

2014

The Application of the Disqualification Clause to Congress: A Response to Benjamin Cassady, "You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify"

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Recommended Citation

Brian C. Kalt, *The Application of the Disqualification Clause to Congress: A Response to Benjamin Cassady, "You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify*, 33 *Quinnipiac L. Rev.* 7 (2014).

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THE APPLICATION OF THE DISQUALIFICATION CLAUSE TO
CONGRESS: A RESPONSE TO BENJAMIN CASSADY,
“YOU’VE GOT YOUR CROOK, I’VE GOT MINE”: WHY THE
DISQUALIFICATION CLAUSE DOESN’T (ALWAYS) DISQUALIFY

Brian C. Kalt*

Benjamin Cassady has put great effort into an arcane subject: When someone is impeached and convicted, and then disqualified from any “Office of honor, Trust or Profit under the United States,” can that person be elected to Congress?¹ I am one of a group of people who would discuss subjects like these endlessly, but for the fact that members of our group can be hard to find.² As such, I am extremely grateful for the opportunity both to read Mr. Cassady’s article (referred to in the rest of this response as *Your Crook*) and to write this response.

This response will disagree with some things in *Your Crook*, and the discussion may get a bit animated. But this is the excited disagreement of a kindred spirit,³ not of a harsh critic. When football fans shout

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This article is one of four articles written in response to Benjamin Cassady, “*You’ve Got Your Crook, I’ve Got Mine*”: *Why the Disqualification Clause Doesn’t (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209 (2014). The other three articles are: (1) Peter Charles Hoffer, *The Pleasures and Perils of Presentism: A Meditation on History and Law*, 33 QUINNIPIAC L. REV. 1 (2014); (2) Buckner F. Melton, Jr., *Let Me Be Blunt: In Blount, the Senate Never Said that Senators Aren’t Impeachable*, 33 QUINNIPIAC L. REV. 33 (2014); and (3) Seth Barrett Tillman, *Originalism & The Scope of the Constitution’s Disqualification Clause*, 33 QUINNIPIAC L. REV. 59 (2014).

¹ Benjamin Cassady, “*You’ve Got Your Crook, I’ve Got Mine*”: *Why the Disqualification Clause Doesn’t (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209 (2014); U.S. CONST. art. I, § 3, cl. 7 (describing disqualification).

² I have produced a too-long work on an arcane facet of impeachment, which contains a fair amount of discussion of disqualification. See Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 73–75, 126–28 (2001).

³ Mr. Cassady and I have both clearly been influenced very heavily by our teacher and mentor, Akhil Reed Amar—Mr. Cassady much more recently. Indeed, much of my criticism

at each other about who was the greatest running back in NFL history,⁴ it is because they love football, and because they have more fun probing their disagreements than they would cataloguing their much-more-voluminous common ground. The same is true with the Disqualification Clause of the Constitution. I agree with *Your Crook* that disqualification does not apply to election to the House or Senate, and I agree that voters should have as free a hand as the Constitution will allow to elect representatives and senators that others in Congress might find scurrilous.

With that out of the way, the remainder of this response can focus on differences and distinctions. First, Part I will critique the nature of the structural claims in *Your Crook*. Part II will examine the importance of the legal-process question: who decides whether a particular person is disqualified from a particular post? Part III will look at other elements of the constitutional structure that *Your Crook* does not consider. Part IV will similarly flesh out the question of disqualification and the presidency. Finally, Part V will take issue with Mr. Cassady's application of the term "pardon" to the election of a previously disqualified or expelled person.

I. PUTTING STRUCTURE IN ITS PLACE

There is a compelling textual argument that representatives and senators do not hold offices of honor, trust, or profit under the United States as referred to in the Disqualification Clause.⁵ *Your Crook* endorses-

of Mr. Cassady's approach to structuralism, *see infra* Part I, could be applied to the structural arguments in my own early work, *see, e.g.*, Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 793–802 (1996).

⁴ The correct answer is Barry Sanders.

⁵ Most compelling are the places where the Constitution very specifically distinguishes service in Congress from offices under the United States in general, and from offices of trust or profit under the United States in particular. *See* U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”); *id.* art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”); *id.* amend. XIV, § 3 (“No person shall be a Senator or Representative in Congress, . . . or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath . . . 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.”); *cf. id.* art. II, § 2, cl. 2 (providing for presidential appointment of officers of—not under—the United States); *id.* art. II, § 3 (providing the same with regard to commissioning officers of the United States); *id.* amend. XIV, § 3 (disqualifying those who violated oaths taken “as a member of Congress, or as an officer of the United States” to support the Constitution).

es that textual argument, but the article's heart is with the constitutional structure, not the text.⁶ This is a shame, as the textual argument would have been well served by the doggedness that *Your Crook* applies to its structural argument.

For example, what exactly is an “office of honor”? The textual argument focuses on “offices under the United States,” and sometimes on “offices of trust or profit,” but nowhere else in the Constitution besides the Disqualification Clause are “offices of honor” mentioned. Is it possible that the addition of that category sweeps in representatives and senators? Probably not.⁷ But who knows what a deeper textual analysis might have found?

Your Crook presses the structural argument first and foremost, though. This creates an unusual mood in the article and, by extension, in much of this response. The constitutional text does not bar disqualified impeachment convicts (referred to in the rest of this response as “DQees”) from Congress, *Your Crook* says.⁸ But, it continues, let's look

A lengthy accounting—not limited to the textual arguments—of the authorities on both sides of this question appears in 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 CLEV. ST. L. REV. 285, 304 n.42 (2013). Tillman agrees that disqualified impeachment convicts (what this response will call “DQees”) are eligible for Congress, and most of the sources that he says disagree only do so through implication, or in cursory statements. See *id.* An interesting historical-textual source, which neither *Your Crook* nor Tillman, *supra*, consider, appears among proposed amendments to the Articles of Confederation. One amendment sought to authorize punishments for poor attendance in Congress, but the punishment could not be “further extended than to disqualifications any longer to be members of Congress, or to hold any Office of trust or profit under the United States, or any individual State . . .” 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167–68 (Merrill Jensen ed., 1976); see also Kalt, *supra* note 2, at 39 (discussing this proposed amendment). The distinction between being a member of Congress and holding an office of trust or profit, in the specific context of disqualification, seems noteworthy even if it was just in the context of a failed amendment to a pre-constitutional authority.

⁶ See, e.g., Cassady, *supra* note 1, at 278 (making textual argument); *id.* at 219 (noting the article's “main[] focus[]” on structure).

⁷ That sort of subtlety would be a truly terrible way to write in such a consequential difference. I submit that whatever offices of honor may be, because they are a subset of “offices under the United States,” they necessarily exclude Congress for the reasons already given. See *supra* note 5. I will speculate here that offices of honor are simply honorary positions—that is, those with no pay or duties. The Framers apparently thought that the blot of an impeachment conviction should foreclose service in these positions, but that they should remain open to members of Congress and the Electoral College.

⁸ See Cassady, *supra* note 1, at 221.

at what the constitutional structure would require if the text *were* ambiguous,⁹ or perhaps even if it seemingly barred DQees from Congress.¹⁰ After all, it says, the structure provides an important “gloss” on the text. Left unclear, though, is whether this gloss actually changes the meaning of the clause or just influences the manner in which Congress should exercise its discretion under it.

This sense of being in a parallel constitutional universe is furthered by the fact that, in American history, impeachment convictions are rare, disqualifications are rarer still, and political comebacks by the convicted are rarest of all.¹¹ This requires *Your Crook* to center not on the real Representative Alcee Hastings, but on a hypothetical version of Hastings who had been disqualified by the Senate after his conviction.¹² Thus, the discussion is about what the constitutional structure might tell us about the Disqualification Clause if it were not written the way it is, and if it were applied in an atypical way to an atypical subject.¹³

I have spent much of my career exploring weird and unlikely twists of constitutional law, so I should be clear that my criticism here is not about the use of such multi-level hypotheticals. Rather, the problem is that instead of using a structural argument in conjunction with textual

⁹ See, e.g., *id.* at 221–22; *id.* at 236 (“[I]n a doubtful case, why not err on the side of popular sovereignty?”); see also *id.* at 218 (leaving text out of statement that the article argues, “for reasons of history, structure, and institutional practice, [that] the Disqualification Clause should not be read to apply to legislative seats”).

¹⁰ After saying “if [the Disqualification Clause] bars the people from electing an impeached and disqualified official, so be it,” *Your Crook* continues with an argument that seems to suggest that even a fairly clear textual argument would need to bow in the face of contrary historical and structural arguments. Cassady, *supra* note 1, at 236.

¹¹ There have been eight convictions, all of judges (John Pickering, West H. Humphreys, Robert Archbald, Halsted Ritter, Harry E. Claiborne, Alcee Hastings, Walter Nixon, and G. Thomas Porteous, Jr.). See *Impeachment*, U.S. SENATE, <http://tinyurl.com/yvulta> (last visited Oct. 11, 2014) (listing all impeachments and their dispositions). Omitting Porteous, *Your Crook* erroneously states that the Senate has imposed disqualification “[o]nly twice.” See Cassady, *supra* note 1, at 216 & n.36 (listing Humphreys and Archbald); 156 CONG. REC. S8611 (daily ed. Dec. 8, 2010) (statement of President pro tempore disqualifying Porteous). Alcee Hastings is the only impeached and convicted officer ever elected to Congress. See Cassady, *supra* note 1, at 211.

¹² See Cassady, *supra* note 1, at 215 & n.31. Less hypothetically, *Your Crook* could have explored whether Porteous—impeached, convicted, and disqualified in 2010, and ten years younger than Hastings—is allowed to serve in Congress.

¹³ It is also worth mentioning, though only in a footnote, that impeachment has been used most often against judges, and that only judges have ever been convicted. See *supra* note 11. *Your Crook*, however, focuses almost entirely on impeachments in the executive branch. See *infra* note 40 (criticizing this).

arguments and practical considerations, *Your Crook* seems to elevate its structural argument above them. But the text says what it says; why not run with that?

More problematically, *Your Crook's* structural argument concentrates intensely on its own rendering of the *Wilkes* precedent and analogies to congressional expulsion, at the expense of other structural avenues.¹⁴ It is hard to win an argument that a particular theme overshadows not just the text and practical considerations, but also other elements of the structure.

To illustrate this point, imagine that the Disqualification Clause had been written in a way that clearly included Congress. In such a case, *Your Crook* could have spent 102 pages exploring the structural reasons that, *despite Wilkes*, this made sense. It could have explored the important structural concept of political accountability, for instance. Making analogies to the President's pardon power, to impeachment more generally, and even to the regular passage of legislation, it could have argued that while the Senate could exclude impeachment convicts from ever serving in Congress, this power would be limited by the fact that senators could pay a heavy political price if they took lightly their constitutional power to violate the *Wilkes* principle.¹⁵ The structure contains multitudes, in other words, and it is also inextricable from the text.

Your Crook's structural approach would have been more felicitous if the article's aim had been just slightly different: using *Wilkes* to argue that Congress *ought* not to be included in disqualification instead of using it as a basis to argue that it *is* not included. "Disqualification doesn't cover Congress," it could have said on the basis of the text. "This material on *Wilkes* and congressional expulsion suggest why the Framers set it up that way, and it also shows us why they were wise to do so." *Your*

¹⁴ See *infra* Part III (making other structural arguments). By using the phrase "own rendering," I don't mean to impugn *Your Crook's* account of the *Wilkes* episode. Rather, I mean to call attention to the fact that the congressional uses of *Wilkes* represent precedent that carries its own weight, even if Congress's consideration of *Wilkes* is not as accurate or complete as *Your Crook's*. See, e.g., Cassady, *supra* note 1, at 258 (suggesting how the House, in the Oakes Ames case, should have made use of *Wilkes*). *Your Crook* does not discuss the case of B.H. Roberts, duly elected to the House in 1899 but denied his seat because of his polygamy—in clear violation of pretty much everything for which *Your Crook* argues. See Robert W. Taylor, *The Roberts Case as Illustrating a Great Prerogative of Congress*, 10 YALE L.J. 37, 37 (1900) (describing the Roberts case and defending the result).

¹⁵ Accountability would also keep the President from naming a DQee to a post that clearly is not covered by the Disqualification Clause, such as the White House Chief of Staff. See Tillman, *supra* note 5, at 307 n.43 (listing senior executive positions available to DQees).

Crook could have even used the same subtitle (*Why the Disqualification Clause Doesn't Always Disqualify*), because his structural arguments do illuminate why the Framers might have drafted the text the way they did, and why disqualification has been used the way it has.

Alternatively, *Your Crook* could have focused on a place where the text is much more ambiguous: state constitutions. There are several states that allow disqualification upon conviction in an impeachment trial, but that extend disqualification to all “offices,” not just “offices of honor, trust, or profit.”¹⁶ One such state, Illinois, impeached and convicted its governor, Rod Blagojevich, in 2009, and disqualified him from “any future public office of th[is] State.”¹⁷ Blagojevich’s eligibility-or-not for the state legislature would have provided a livelier focus, both in terms of the facts on the ground and the legal arguments, than *Your Crook*’s hypothetical-Hastings does.

II. WHO DECIDES AND WHY THAT MATTERS

The “legal process” question—who decides?—makes a big difference here. If DQee eligibility were a matter for each house to decide on its own as applicable, without review in court, then the difference between “ought” and “is” discussed in the last section would loom much larger.

Given the chance to vote on whether to seat a DQee elected to Congress, individual representatives or senators would be able to vote their consciences as opposed to their considered legal judgment, and have that stick. To be sure, some of their consciences might direct them to vote based only on the best legal arguments (found, of course, in the best law-review articles). For others, though, it would be more effective to appeal to justice and abstract principles, rather than law and archaic technicalities. One would expect a number of members to vote to seat the DQee (or not) simply because they thought it was the right thing to do, and because they had the power to make it so. For others, the fact that the Constitution requires a certain result might matter more, but up-

¹⁶ See ALA. CONST. art. VII, § 176 (“disqualifications from holding office, under the authority of this State, for the term for which the officer was elected or appointed”); IDAHO CONST. art. V, § 3 (“disqualification to hold office in this State”); ILL. CONST. art. IV, § 14 (“disqualification to hold any public office of this State”); TENN. CONST. art. V, § 4 (“disqualification to fill any office”).

¹⁷ See 2009 Ill. Laws 9003, 9004 (judgment of conviction and disqualification).

on seeing that there are two sides to the legal argument they would feel empowered to choose whichever legal side best comported with their own opinions on policy or politics. Still others might conclude that they had the power to exclude a DQee but that they should decline to use that power.¹⁸ The point is that *Your Crook*'s discussion of *Wilkes* and popular sovereignty would probably go much further in Congress than in court. In court, one assumes, the legal formalities would garner more focused attention, and the sole question would be the chamber's constitutional authority—the “can they” and not the “ought they.”

Given all of this, it is a problem for *Your Crook* that a DQee-elected-to-Congress case would almost certainly end up in court. This much seems clear from the landmark case of *Powell v. McCormack*.¹⁹

Your Crook pays surprisingly little attention to *Powell*, given its landmark status and given how deeply that case reinforces *Your Crook*'s idea that voters have the constitutional power to elect representatives whom their colleagues would like to ban. It is also significant that a DQee's case would most likely play out as an exclusion case,²⁰ just like *Powell*'s (if it weren't decided even sooner by pre-election litigation over the DQee's placement on the ballot). Despite that, *Your Crook* keeps its focus pretty squarely on expulsion instead.²¹ Although *Wilkes*'s case may loom large in a proper understanding of the Constitution, *Powell* (which repeatedly took note of *Wilkes*) would loom large in an actual case too.²²

The core holding of *Powell* is that the House and Senate can only legitimately refuse to seat someone for failing to meet one of the discrete qualifications in the Constitution; the chambers cannot add new qualifications and thereby flout the will of the electorate.²³ That much is con-

¹⁸ The can-but-shouldn't approach seems to be a common understanding of expelling members for past misconduct. See Cassady, *supra* note 1, at 248 & n.196. Nevertheless, the lines are not always clear, and can lead to confusion at times. See, e.g., *id.* at 252 (discussing Matteson case).

¹⁹ *Powell v. McCormack*, 395 U.S. 486 (1969).

²⁰ *Your Crook* recognizes this. See Cassady, *supra* note 1, at 215, 302. But it avoids citing *Powell* in places where it seems to be the most obvious authority extant. See, e.g., *id.* at 303 (worrying about a chamber “tempted to essentially judge Hastings's fitness for office under the guise of determining his qualifications”).

²¹ Indeed, at times *Your Crook* seems to be more about expulsion than it is about impeachment.

²² See *Powell*, 395 U.S. at 527–31, 534, 537–38, 547 (discussing *Wilkes*).

²³ See *id.* at 550 (holding that “in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution”).

sistent with *Your Crook*.

The important thing *here* about *Powell*, though, is that the Court decided the case at all. Because the Constitution makes the House the sole judge of the qualifications of its members, Powell's challenge was arguably a "political question" insulated from Court review. The *Powell* Court conceded that the House's power to judge the qualifications of its members was unreviewable. But even though the House was convinced that Powell was a crook, the Constitution nowhere makes "not being a crook" a qualification for office, so the vote to exclude Powell was fair game to be reviewed and repudiated in court.²⁴

Under *Powell*, this is precisely how a DQee-in-Congress case would be treated. If the House or Senate purported to exclude a DQee, and that person sued, the Court would examine the Constitution to see if disqualification applies to congressional seats. If it does, it would be a political question and the plaintiff would lose. If it doesn't, *Powell* would apply, it would not be a political question, and the plaintiff would win.²⁵ *Your Crook* apparently sees this otherwise, saying that a refusal by the House or Senate to seat a DQee would be unreviewable, but this misses the point of *Powell*.²⁶

Thus, *Your Crook*'s arguments should be directed first and foremost at the judges who would get the last word, rather than to Congress. As such, the "is" of the law (particularly the text) should play a bigger part in *Your Crook*'s discussion than it does, and the "ought" should play a correspondingly smaller role.

III. MORE STRUCTURE

Notwithstanding the discussions in the previous two sections, structure does matter, and *Your Crook* contains a worthy discussion of structure. It leaves some structural points out, though. Some of these other points lean in favor of allowing DQees into Congress, but others cut against it.

²⁴ See *id.* at 518–49 (performing lengthy political-question analysis).

²⁵ It is a noteworthy and odd feature of *Powell* that the political-question issue is supposed to be a pre-merits determination, but in order to resolve it properly the Court must essentially reach a conclusion as to the merits. See *id.*

²⁶ See Cassady, *supra* note 1, at 302. A decision to seat a DQee would be subject to review under a similar theory, assuming an interested plaintiff with standing stood ready to challenge it.

A. *Expulsion's Distinctness from Disqualification*

One such set of structural points centers on expulsion. *Your Crook* concludes that because expelled members of Congress are eligible for election to Congress, so too are DQees.²⁷ It is thus worth considering some important differences between expulsion and impeachment convictions. Although this response agrees with *Your Crook's* ultimate conclusion that disqualification does not apply to Congress, these structural points mostly weigh in the opposite direction. At the very least, they counsel against equating disqualification and expulsion too casually.²⁸

The first and foremost difference between expulsion and disqualification is that, on its face, expulsion does not *purport* to affect future eligibility. Expulsion has a present effect—it creates a vacancy—but not necessarily anything else. Disqualification, by contrast, purports to disqualify, and it has only future effects.²⁹ While this still leaves the question, “disqualified from what?,” it certainly tees up the possibility that the “Scarlet D” of disqualification could affect eligibility to serve in Congress in a way that expulsion does not.

It also matters that there are more hoops to jump through for disqualifications than for expulsions. To disqualify someone requires a House majority to impeach, a trial in the Senate, a two-thirds Senate majority to convict, and a separate Senate majority to disqualify.³⁰ By contrast, an expulsion requires a two-thirds majority in just one chamber.³¹ All other things being equal, it is reasonable to attach heavier consequences to things that require more procedure and greater consensus.³²

²⁷ See *id.* at 219 (“And so, as a constitutional matter, this Article shows that because expulsion is not permanent, *neither should impeachment and disqualification be*. The people’s power to pardon an expelled legislator—even one expelled for high crimes and misdemeanors—should also apply to the case of an impeached and disqualified official.”).

²⁸ But see *id.* (noting, but dismissing structural consequences of, distinctions between expulsion and disqualification).

²⁹ A member of Congress resigning to avoid expulsion is functionally the same as one being expelled; the only difference is one of symbolism. With impeachment, by contrast, resignation usually makes a big practical difference—it is almost never worth continuing an impeachment once the target resigns—and the possibility of disqualification ensures that resignation and conviction are functionally distinct.

³⁰ See U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; *id.* art. I, § 3, cl. 7.

³¹ See *id.* art. I, § 5, cl. 2.

³² This conclusion is belied by the fact that disqualification can also be a punishment for violating certain criminal statutes, which would entail much less process or political consensus. *Your Crook* does not discuss this (constitutionally debatable) avenue. See Kalt, *supra* note 2, at 132 & n.549 (discussing such criminal statutes and their potential unconstitutionality).

Next, disqualification is a more flexible penalty than expulsion is. The Constitution specifies that disqualification is not mandatory but is just part of the maximum judgment following an impeachment conviction.³³ Presumably, this means not only that the Senate can (as it usually does) decline to disqualify the convict, but also that it can impose limited disqualifications: a disqualification of a judge that bars her only from judicial posts, say, or one that is limited to a certain term of years.³⁴ Thus, even if disqualification could apply to Congress, the Senate could make an individual determination that the disqualification should not be applied to a particular person. This ability to render such a nuanced judgment makes applying disqualification to Congress more reasonable than it otherwise would be.

Finally, expulsion is a more direct threat to popular sovereignty than disqualification-in-Congress would be. The singular feature of Congress is that it is stocked with the people's chosen representatives.³⁵ When the House or Senate expel someone, therefore, they are overturning the people's choice and seizing the dangerous power of self-constitution. The people must have the power to fill the vacancy that results from an expulsion; that is the only way for them to retain ultimate control over Congress's composition.³⁶ *Your Crook* understands and explains this point well. But disqualification, if applied to Congress, would represent a lesser threat to popular sovereignty. Although a disqualification would keep someone out of Congress that the people might like to send there, it would not discard the people's choice in the first instance. Applying disqualification to Congress thus would not tend toward self-constitution in nearly the same degree as would making expulsion permanent.

Again, these structural points do not change this response's support of *Your Crook*'s conclusion that DQees are eligible for election to Congress. They do, however, suggest that *Your Crook* extrapolated a bit too casually from expulsion to disqualification.

³³ See U.S. CONST. art. I, § 3, cl. 7.

³⁴ See Kalt, *supra* note 2, at 127 (discussing partial disqualification).

³⁵ The Senate was not popularly elected until after the passage of the Seventeenth Amendment in 1913. See *infra* notes 47–49 and accompanying text.

³⁶ In the case of Senate vacancies, the state's governor might fill the vacancy in the short term. See U.S. CONST. amend. XVII. The governor is elected by the people, though, and not beholden to Congress.

B. Other Points

Some other structural elements besides expulsion matter as well. One example comes from the relationship between the confirmation and impeachment processes. Just as the confirmation process gives the Senate the last word over the appointment of principal officers in those branches, the impeachment process gives the Senate the last word over their removal.³⁷ Disqualification projects the Senate's impeachment-related powers into the future, essentially combining them with the confirmation power by preemptively rejecting any nomination to a Senate-confirmable office that the DQee might get. Thus, if someone is *not* a DQee, a simple majority of the Senate in a confirmation vote can keep that person out of office.³⁸ Once someone has been impeached and convicted, the Senate can keep that person out of office permanently with the same simple majority.³⁹

Keeping people out of the House or Senate is not part of this symmetrical relationship at all. Structurally, impeachment is about Congress policing the other branches' personnel, not its own.⁴⁰ It would therefore be odd if there was a provision tacked on tangentially to the impeachment process that allowed the Senate to control the membership of future Congresses. As *Your Crook* well notes, the Senate has no discre-

³⁷ *Your Crook* makes a different but related point—that impeachment deals only with executive and judicial officers, and so it makes sense that disqualification would too. See Casady, *supra* note 1, at 221, 271–74. On a separate note, the President is also subject to impeachment, but not to Senate confirmation. This makes it somewhat less comfortable structurally to bar DQees from the presidency. The application of disqualification to the presidency is covered in more detail in Part IV.

³⁸ Technically a nomination could fail if it was opposed by exactly half of the senators voting, which would deprive supporters of a majority. But we can presume (post-Twelfth Amendment) that if the vote is tied the Vice President will break the tie in favor of the administration. Thus, a nomination really needs to be opposed by a majority to actually defeat it.

³⁹ *Your Crook* offers a critique of the Senate's decision in the Archbald impeachment that it only needed a simple majority to disqualify a convicted impeachee. *Id.* at 300–02 & n.427. I am not taking sides in that debate here.

⁴⁰ *Your Crook* presses the point that the Disqualification Clause, like impeachment, is best read as having been designed to protect the people from corrupt executive officers because, unlike members of Congress, they are not directly accountable to the voters. See *id.* at 271, 286. This leaves out the President and Vice President, who are directly accountable to the voters under our current system of elections. See *id.* at 269 (noting presidential exception); *infra* Part IV (discussing application of disqualification to the presidency). More importantly, though, it ignores judges. Most impeachments—and all of the successful ones—have targeted judges, who are even further removed from electoral accountability than members of the executive branch. See *Impeachment, supra* note 11 (listing successful impeachments).

tionary power to control its own membership (let alone the House's). As a result, the Senate fittingly lacks the ability to project any such power into the future when someone is impeached and convicted. The Senate does have the power to exclude those would-be senators who fail to meet the Constitution's qualifications, but as *Powell v. McCormack* teaches us, the Constitution defines those qualifications very clearly: the Senate cannot add "our own personal judgment" as a qualification the same way it can in the nomination/confirmation process.⁴¹

The link between the Senate's confirmation power and its disqualification power offers another possible explanation for why the Senate has declined to disqualify most of the impeached people it has convicted.⁴² To the extent that a disqualification keeps DQees out of offices that require Senate confirmation,⁴³ a disqualifying Senate is essentially usurping the confirmation role of a future Senate. When someone is convicted after an impeachment trial, then senators can tell themselves that if the convict is ever nominated for a federal office, they can trust the future Senate to reject the nomination (or, alternatively, to confirm that the convict has rehabilitated himself). The current Senate thus need not detain itself with disqualification. Because no such future internal safeguard for congressional seats exists, it would seem that if disqualification did apply to Congress, the Senate would have a much greater incentive to take disqualification seriously. Conversely, the Senate's failure to disqualify most convicts is evidence that it does not think disqualification applies to Congress.

One other structural facet of disqualification is more practical in nature: disqualification is easy to evade. Although there is good reason to believe that people can be impeached even after leaving office, history shows that when the target of an impeachment resigns, that generally

⁴¹ See *Powell v. McCormack*, 395 U.S. 486, 542, 548 (1969).

⁴² *Your Crook* offers a slightly different explanation: that the disgrace of conviction is sufficient to keep someone out of public office. Cassady, *supra* note 1, at 216.

⁴³ DQees are also arguably barred from the presidency and vice presidency, which obviously do not require Senate confirmation. *But see infra* note 56 and accompanying text (collecting arguments to the contrary about DQees and the presidency). They are also barred from inferior offices, which do not necessarily require Senate confirmation. See U.S. CONST. art. II, § 2, cl. 2 (describing appointment process for inferior officers). They are not, however, barred from some important posts, such as the White House Chief of Staff, or various "czars" on the White House staff, that are not considered offices in the constitutional sense. See Tillman, *supra* note 5, at 307 n.43.

leads the Senate to choose not to proceed.⁴⁴ To some, this might suggest that disqualification functions as a bargaining chip: by resigning once it becomes apparent that he will lose, a target could limit his penalty to removal and can avoid disqualification. If removal were the only possible penalty, the target would have no reason not to stand his ground and fight.⁴⁵ With that in mind, disqualification makes less sense when it is less potent—if DQees were barred from Congress, disqualification would function much more effectively as a bargaining chip than it would if they were not. This is pretty weak as structural arguments go,⁴⁶ but it should be part of the picture.

Two final structural points concern the Senate. *Your Crook* generally treats the House and Senate the same because both are popularly elected, and the sanctity of the people's voice is central to *Your Crook's* Wilkesian case. But the Senate only became popularly elected with the passage of the Seventeenth Amendment in 1913.⁴⁷ At the start, senators were selected by state legislatures, not by the people.⁴⁸ *Your Crook* brushes this off, noting that state legislators are themselves elected by the people (so too are the governors who, in many states, can temporarily fill Senate vacancies).⁴⁹ But this sort of attenuation in representation makes a difference. If barring a DQee from the Senate would flout the will of the people (as represented by the state legislature), why doesn't barring the DQee from executive or judicial office—which everyone agrees is constitutional—flout it too? Executive and judicial officers are selected directly by the President, who is elected by the people in an election that represents the American people's voice at its loudest.⁵⁰ Is

⁴⁴ See Kalt, *supra* note 2, at 106–07 (discussing aborted cases). Note that *Your Crook's* hypo-Hastings could resign right before the last vote is cast; without late impeachment, that would render disqualification an empty possibility.

⁴⁵ *Id.* at 75 (making this point).

⁴⁶ The fact that the Disqualification Clause would work better this way (as to this one aspect, at least) does not do much to illuminate what the clause actually requires. The Framers had a lot of good ideas, but not everything they created was perfectly optimal. Disqualification certainly isn't. Indeed, it is hard to square the bargaining-chip view of disqualification with the reality of it, which is that even when targets proceed to trial and are convicted, the Senate has rarely bothered to disqualify them.

⁴⁷ See U.S. CONST. amend. XVII.

⁴⁸ *Id.* art. I, § 3, cl. 1.

⁴⁹ Cassady, *supra* note 1, at 274 n.326; see also U.S. CONST. amend. XVII.

⁵⁰ The Electoral College represents some attenuation, of course, especially back in 1789, but even at the start most states had popular voting to select the presidential electors, and the alternative was appointment by the same state legislature that chose the senators. See Richard E. Berg-Andersson, *What Are They All Doing, Anyway?: An Historical Analysis of the Elec-*

foreclosing the choice of a senator by a state legislature really more of an affront to popular sovereignty than foreclosing the choice of an officer by the President?⁵¹ Perhaps, but the case is not as simple as *Your Crook*'s brush-off suggests.

The second structural point regarding the Senate relates to an important part of *Your Crook*'s argument about the application of disqualification to the presidency and vice presidency. The next section will be devoted to considering DQees running for President.⁵² For now, the point is that *Your Crook* distinguishes congressional office (not covered by disqualification) from the presidency (covered by disqualification) in part by noting that Congress is a collegial body where one person cannot do much harm, while the presidency is a unitary office where one person can make all the difference in the world. This distinction is certainly true as a general matter, but consider how much power any one senator can have to stymie legislation or nominations. If the potency of the presidency is a reason to allow disqualification to cover it, then the potency of a single Senate seat deserves some (albeit lesser) consideration too.

This is not a structural argument so much as a final reminder about the limitations of structural arguments. A single senator has much more individual, non-collegial power than a single representative does, but this proves nothing about disqualification. To say that Senate seats are offices of honor, trust, or profit under the United States but that House seats are not would be a highly implausible reading of the Disqualification Clause. (On a similar note, the fact that federal appellate courts are collegial bodies would not justify reading the Disqualification Clause to apply only to judgeships on the district court. Similarly, the fact that some executive agencies are headed by a group of commissioners rather than a single leader would not justify reading the Disqualification Clause

toral College, GREEN PAPERS (Sept. 17, 2000), <http://tinyurl.com/5z5n9> (describing states' methods of electing presidential electors in 1789). Now, of course, every state uses popular voting, even if this is not strictly mandated in the Constitution. See *U.S. Electoral College: Who are the Electors? How do they Vote?*, NARA, <http://tinyurl.com/8g9sq4a> (last visited Oct. 11, 2014). Indeed, *Your Crook* overstates the degree to which the Constitution mandates the current system of popular voting. See Cassady, *supra* note 1, at 293 (stating that the people "are constitutionally empowered to select" the President "through the electoral process").

⁵¹ There is, of course, the additional matter of Senate confirmation being foreclosed. Given the indirect election of senators before the Seventeenth Amendment, this might not add much to disqualification's assault on popular sovereignty, but it certainly does not subtract anything from it.

⁵² See *infra* Part IV.

to apply only to offices of the latter sort.) This highlights the problem with making structural arguments without keeping one foot in text, and so it is a fitting note with which to leave this section.

IV. ALCEE HASTINGS FOR PRESIDENT

Your Crook has every right to be about DQees in Congress rather than DQees in the presidency, but the latter does present a more complicated—and to me, more interesting—question. Unfortunately, *Your Crook* gives this question inadequate attention. After *Your Crook* makes such a strong case that the electorate in a district or state can redeem⁵³ a DQee who wants to serve in Congress, it takes only a little time to note that the national electorate cannot similarly redeem a DQee who would like to be President.⁵⁴

As noted above, the textual argument for keeping Congress open to DQees is strong,⁵⁵ so *Your Crook*'s discussion of *Wilkes* and the structure of popular sovereignty is to some extent an exercise in lily-gilding. But the textual case for barring DQees from the presidency is not quite as clear, and it has a serious and detailed case on the other side.⁵⁶ As a result, the stakes for the structural and other non-textual arguments are much higher for the presidential case than for the congressional one.

A. Structure

Your Crook's popular-sovereignty argument seems like it should be more potent for the presidency than it is for Congress. The President is elected by the people of all fifty states and D.C., not just by the voters of

⁵³ *Your Crook* uses the word “pardon” rather than “redeem”; this difference is problematic. See *infra* Part V.

⁵⁴ For the main argument, see Cassady, *supra* note 1, at 287–94.

⁵⁵ Seth Barrett Tillman notes that there is not and has not been unanimity on this point, but he deems it the majority view among commentators today. Most of the authorities he marshals for his accounting of the minority view merely imply or assume that DQees cannot serve in Congress, without actually providing a full justification of that point. Tillman, *supra* note 5, at 304 n.42; see also Joshua Levy, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913, 1932 (1992) (stating without argument that DQees cannot serve in Congress, but also erroneously holding that all impeachment convicts are disqualified).

⁵⁶ See Tillman, *supra* note 5, at 308–28 (making a serious and detailed case); Cassady, *supra* note 1, at 289 & n.388 (engaging Tillman at length).

a single district or state.⁵⁷ Campaigns (primary and general) are longer in elections for President than for Congress, and turnout is typically much higher for presidential elections than for standalone congressional races. Congressional races regularly feature no opposition; by contrast, no presidential candidate since 1820 has run unopposed. If *Your Crook's* popular-sovereignty principles are to apply to Congress but not to the presidency, other things must be weighing against allowing DQees to be President.

One such thing is, of course, the text. As *Your Crook* notes, there is a popular (if disputed) argument that the presidency is an “Office of honor, Trust or Profit under the United States,” while there is very little support for the notion that congressional seats are.⁵⁸

As elsewhere, though, *Your Crook* concentrates more on structure. Its argument for keeping DQees out of the presidency—despite the popular mandate that election represents—rests primarily on the collective nature of Congress. Congress is a collegial decision-making body, while the presidency is a unitary office. Thus, the danger to the Republic is much smaller if the people are allowed to choose a bad apple to represent them in Congress than if they are allowed to elect one as President.⁵⁹

Although *Your Crook's* contrast between congressional office and the presidency is undeniably true, it leaves a lot out. For one thing, the point can be flipped on its head: given that presidential elections are so much more consequential, it is correspondingly more important to allow the people their choice and to respect it.

In arguing that disqualification should apply to officers but not legislators, *Your Crook* notes that the latter are directly accountable to the voting public.⁶⁰ But the President is even more politically accountable than members of Congress are. The media and especially the opposition

⁵⁷ As already mentioned, even though popular voting for President has become entrenched in our constitutional system, it is not mandated directly by the Constitution itself. See *supra* note 50.

⁵⁸ See U.S. CONST. art. I, § 3, cl. 7; Cassady, *supra* note 1, at 219, 287–94.

⁵⁹ Cassady, *supra* note 1, at 287–94. This has interesting implications for the state versions of the Disqualification Clause. Governors are not as unitary (most states have separately elected attorneys general, secretaries of state, and such) and not as powerful. This removes much of *Your Crook's* basis for applying disqualification to governorships despite the structural importance of popular sovereignty. See *supra* notes 16–17 and accompanying text (introducing issue of state disqualification).

⁶⁰ Cassady, *supra* note 1, at 221.

scrutinize his every move. Everything political that he does affects everything else political that he does, because he is involved in everything: the passage of every law, the appointment of every principal officer, and ultimate control over the vast federal regulatory bureaucracy. Individual members of Congress, by contrast, can miss votes, or hide on the back benches and in their caucuses. And while the Twenty-Second Amendment means that Presidents only ever have to worry about one re-election, that re-election is never a cakewalk as in most of the gerrymandered House, and it is never as far away as in the Senate with its six-year terms.

Presidents can also be held accountable through the impeachment process. Two Presidents (Andrew Johnson and Bill Clinton) have been impeached, and Richard Nixon would have been if he had not resigned. That's three men out of forty-three, or 7%. Members of Congress, by contrast, are subject only to expulsion, which is a much rarer proposition.⁶¹

Your Crook makes a telling argument elsewhere, in its discussion of the contrasts between expelled members of Congress and DQees. In this passage, *Your Crook* notes some things about congressional office that should make us feel better about leaving it open to DQees while offices in the other branches are not:

[L]et's look at the position to which both offenders seek to return—a legislative seat. Because the legislature is politically accountable, it's very unlikely that the offender would be re-elected without making a persuasive public case of his innocence or his remorse. And if he succeeded, he would be restored to a position that requires periodical re-election, involves collective supervision of his every move by both his own party leaders and the opposition, and by nature minimizes the danger that he would be able to successfully offend against the

⁶¹ As of October 2, 2014, there have been 12,107 individuals that have served in the House, Senate, or both. *Total Members of the House & State Representation*, U.S. HOUSE REPRESENTATIVES, <http://tinyurl.com/p4z35ey> (last visited Oct. 11, 2014). Thus, to have the same proportion of expulsion cases as presidential-impeachment cases, Congress would have needed to expel 845 of its members. In reality, though, there have been an order of magnitude fewer. See JACK MASKELL, CONG. RESEARCH SERV., RL31382, EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 4-5 & nn.23-25 (2013), available at <http://fas.org/sgp/crs/misc/RL31382.pdf> (listing five House expulsion cases and preempted cases numbering near twenty); ANNE M. BUTLER & WENDY WOLFF, ELECTION, EXPULSION AND CENSURE CASES: 1793-1990, S. DOC. NO. 103-33, at xxviii-xxix (1995) (counting fifteen expulsions and sixteen other attempted ones).

public once again.⁶²

But if those things should make us feel better about letting DQees serve in Congress, they should make us feel positively spectacular about letting them serve as President. Political accountability? As just discussed, Presidents are more politically accountable than are members of Congress. Periodic re-election? As mentioned above, presidential elections are more meaningful than congressional elections in a variety of ways. Supervision of his every move? Again, the President is in the news every day and is the focus of much more intense opposition and scrutiny than any member of Congress.

In sum, there are a lot of structural reasons that call into question *Your Crook's* refusal to apply its powerful principle of popular sovereignty to the presidency, or at least the blitheness of that refusal. Once again, it is the text and not the structure that gives us the answer about whether DQees cannot be President.

B. Reality

None of these structural reasons to allow DQees to serve as President would amount to much unless there was actually a DQee who could plausibly hope to be elected President. This prospect is improbable, but it is worthwhile to consider what sorts of factors might lead to such a case: rather than debate how likely it is to happen, let's think about what it will look like if it does.⁶³ The actual facts of a case would make law less salient, and politics more so.

Some features of the scenario seem clear. First, it would be helpful if the impeachment, conviction, and disqualification were heavily contested. Anyone who was obviously guilty of terrible offenses and subject to unanimous condemnation would be much less likely to resurrect his or her career.⁶⁴

Second, there would probably have to be a significant shift in the political balance of power between the impeachment and the DQee's presidential election. Without such a shift, it is hard to imagine someone

⁶² Cassady, *supra* note 1, at 297.

⁶³ This is the approach that I took in BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES (2012).

⁶⁴ Analogously, *Your Crook* notes how the case against Alcee Hastings's guilt was less than clear. See Cassady, *supra* note 1, at 308–09.

lacking the support of the thirty-four senators needed for acquittal but having enough political support to be nominated by his party and elected President. With the right sort of political shift, though, the disqualification could even be a badge of honor. One can imagine the DQee railing against the Congress that impeached and convicted him, and riding that populist wave into a series of prominent positions that would tee up a presidential run.

Third, the courts would have to decline to keep the DQee off the ballot. This would mean either giving the DQee's candidacy a green light or deferring to the electorate and to Congress. In the latter vein, the courts could say that the Twelfth Amendment leaves it to Congress, when it counts the electoral votes in January, to decide whether a candidate is qualified or not.⁶⁵ This would lead the courts to stay out of the matter, under the political-question doctrine, and kick it to the voting public to decide whether the DQee should be President. There is a good argument, reminiscent of the themes of *Powell v. McCormack* discussed above,⁶⁶ that this should not be considered a political question. But the point is not that this is definitely a political question, it is that if the courts *did* decide to keep the DQee off the ballot the issue would be determined according to law instead of politics.

So this would be the landscape facing a Congress that had to decide whether DQees can be President. These facts on the ground would matter for those seeking to interpret the Disqualification Clause and come up with the right legal answer. They would matter more as a matter of politics, though—politics, not law, would probably determine the outcome. Some members of Congress would rely on legal arguments *qua* legal arguments, but a greater number would probably latch on to whatever legal arguments happened to support their side, or would conclude that with plausible-sounding legal arguments on either side, voting on the basis of the political ramifications would be the best course.

If the voters elected the DQee, one can presume that they would elect a like-minded Congress, or at least that there would be enough members of Congress unwilling to flout the people's choice to prevent the DQee's victory from being overturned on Counting Day.⁶⁷ In other

⁶⁵ See *Bush v. Gore*, 531 U.S. 98, 153 (2000) (Breyer, J., dissenting) (noting that the Court's role in resolving election disputes should be limited given that "the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes").

⁶⁶ See *supra* Part II.

⁶⁷ The election result would not itself be overturned; the Twentieth Amendment specifies

words, a resonant pardon⁶⁸ by the people would carry tremendous political weight. Of course, it might *also* factor into the legal arguments about popular sovereignty that *Your Crook* concerns itself with. But politics would be in the mix, and would represent a decisive factor in resolving this constitutional question and setting a definitive precedent.⁶⁹

V. WHAT'S ALL THIS ABOUT PARDONS?

I have reserved the final section of this response to give in to my own peevishness. I can easily forgive Mr. Cassady for the transgression (unsurprisingly common among legal scholars) of failing to rely heavily on my work.⁷⁰ I cannot, however, resist my urge to be persnickety about *Your Crook's* use of the term “pardon,” a word I have carefully considered elsewhere.⁷¹

Dozens of times, *Your Crook* uses the word “pardon” to characterize the act of an electorate in returning someone to Congress who had been expelled from it, or in electing a DQee. In such instances, *Your Crook* is of course using the term “pardon” colloquially; there is no suggestion that the constitutional power to pardon (which belongs solely to

that in such a case, the DQee's running mate would swear in as President. *See* U.S. CONST. amend. XX, § 3.

⁶⁸ *See infra* notes 76–82 and accompanying text (making analogy to pardons in hypothetical case of a DQee elected President).

⁶⁹ If the DQee lost the election but won at least some electoral votes, it would still matter what Congress decided to do. If it decided to count the electoral votes cast for the DQee, it would provide fodder for the argument that DQees are eligible for the presidency; if it opted against counting the votes it would provide fodder for the argument that they are ineligible. *Cf.* KALT, *supra* note 63, at 149 (discussing congressional handling of Horace Greeley's three posthumous electoral votes in 1872). Such precedents are not etched into stone, but they would be highly meaningful and would presumably carry significant weight for future would-be candidates and future Congresses.

⁷⁰ *Your Crook* does cite my most relevant article, but only for a footnote in it about whether Presidents and Vice Presidents are civil officers. Cassady, *supra* note 1, at 291 n.396. I also reject *Your Crook's* characterization of my footnote as an example of an “ingenious argument” that the President and Vice President are not officers of the United States. *See id.* at 291. My footnote briefly presents two sides of the argument in an effort at being precise and complete on a point that is tangential to the article (which, at 123 pages and 552 footnotes, has plenty such tangents). *See* Kalt, *supra* note 2, at 19 n.17. *Your Crook's* refutation of the “ingenious argument” is quite good, *see* Cassady, *supra* note 1, at 291–94, and so I would have loved to see what Mr. Cassady thought about my discussions of disqualification, and of other structural aspects of impeachment, in the rest of that article.

⁷¹ *See, e.g.,* KALT, *supra* note 63, at 44–47 (considering textual arguments about the inherent bilateral nature of pardons).

the President) is being used in such cases. But what the voters are doing in these cases is different from a pardon in ways more fundamental than that.

Black's Law Dictionary defines a pardon as “[t]he act or an instance of officially nullifying punishment or other legal consequences of a crime.”⁷² For both expulsions and disqualifications, the notion of a pardon is inapt even by analogy.⁷³

What is the “legal consequence” of a disqualification? If disqualification does not bar DQees from Congress, then electing a DQee is not nullifying any legal consequences of the disqualification. If disqualification *does* bar DQees from Congress, then the voters do not have the power to nullify that legal consequence.⁷⁴ In neither case would the voters be nullifying a legal consequence of disqualification. Conversely, the

⁷² BLACK'S LAW DICTIONARY 1286 (10th ed. 2014).

⁷³ We are in the realm of analogy because there are no crimes involved in impeachment or expulsion; a main point of both impeachments and congressional expulsions is that they are distinct from the actual criminal-justice process. *Your Crook* does not claim otherwise, but it does refer infelicitously to Alcee Hastings as having been “convicted of a terrible crime against the public.” Cassady, *supra* note 1, at 214.

⁷⁴ By analogy, consider Section 3 of the Fourteenth Amendment, which bars rebels (i.e., Confederates and their ilk) from election to Congress and other positions. U.S. CONST. amend. XIV, § 3. Any attempt by voters to “pardon” a Section 3 disqualification would be invalid, *Your Crook's* Wilkesian structural imperatives notwithstanding. Only Congress, by a two-thirds vote of both houses, can “pardon” this disability. *See id.*

The voters' lack of power here is not necessarily a strike against *Your Crook's* fundamental argument; if ever there were an instance in which it made sense to protect Congress from the people's free choice of representatives, it is here. In an analogous situation, *Your Crook* creates an exception to its notion that Congress must accept a voters' “pardon” of an expelled member: “defiant encouragement of ongoing conduct that is detrimental to republican government.” Cassady, *supra* note 1, at 261–63 (discussing Preston Brooks, who assaulted a senator, and a hypothetical corrupt representative who steals things for his district, but limiting the exception to such cases rather than including, say, someone who habitually demeans minority colleagues in a way that is pleasing to his constituency). The bottom line remains, though, that *Your Crook's* structural imperatives are subordinate to the constitutional text—or should be—and here, as with impeachment disqualification, the voters have no power to nullify any legal consequences.

Of course, if the voters think a candidate was a rebel, they can vote against him on that basis. But even if they elect him—if they think he is not a rebel, or that he is but that that should not matter—they do not get the last word. As with the election of a disqualified person, by electing a person potentially classified as a rebel the voters would be setting up a qualification challenge in Congress. Adjudging someone to be a non-rebel (and thus not in need of a “pardon”) arguably requires only a simple majority of the chamber to which a non-rebel has been elected. *See* U.S. CONST. art. I, § 5, cl. 1 (making each house the sole judge of the qualifications of its members). Anyone failing that vote could still—but would be unlikely to—win the requisite two-thirds majorities in both houses to win a “pardon.” *See id.* amend. XIV, § 3.

DQee's eligibility would not turn in any way on his or her ability to win an election, and so an electoral victory would never constitute any sort of pardon.

The same is true for expulsion. As *Your Crook* correctly and painstakingly notes, someone who is expelled from the House or Senate should be eligible immediately for election to his or her old seat. But such people *are* eligible for election. Because of that eligibility, voters do not nullify any legal consequences of the expulsion when they elect an expelled person. The legal consequence of the expulsion is simply the removal of the incumbent from his or her seat and the creation of a vacancy. Legally, then, the expelled incumbent stands in the same position as any other potential candidate, any of whom can count an election victory as a popular endorsement, but none of whom should count an electoral victory as any sort of a pardon.

In this light, *Your Crook's* statement that a successful election can constitute an "exception" to disqualification is basically meaningless.⁷⁵ Again, disqualified people are either eligible for election to Congress or they are not. *Your Crook* seems to be attempting to find a third category, despite the lack of a space for one. Electoral eligibility necessarily precedes electoral victory. Here too, to say that DQees can serve in Congress, but only if they win an election, is simply to say that DQees stand in the same position as any other candidate.

Despite all of this, *Your Crook* spurred me to consider two areas where the "pardon" analogy could be meaningful. The first is election to the presidency.⁷⁶ I make no choice here between *Your Crook's* conclusion that, legally, the Disqualification Clause renders targets ineligible for the presidency such that "even the unanimous election of the whole people could [not] give absolution,"⁷⁷ and the arguments on the other

⁷⁵ Cassady, *supra* note 1, at 222.

⁷⁶ The issue is not presidential pardons per se; *Your Crook* recognizes that disqualifications are beyond the reach of actual pardons. *See id.* at 221 (referring to disqualification as "unpardonable"); *see also id.* at 269–71 (discussing importance of this limitation).

⁷⁷ H.R. REP. NO. 42-81, at 6 (1873). This quotation is from the House Judiciary Committee's discussion of impeachment in a report on the Crédit Mobilier scandal. The committee argued against the idea that Vice President Colfax could be impeached for offenses he committed before entering office. Part of its argument concerned the serious—and unpardonable—blot that impeachment could represent. *Your Crook* quotes this discussion, *see* Cassady, *supra* note 1, at 265, which I appreciated because, despite its relevance for my past work on impeachment, I had not before made use of it.

side.⁷⁸ One can easily imagine the arguments in such a legally contested case for extending the “electoral pardon” concept to the presidency.

Imagine a President impeached, convicted, and disqualified in a highly politicized proceeding. Refusing to back down, he runs for President at the next opportunity. His opponents claim that he is ineligible, but his proponents fire back with their own arguments. Throughout the resulting litigation and campaigns in Congress, the media, and the court of public opinion, the candidate and his followers would surely trumpet their slogans of popular sovereignty. Such a candidate could win, and could do so at the same time that the opposing party was punished severely by the voters in congressional elections.

Because the question of eligibility for the presidency is less clear than eligibility to Congress, however, one could say that during the presidential campaign the DQee is really only “semi-eligible” to be President. In an analogy to quantum physics, we can say that only once he wins—*because* he wins—would he be fully eligible.⁷⁹ In that sense, it would be more apt (if still not fully apt) to say that the DQee had been granted an electoral pardon.⁸⁰

Much of this depends on who decides, though. One would presume that there would be legal challenges any time a DQee ran for Congress⁸¹ or for President. An adverse court decision early on would nip in the bud any possibility of an electoral pardon. Without such a court decision, though, a successful election result would make it harder for the proper authorities (a later court, or one or both houses of Congress) to go the other way. And that said, it is much harder to imagine a court or Congress rejecting a clear result in a presidential election as lightly as it might reject one for the House or Senate.⁸²

⁷⁸ See *supra* note 56 and accompanying text.

⁷⁹ See *supra* text accompanying notes 67–68.

⁸⁰ I wrote about similar phenomena in KALT, *supra* note 63. Two principal ideas pervaded my discussion there. First, if there are two sides to a constitutional question about the presidency, the winning one may owe more to the political potency of its proponents than to its objective, abstract legal correctness. Second, precedent is powerful, and a victory for one side in just one case can turn a disputed question into a settled one. A good example of this is the precedent set by President Tyler that when a President died, the Vice President became President rather than merely Acting President. Controversial at the time, Tyler’s (politically) successful assumption of his preferred title set a precedent that was honored ever after. See *id.* at 65, 96.

⁸¹ There was a legal challenge to Alcee Hastings’s eligibility for election to the House, unmentioned in *Your Crook*. *Waggoner v. Hastings*, 816 F. Supp. 716, 717 (S.D. Fla. 1993).

⁸² See *supra* notes 67–69 and accompanying text.

The second area where the pardon analogy is useful is with regard to another interesting question outside the scope of *Your Crook*: can a disqualification be reversed? Imagine a case in which an executive branch official is convicted of a crime, but continues to protest his innocence. He is impeached by the House, and convicted and disqualified by the Senate. Some years later, though, new evidence emerges that exonerates him. The President pardons him and thereby erases his criminal conviction. Congress could attempt to repudiate the former Congress's action: a House resolution could symbolically disavow the impeachment, and a Senate resolution could symbolically disavow the conviction. While this would not un-remove him from office, Congress could pass a law to award him the back pay he would have earned if he had served out his term, similar to what it did after the Senate reversed its expulsion of William Sebastian.⁸³

But what about the disqualification? Could the Senate vote to undo the earlier Senate's action, on grounds that the new evidence renders it unjustifiable? Such an action would certainly be questionable; finality is an important principle.⁸⁴ But realistically, what is to stop the Senate? If the President were to nominate a DQee for something, the Senate would presumably reject the nomination on the grounds that the official had been disqualified. But if the DQee had been exonerated and Senate thought it could undo the disqualification, it could take a vote to do so and then confirm the nominee. It might be hard for anyone to have standing to challenge the validity of certain appointments (say, ambassadorships), so the courts might not even have a chance to weigh in. Even if they did review it, they could declare revocability of a disqualification to be a political question or, short of that, one on which the Senate's interpretation of its own powers is subject to a high level of deference. Although nothing is certain here, there is at least the *possibility* that the Senate could remove the legal consequences of a disqualification.

And *that* would be analogous to a pardon.

⁸³ See S. REP. NO. 44-513 (1876) (dealing with Sebastian's case); 5 CONG. REC. 2194 (1877) (revoking Sebastian's expulsion).

⁸⁴ For an interesting analogous discussion, regarding whether the Senate could have disqualified Hastings later, only after his election, see MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 60-61 (2d ed. 2000).

VI. CONCLUSION

This response ends as it began: noting that *Your Crook* is an interesting article about an interesting subject, and endorsing its conclusion that DQees are eligible for election to Congress. But the constitutional text is the most important source for making this determination, and the constitutional structure is not as one-sided as *Your Crook* would have it.

Because there are places where the Disqualification Clause's text is *not* as decisive, all of this can matter. If Rod Blagojevich ever runs for the Illinois General Assembly, expect his supporters and lawyers to cite *Your Crook* and John Wilkes, but expect to see his opponents cite their own textual, structural, and historical arguments. If a DQee ever runs for President, the text and (all of) the structure will matter, but probably not as much as the political facts on the ground. In either case don't be surprised if *Your Crook's* arguments, worthy though they are, end up on the losing side.

