

GUEST ESSAY

The Supreme Court Should Overturn the Colorado Ruling Unanimously

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When Donald Trump appeals the Colorado decision disqualifying him from the ballot in that state's Republican primary, the Supreme Court should overturn the ruling unanimously.

Like many of my fellow liberals, I would love to live in a country where Americans had never elected Mr. Trump — let alone sided with him by the millions in his claims that he won an election he lost, and that he did nothing wrong afterward. But nobody lives in that America. For all the power the institution has arrogated, the Supreme Court cannot bring that fantasy into being. To bar Mr. Trump from the ballot now would be the wrong way to show him to the exits of the political system, after all these years of strife.

Some aspects of American election law are perfectly clear — like the rule that prohibits candidates from becoming president before they turn 35 — but many others are invitations to judges to resolve uncertainty as they see fit, based in part on their own politics. Take Section 3 of the 14th Amendment, which blocks insurrectionists from running for office, a provision originally aimed at former Confederates in the wake of the Civil War. There may well be some instances in which the very survival of a democratic regime is at stake if noxious candidates or parties are not banned, as in West Germany after World War II. But in this case, what Section 3 requires is far from straightforward. Keeping Mr. Trump off the ballot could put democracy at more risk rather than less.

Part of the danger lies in the fact that what actually happened on Jan. 6 — and especially Mr. Trump's exact role beyond months of election denial and entreaties to government officials to side with him — is still too broadly contested. The Colorado court deferred to a lower court on the facts, but it was a bench trial, meaning that no jury ever assessed what happened, and that many Americans still believe Mr. Trump did nothing wrong. A Supreme Court that affirms the Colorado ruling would have to succeed in constructing a consensual narrative where others — including armies of journalists, the Jan. 6 commission and recent indictments — have failed.

The Supreme Court has been asked to weigh in on the fate of presidencies before, and its finer moments in this regard have been when it was a force for stability and reflected the will and interests of voters. Almost 50 years ago, the court faced a choice to end a presidency as it deliberated on Richard Nixon's high crimes and misdemeanors. But by the time the Supreme Court acted in 1974, a special prosecutor, Leon Jaworski, had already won indictments of Nixon's henchmen and named the president himself before a grand jury as an unindicted co-conspirator. Public opinion was with Jaworski; the American people agreed that the tapes Nixon was trying to shield from prosecutors were material evidence, and elites in both political parties had reached the same conclusion. In deciding against Nixon, the Supreme Court was only reaffirming the political consensus.

As the constitutional law professor Josh Chafetz has observed, even *United States v. Nixon* was suffused with a rhetoric of judicial aggrandizement. But if the Supreme Court were to exclude Mr. Trump from the ballot, seconding the Colorado court on each legal nicety, when so many people still disagree on the facts, it would have disastrous consequences.

For one thing, it would strengthen the hand of a Supreme Court that liberals have rightly complained grabs too much power too routinely. Joe Biden came into office calling for a re-examination of whether the Supreme Court needs reform, and there would be considerable irony if he were re-elected after that very body was seen by millions to pre-empt a democratic choice.

Worse, it is not obvious how many would accept a Supreme Court decision that erased Mr. Trump's name from every ballot in the land. Liberals with bad memories of *Bush v. Gore*, which threw an election to one candidate rather than counting votes, have often regretted accepting that ruling as supinely as they did. And rejecting Mr. Trump's candidacy could well invite a repeat of the kind of violence that led to the prohibition on insurrectionists in public life in the first place. The purpose of Section 3 was to stabilize the country after a civil war, not to cause another one.

As it unfolds, the effort to disqualify Mr. Trump could make him more popular than ever. As harsh experience since 2016 has taught, legalistic maneuvers haven't hurt him in the polls. And Democrats do nothing to increase their popularity by setting out to "save democracy" when it looks — if their legal basis for proceeding is too flimsy — as if they are afraid of practicing it. That the approval ratings of the Democratic standard-bearer, Mr. Biden, have cratered as prosecutions of Mr. Trump and now this Colorado ruling have accumulated indicates that trying again is a mistake, both of principle and of strategy.

Perhaps the worst outcome of all would be for the Supreme Court to split on ideological lines, as it did in *Bush v. Gore*, hardly its finest hour. Justices have fretted about the damage to their "legitimacy" when their decisions look like political choices. They often are, as so many recent cases have revealed, but when the stakes are this high, the best political choice for the justices is to avoid final judgment on contested matters of fact and law and to let the people decide.

In the Nixon era, the justices were shrewd enough to stand together in delivering their decision: It was handed down 8-0, with one recusal. In our moment, the Supreme Court must do the same.

This will require considerable diplomacy from Chief Justice John Roberts, and it will define his stewardship as profoundly as cases such as *Dobbs v. Jackson Women's Health Organization*, in which his effort to herd his colleagues into consensus failed. In this situation, unlike that one, it will require him to convince his liberal colleagues who might otherwise dissent. For their part, they ought to be able to anticipate the high and unpredictable costs of presuming that judges can save a nation on the brink of breakdown.

The truth is that this country has to be allowed to save itself. The Supreme Court must act, but only to place the burden on Mr. Trump's political opponents to make their case in the political arena. Not just to criticize him for his turpitude, but to argue that their own policies benefit the disaffected voters who side with a charlatan again and again.

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