

**A Response to Michael B. Mukasey and *Cause of Action***

Michael B. Mukasey, a former Attorney General of the United States (and former Chief Judge of the United States District Court for the Southern District of New York), has stated that if former Secretary of State (and former Senator) Hillary Clinton is convicted under 18 U.S.C. § 2071,<sup>1</sup> then she is disqualified from holding the presidency.<sup>2</sup> Likewise, a Washington, DC think tank has just published a white paper taking the same position.<sup>3</sup> Mukasey's and *Cause of Action*'s position is fundamentally misconceived; indeed, neither puts forward *any* authority for the position that Section 2071 or any other federal statute creates or could create a disqualification in regard to any elected federal position, including the presidency.

It is widely accepted that the Supreme Court's decisions in *Powell v. McCormack*<sup>4</sup> and *U.S. Term Limits, Inc. v. Thornton*<sup>5</sup> have come to stand for the proposition that neither Congress nor the States can add to the express textual qualifications for House and Senate seats in Article I. Importantly, the rationale of *Powell* and *U.S. Term Limits*—i.e., the primacy of the

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<sup>1</sup> 18 U.S.C. § 2071(b) (“Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any **office under the United States.**” (emphasis added)).

<sup>2</sup> See Transcript, MSNBC MORNING JOE (Aug. 24, 2015, 06:45:25 AM):

*Mukasey*: [I] think the more dangerous part of this from [Hillary Clinton's] standpoint is not so much the placement of the material there [on her server] as wiping the server, because there are other statutes that deal with what happens to you if you are a custodian of public records and you among other things alter them or obliterate them. [N]umber one, that's a felony, but that statute makes you unqualified—disqualifies you from holding any further office in the United States and **she's running for a further office under the [U]nited [S]tates.**

*Interviewer*: [Y]ou're saying there's statutes on the books now[?]

*Mukasey*: [Y]eah.

*Interviewer*: [T]hat would prohibit that?

*Mukasey*: [T]itle 18, [U.S.C.] [§] 2071.

*Id.* (at 6:47:57 AM) (emphasis added).

<sup>3</sup> See *Legal Analysis of Former Secretary of State Hillary Clinton's Use of a Private Server to Store Email Records*, CAUSE OF ACTION: ADVOCATES FOR GOVERNMENT ACCOUNTABILITY 1 (Aug. 24, 2015) (“As described below, based upon facts publicly disclosed and consistent with General Mukasey's conclusions, the manner in which former Secretary Clinton stored official email correspondence during her tenure as Secretary of State, and her conduct with those emails subsequent to her resignation, trigger applicable laws and regulations relating to federal records and also raise criminal concerns, **with at least one applicable penalty being the disqualification from holding the office of President.**” (emphasis added)), *available at* <http://causeofaction.org/assets/uploads/2015/08/Hillary-Clinton-Email-Memo-8.24.15.pdf>.

<sup>4</sup> 95 U.S. 486 (1969) (Warren, C.J.).

<sup>5</sup> 514 U.S. 779 (1995) (Stevens, J.).

written Constitution's express provisions setting fixed textual qualifications—equally applies to the qualifications for the presidency (and vice presidency) in Article II.<sup>6</sup> Indeed, this extension of *Powell* and *U.S. Term Limits* appears uncontroversial. For example, Chief Judge Posner opined:

The democratic presumption is that any adult member of the polity . . . is eligible to run for office. . . . The requirement in the U.S. Constitution that the President be at least 35 years old and Senators at least 30 is unusual and reflects the felt importance of mature judgment to the effective discharge of the duties of these important offices; nor, as the cases we have just cited hold, may **Congress** or the states supplement these requirements.<sup>7</sup>

Federal district courts, including those outside of Chief Judge Posner's Seventh Circuit, have taken a similar stance.<sup>8</sup> So has persuasive scholarly authority.<sup>9</sup>

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<sup>6</sup> See U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen . . . shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”); see also, e.g., *id.* amend. XXII (“No person shall be elected to the office of the President more than twice . . . .”); cf., e.g., *id.* amend. XII (“No person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.”).

<sup>7</sup> *Herman v. Local 1011, United Steelworkers of America, AFL-CIO, CLC*, 207 F.3d 924, 925 (7th Cir. 2000) (Posner, C.J.) (citing *Powell v. McCormack*, *supra*, and *U.S. Term Limits, Inc. v. Thornton*, *supra*) (emphasis added)).

<sup>8</sup> See, e.g., *United States v. Caron*, 941 F. Supp. 238, 254–55 (D. Mass. 1996) (Young, J.) (“[T]he Constitution is the **sole source** of eligibility for President of the United States and it does not preclude felons. U.S. CONST. art. II, § 1, cl. 5 . . . .” (citing *Powell v. McCormack*, *supra*) (emphasis added)); *Nat'l Comm. of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 75–76 (W.D. Tex. 1996) (Nowlin, J.) (citing *U.S. Term Limits*, *supra*); *Gordon v. Secretary of State of N.J.*, 460 F. Supp. 1026, 1027 (D.N.J. 1978) (Biunno, J.) (“As a consequence, whether in jail or not, nothing prevented Gordon from seeking to gain the votes of enough electors to have been elected President of the United States. . . . **Eugene V. Debs ran for President four times and was a candidate while in jail.** Gordon was free to do the same.” (emphasis added) (footnote omitted)); see also, e.g., Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 571 (2015) (“Courts have occasionally treated the holding in *U.S. Term Limits, Inc. v. Thornton*, which found the qualifications for members of Congress enumerated in the Constitution as exclusive, applicable to presidential elections, too.” (footnote omitted)).

<sup>9</sup> See, e.g., William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 660 n.236 (2009) (“[Alexander Hamilton's] view was upheld in *Powell v. McCormack*, 395 U.S. 486, 550 (1969), which held that when ‘judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.’ **The same reasoning should apply to the qualifications for President and Vice President.**” (emphasis added)); Sean R. Sullivan, *A Term Limit by any Other Name? The Constitutionality of State-Enacted Ballot Access Restrictions on Incumbent Members of Congress*, 56 U. PITT. L. REV. 845, 856–857 (1995) (restating Joseph Story's position in his *Commentaries* as “Since the Constitution created both the offices of President and Representative, the qualifications that the Constitution enumerated for each office were the exclusive qualifications one would need to possess in order to hold office.”); Matthew J. Franck, *No, a Statute Can't Keep Hillary From Being President*, BENCH MEMOS (Mar. 18, 2015, 1:41 PM), <http://www.nationalreview.com/bench-memos/415603/no-statute-cant-keep-hillary-being-president-matthew-j-franck> (“Last night on her Fox News program, Megyn Kelly was discussing the Hillary Clinton e-mail affair with Shannen Coffin . . . and after partially quoting 18 U.S.C. § 2071, Kelly remarked that if Clinton was [sic] indeed guilty of destruction of documents, she would not only have committed a felony but ‘she

As a matter of constitutional structure, the case for exclusivity in regard to the Constitution's express textual qualifications for the presidency is stronger than the coordinate case for exclusivity in regard to qualifications for House and Senate seats. The power to judge members' qualifications is expressly and unambiguously committed to each house of Congress, but no such express power is unambiguously committed to Congress in regard to adjudicating a president's (or presidential candidate's or president-elect's) qualifications. It would seem to follow that if Congress has no power to add to the standing qualifications of its own members, it cannot add to the standing qualifications for the other elected constitutional positions,<sup>10</sup> i.e., the President and Vice President. Any other result risks congressional aggrandizement at the expense of the presidency; any other result risks Congress's manipulating qualifications for the presidency so that Congress chooses the President, rather than the People of the United States.<sup>11</sup>

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cannot be president.' . . . [The question] is not so interesting, because **the answer is so obvious**, is whether this statute has any effect whatsoever on eligibility to be president. **It doesn't, because it can't.**" (emphasis added)). See generally Seth Barrett Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59 (2014) (invited response), available at <http://ssrn.com/abstract=2484377>; Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz's Impeachment & Assassination*, 61 CLEVELAND ST. L. REV. 285 (2013), available at <http://ssrn.com/abstract=1622441>.

<sup>10</sup> See *Franklin v. Mass.*, 505 U.S. 788, 800 (1992) (O'Connor, J.) ("The new and pending bill recognizes this objection to the extent that the President is substituted for the Secretary of Commerce so that **this function may be served by a constitutional officer.**" (quoting from a Senate report) (emphasis added)); *id.* at 809 n.6 (Stevens, J., concurring) ("[I]t were better to name a **constitutional officer rather than a statutory officer.**" (quoting Senator Vandenberg's floor statement) (emphasis added)); 63C AM. JUR. 2D *Public Officers and Employees* § 15 (updated through May 2015) ("A constitutional office is one created by the United States Constitution or by a state constitution, **as distinguished from an office created by statute.**" (footnote omitted) (emphasis added)). See generally *FAQs*, COMPENSATION BOARD: THE COMMONWEALTH OF VIRGINIA (last visited Apr. 17, 2015), <http://www.scb.virginia.gov/faqsmenu.cfm> ("In Virginia, the public elects . . . its **constitutional officers, so named because their offices are specifically established by the Constitution of Virginia.**" (emphasis added)).

<sup>11</sup> See, e.g., 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 404 (Jonathan Elliot ed., Washington, n.p. Supp. 1845) (**James Madison**: "The qualifications of electors and elected were fundamental articles in a republican government, and ought to be **fixed** by the Constitution. If the legislature could regulate those of either, it can by degrees **subvert the Constitution**. A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected as the number authorized to elect." (emphasis added)); see also, e.g., THE FEDERALIST NO. 60, at 326 (**Alexander Hamilton**) (J.R. Pole ed., 2005) (noting that the qualifications for membership in Congress are "defined and fixed in the constitution; and are unalterable by the [national] legislature"); *id.* NO. 52, at 286 (**James Madison**) (same); 2 **JOSEPH STORY**, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 624 (Boston, Hilliard, Gray and Company 1833) ("[W]hen the constitution established certain qualifications, as necessary for office, it meant to exclude **all others**, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." (emphasis added)); GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS § 347, at 264 (Henry L. McCune ed., Chicago, Callaghan & Co. 4th ed. 1897) ("Where the Constitution prescribes the qualifications for an office, the **Legislature cannot add** others not therein prescribed." (emphasis added)).

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