declared about ex-Confederates: "we are willing to accord them their enfranchisement, and here today give our votes that they may be amnestied" but "there is another class of citizens in this country who have certain dear rights and immunities which they would like you, sirs, to remember and respect."[91] Congress in 1872 passed a blanket amnesty, decreeing that

> all political disabilities imposed by the third section of the fourteenth article of amendments of 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

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[89] Ulysses S. Grant, Third Annual Message to Congress, Dec. 4, 1871.

[90] Cong. Globe, 42nd Cong., 2d Sess., 3381 (1872) (remarks of Rep. Butler).

[91] *See* Magliocca, *supra* n.85 at 87–130; Cong. Globe, 42nd Congr., 2d Sess. 3382–83 (1872) (remarks of Rep. Rainey).

> States, heads of departments, and foreign ministers of the United States.[92]

The 1872 Amnesty Act specifically did not extend to anyone who had served in Congress between 1859 and 1863, which included Jefferson Davis. Disqualification remained in full force for those not covered by the Act. Newspapers continued to observe that, without Section Three, Davis or another ex-Confederate might become President of the United States.[93] Ex-Confederates would indeed soon be elected to governorships and other offices all across the South. In 1876, Maine Republican James Blaine argued in Congress against extending amnesty to Davis because it would make him "eligible and worthy to fill any office up to the Presidency of the United States."[94] The *Chicago Tribune* complained that a new amnesty bill before Congress was "a bill to make DAVIS eligible to the presidency"[95] and a Burlington, Vermont, newspaper regretted that the legislation seemed designed to make Davis "the Democratic candidate for President in 1876 or 1880."[96] In 1879, Northerners expressed gratitude that Section Three meant that Davis could not run for president.[97] (As late as 1896, Jefferson Davis's

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[92] Act of May 22, 1872, ch. 193, 17 Stat. 142.

[93] *See* Magliocca, *supra* n.72.

[94] 44 Cong. Rec. 325 (1876) (remarks of Rep. Blaine).

[95] Chicago Tribune, Jan. 12, 1876.

[96] Burlington Weekly Hawkeye, Jan. 20, 1876.

[97] Sioux City Daily Journal, Mar. 5, 1879. *See also, e.g.*, Belleville Advocate, May 7, 1880 (stating that holding President

nephew, John Taylor Wood, who had been a U.S. Naval officer before serving in the Confederate Navy, and who was never convicted of any crime, petitioned Congress for the removal of his Section 3 disabilities.[98])

In the South, Jefferson Davis became an emblem of the Lost Cause. After having been honored in one ceremony after another across the South and delivering a fierce defense of secession in his memoirs, Davis died in 1889. In 1898, with a new generation in power, Congress enacted a blunderbuss amnesty for past oath violators, closing a chapter in the story of the Civil War.[99] Yet it left Section Three in place for future generations, a bulwark against disunion and lawlessness.

CONCLUSION

The meaning of Section Three of the Fourteenth Amendment is best discerned in the actual history of Reconstruction. Haunted by the nation's suffering and fearful of disloyalty and ongoing political violence, Congress conducted an investigation into conditions in the South and determined that the disqualification of office-holders who had engaged in

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Grant ineligible to a third term of office would "be placing him on a par with Jefferson Davis so far as '*eligibility*' for the presidency is concerned"); Buffalo Morning Express, Apr. 28, 1882 (warning that a universal amnesty would mean that Davis could be "Commander-in-Chief of the Army of the United States").

[98] An Act To Remove the political disabilities of Colonel John Taylor Wood, Febr. 11, 1897, 54th Congr., ch. 17, 29 Stat. 801.

[99] Act of June 6, 1898, ch. 389, 30 Stat. 432.

an insurrection against the Constitution was necessary for the security of the republic. Their concerns included a possible bid for the presidency by Jefferson Davis. Section Three also gave the federal government the authority to guide reconstructed ex-Confederate states to find new leadership committed to equal rights for all. With an eye toward establishing enduring fundamental law and ensuring domestic tranquility, they framed a provision designed to hold future insurrectionists accountable by the same means. They knew that no one in the United States is above the law, not even the President, and that no republican government can afford to return insurrectionists to office. As Missouri Republican John B. Henderson declared the day he cast his vote for the Fourteenth Amendment in the Senate, "The language of this section is so framed as to disenfranchise from office the leaders of the past rebellion as well as the leaders of any rebellion hereafter to come."[100] May the curse of that hereafter never come again.

[100] Cong. Globe, 39th Cong., 1st Sess., 3035–36 (1866).

Respectfully submitted,

JONATHAN B. MILLER
Counsel of Record
JOSHUA A. ROSENTHAL
MICHAEL ADAME
EUSHRAH HOSSAIN
PUBLIC RIGHTS PROJECT
490 43rd Street, Unit #115
Oakland, CA 94609
(510) 738-6788
jon@publicrightsproject.org

Counsel for Amici Curiae

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