



History, democracy and violence: Groups weigh in to SCOTUS ahead of Trump disqualification arguments

Michael Karlik

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In the days leading up to the U.S. Supreme Court's historic consideration of whether Donald Trump is constitutionally barred from seeking another term as president, 73 sets of legal briefs representing thousands of individuals and organizations flooded in to offer perspectives on the Colorado Supreme Court's finding of Trump's ineligibility.

Although most of the "amicus" — or friend-of-the-court — briefs took a position on Trump's disqualification from office, 14 submissions were formally filed in favor of neither side. Some groups simply asked the Supreme Court to decide the case as soon as possible, as voters have already cast primary election ballots in multiple states. Others warned that federal courts should not second-guess state courts' interpretations of their own election law.

David Boyle, a Long Beach, Calif. attorney, argued the Supreme Court could order Trump removed from every state's ballot or kept on every state's ballot if it wished, but disqualification would not be inherently undemocratic.

"Democracy includes protecting people from insurrectionists, not just letting anyone onto the ballot," Boyle wrote. "And it may be exponentially more important to keep an insurrectionist off the ballot, than to keep someone off who's 34 years, 11 months, and 29 days old on Inauguration Day."

The Supreme Court agreed last month to hear a case that rocketed through Colorado's courts since the fall. A group of four Republican and two unaffiliated voters petitioned a judge to order Secretary of State Jena Griswold to keep Trump off of Colorado's 2024 presidential primary ballot.

Colorado Supreme Court Justice Carlos Samour, Jr., left, asks a question during oral arguments before the court on Dec. 6 in Denver. Looking on are Justices Richard L. Gabriel, second from left, Monica M. Marquez, third from left, and Chief Justice Brian D. Boatright. Colorado Supreme Court justices have sharply questioned whether they could exclude former President Donald Trump from the state's 2024 ballot.

Although the petitioners used state elections law as their vehicle, their fundamental complaint was that Trump's actions to halt the certification of President Joe Biden's victory and encourage a mob of his supporters to attack the U.S. Capitol amounted to disqualifying conduct. Specifically,

Section 3 of the 14th Amendment, which was ratified in the wake of the Civil War, disqualifies senators, U.S. representatives and "an officer of the United States," among others, from holding future office if they took an oath to support the Constitution and subsequently "engaged in insurrection."

The Colorado Supreme Court, by 4-3, agreed with the petitioners in December, prompting Trump's appeal to the nation's highest court.

"Remarkably, the Supreme Court of Colorado has devised a new way to divide an already bitterly divided national electorate. It has found a way for state officials to take the outcome of a presidential election, at least in part, and perhaps entirely, out of the hands of voters," wrote the conservative groups Judicial Watch and Allied Educational Foundation in support of Trump. "Its decision rewards local, partisan interests, and clever lawyering."

"Section 3 was enacted for such a time as this, and for such a figure as President Trump," countered Sherrilyn Ifill, who formerly led the NAACP Legal Defense Fund.

"Insurrection in a stable democracy should be rare and firmly rejected. But when it occurs, its proponents must be barred from political leadership."

Several of the briefs addressed the main themes underlying the disqualification case: Does Section 3 apply to presidents as "officers of the United States?" Can Section 3 alone function to disqualify Trump or does Congress need to act first? Did Trump's words and actions to overturn the 2020 election results amount to engaging in insurrection?

Some of Trump's supporters characterized his conduct as First Amendment-protected speech or minimized the Capitol attack of Jan. 6, 2021. The Christian Family Coalition Florida, Inc. described Jan. 6 as an "unruly break-in at the Capitol which lasted 2-3 hours." A collection of gun rights groups suggested that Trump "may have" actually won reelection in 2020.

Other briefs pointed out law enforcement has not charged Trump with insurrection and the U.S. Senate failed to reach the supermajority required to convict him for incitement.

The absence of criminal proceedings for Trump meant nothing, countered George Mason University professor and Cato Institute scholar Ilya Somin, because "as demonstrated by the famous case of O.J. Simpson, a person acquitted of a crime may nonetheless be subject to civil liability for the very same events."

On the subject of Section 3's applicability to the presidency or the need for Congress to authorize disqualification proceedings, multiple briefs presented historical evidence about the motivations of the Reconstruction Congress. Trump's supporters contended the exclusion of the presidency from Section 3 was conspicuous, and the ratifiers of the 14th Amendment were not concerned about a supporter of the Confederacy becoming president.

Some briefs even suggested the actions Congress took in the late 1800s granting amnesty to former Confederates extended amnesty to anyone implicated by Section 3 going forward.

A group of Civil War and Reconstruction historians, however, noted Congress actually began considering Section 3 after hearing reports that secessionist activity in the South was on the rise

even after the war's end, making it a national security imperative to bar insurrectionists from positions of power.

"The Republican framers of the Amendment believed that anything short of the disqualification of insurrectionists risked surrendering the government to anti-Constitutionalist rebels," the scholars wrote.

Some Trump backers, in contesting the notion that a candidate could be disqualified before his election, noted the 20th Amendment provides a process for the vice president-elect to fill in "if the President elect shall have failed to qualify." Therefore, the appropriate time to adjudicate Trump's qualification would be after he wins.

Not so, argued 20th Amendment scholar Edward J. Larson of Pepperdine University. The amendment purely governs the line of succession after electors choose a president, and "has no impact" on disqualification decisions before Election Day.

Several briefs raised an identical concern: If Democratic states can find ways to disqualify Republican candidates from the ballot, Republican candidates will respond in kind by kicking off Democrats.

"For secretaries of state and state supreme court justices, the path to national notoriety will be illuminated: To enhance your credibility among co-partisans, simply concoct a reason to declare a disfavored presidential candidate of the opposing party ineligible to run for office," wrote Vivek Ramaswamy, a GOP presidential candidate who dropped out of the race after this year's Iowa caucuses.

Supporters of Trump alleged that Democratic officials' support for the 2020 protests over the police killings of Black Americans could just as easily qualify as an "insurrection."

Constitutional law scholars Akhil Reed Amar and Vikram David Amar emphasized there is a difference between lawmakers' "abstract statements of solidarity" and the action or inaction by a president as the electoral vote count is under assault by his supporters.

"A president must affirmatively protect the Constitution. Certain intentional inactions — smiling and sitting on his hands amidst an insurrection — are more constitutionally culpable," the Amars wrote.

FILE - Trump supporters participate in a rally in Washington, Jan. 6, 2021, that some blame for fueling the attack on the U.S. Capitol. The fate of former President Donald Trump's attempt to return to the White House is in the U.S. Supreme Court's hands. On Thursday, the justices will hear arguments in Trump's appeal of a Colorado Supreme Court ruling that he is not eligible to run again for president because he violated a provision in the 14th Amendment preventing those who "engaged in insurrection" from holding office.

State and national GOP organizations, as well as individual voters warned the disqualification of Trump infringed on their constitutional rights to select and support their party's candidates. If Trump remains ineligible, "then every President will now have to constantly look over his

shoulder, wondering how any politically charged decision or even campaign-related rhetoric might play out in each of the 50 states," wrote Republican attorneys general for 25 states.

If that is the case, countered a collection of experts who study democracy and the rule of law, it would be a product of Trump or other presidents using the tactics of dictators abroad.

"The events of January 6 unfortunately bear closer resemblance to what happens in some of the world's weakest democracies," they added.

The briefs further argued over the proper role of states and the courts in adjudicating presidential disqualification.

"Whatever the answer to that question, it emphatically should not be a power given to Secretaries of State," wrote a group of Republican secretaries of state.

A brief signed by more than 3,000 Americans believed any proceedings disqualifying Trump should take place "in a Washington, D.C. courtroom and not in a Colorado state court."

Those who supported Colorado's process noted the substantial evidence and witness testimony afforded to the disqualification challenge, and that the U.S. Constitution vests states with the ability to administer elections. Moreover, GOP voters could select a candidate who holds Trump's same policy views, but who did not engage in insurrection.

Second-guessing Colorado's decision "would avoid neither violence nor further insurrection. It would convey that our Constitution does not apply to individuals who threaten it, precisely because they threaten it," wrote retired members of six state supreme courts.

Three former GOP governors — Marc Racicot of Montana, William Weld of Massachusetts and Christine Todd Whitman of New Jersey — wrote at length about the sanctity of an oath to support the Constitution.

"Should Mr. Trump be permitted to stand again for election," they wrote, then the presidential oath and Section 3 "will have been rendered meaningless in their legal force and stripped of their moral authority and power."

Nearly 200 Republican members of Congress, writing in support of Trump, believed the court should merely conclude Section 3 did not account for a person like Trump

"Section 3 simply does not apply to someone whose only former governmental position was President of the United States," they argued.

Finally, 33 state and territorial Republican parties suggested the Supreme Court could simply end the case without deciding the case. Until Trump is formally the nominee — and potentially not until he is president-elect — the case may actually not be "ripe."

"In other words, if Mr. Trump were to lose either the Republican primary election or the general election, then there would be nothing for the courts to decide," they noted.