

NATION

Trump's cloudy future



Donald Trump campaigning in Colorado Springs in February 2020.

Evan Vucci/AP Photo

'No easy exit ramp' for SCOTUS after
Colorado high court disqualifies former
president from primary ballot, scholar says

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The historic 4-3 [decision](#) by the Colorado Supreme Court this week to bar Donald Trump from the state's primary ballot has turned up the heat on the 2024 presidential race.

In reversing the [ruling](#) of a lower court, the majority said the former president engaged in the Jan. 6, 2021, insurrection, and as an officer of the U.S. who swore an oath to uphold the Constitution, is disqualified from holding office again under Section 3 of the 14th Amendment. The Trump campaign has said it will appeal the decision to the U.S. Supreme Court.

For months, conservative and liberal constitutional [legal scholars](#) around the country, including J. Michael Luttig, a retired federal appeals court judge, and [Harvard Law School's Laurence Tribe](#), have [argued](#) that the 14th Amendment renders Trump ineligible.

The Gazette spoke with Tribe, Carl M. Loeb University Professor, *Emeritus*, about the Colorado decision and what will happen if the Supreme Court takes up the appeal. The interview has been edited for clarity and length.

Q&A

Laurence Tribe

GAZETTE: Luttig has called this a [“masterful” decision that is “unassailable”](#) on whether Section 3 of the 14th Amendment applies to a president. Do you share that view?

TRIBE: I do think it's unassailable. I think it's monumentally important, and it's the most important pro-democracy ruling in recent history. And I say that despite the fact that a lot of people are mistakenly thinking that there's something “undemocratic” about excluding an insurrectionist who attempted to overthrow our relatively democratic Constitution from the ballot. The whole point of this provision of the 14th Amendment was that we cannot trust anyone to hold any office of power, all the way up to the presidency, if that person took an oath to support or uphold the Constitution and then engaged in a systematic effort to engage in an insurrection against it. That's exactly the kind of person the authors of the 14th Amendment and those who ratified it recognized could not be trusted with power because entrusting power to someone who swears to defend the Constitution and then turns on it in order to seize power for

himself is a path to unfettered tyranny.

GAZETTE: What do you think of the dissents, particularly the argument that Trump was not afforded sufficient due process?

TRIBE: The dissents are extremely weak, surprisingly weak. Two of the three are now completely irrelevant. The dissents of Chief Justice [Brian] Boatright and Justice [Maria] Berkenkotter both involve an interpretation of Colorado election law that the court in this case authoritatively rejected by a vote of 5-2. The Supreme Court of Colorado has the last word on the meaning of Colorado law, so the fact that two of these justices happen to read Colorado law in a way that is now definitively rejected by the highest court of Colorado is of no moment.

The dissent of Justice [Carlos] Samour is fundamentally flawed. He begins and ends with the false proposition that “our government cannot deprive someone of the right to hold public office without due process of law.” There is no “right” to hold public office. When one holds a particular public office, that can’t be taken away without a fair, trial-like hearing. But the opportunity to run for office, especially the highest office in the land, is not a right in that sense. So, his entire frame of reference is wrong.

He says the elaborate procedure that the Colorado Supreme Court, and initially the Colorado trial court, made available to Donald Trump was “subpar due process.” On page 27, he calls it “diminished due process.” It was neither. It was a quite elaborate process and entirely fair. The Constitution itself contemplates that this is not like a criminal trial. It doesn’t impose punishment; it doesn’t impose civil liability; it doesn’t threaten anyone with the loss of liberty or property, or with imprisonment. It simply says, that for the privilege of wielding power over others, you must be someone who has not tried to overturn the Constitution after swearing to uphold it.

So the dissents are very weak and that reduces the likelihood that the Supreme Court will rely on anything the dissents say in order to overturn the majority’s ruling.

GAZETTE: Which issues will the Supreme Court likely address if they take this up, as is widely expected?

TRIBE: They have to address them all. There’s no way to resolve this case without deciding whether the 14th Amendment disqualifies people who take an oath to uphold the Constitution and then engage in an insurrection against it or whether it means

until Congress puts in place a special scheme to determine who is disqualified, the Disqualification Clause has no effect.

They'll have to decide what the Constitution means by an "insurrection" against the Constitution and whether that's what happened in this case. They will have factual findings, 298 paragraphs of them, from the state trial court. It's very hard to overcome those findings, given the limitations appellate courts, including the Supreme Court, always obey when reviewing the factual findings of a trial court. They'll have to decide whether Donald Trump "engaged" in that insurrection or gave it "aid and comfort."

One thing they could theoretically decide, as a legal matter, is that the highest office in the land is exempt from all this. That's an absurd interpretation of the language and of the history, but that is the hook on which the trial court hung its final decision not to disqualify Donald Trump — that the Disqualification Clause doesn't disqualify anyone from the presidency.

There's no issue in this case that the justices can avoid addressing. Even if they are desperate to duck, there is no easy exit ramp.

GAZETTE: How long could the Supreme Court take to decide this? Months?

TRIBE: It won't be months. If you go back to the calendar for the Nixon tapes case, that didn't take them very long. Look at *Bush v. Gore*: There were two arguments in the Supreme Court. I gave the first; David Boies gave the second. Mine was on Dec. 4; his was Dec. 11; and the Supreme Court decision was on Dec. 12. If there's a will, there's a way. And there better be a will here because the future of the country is at stake.

GAZETTE: Will any of the conclusions the Colorado Supreme Court has drawn — that Trump is an officer, that Section 3 of the 14th Amendment applies to him, that there was an insurrection on Jan. 6, 2021, which he engaged in and therefore is disqualified from the ballot — affect the Special Counsel's case in Washington, D.C., or the Fulton County District Attorney's case in Georgia?

TRIBE: No, I think none of them do. They may sound like they do because some of the language is the same. But the standards are different; the definitions may be different. The Georgia case involves the state RICO criminal statute, and the case in Miami involves classification and espionage laws. And he's not charged criminally with insurrection in D.C.

Do I think the Supreme Court will be affected by pure politics or by the threatened violence Trump keeps talking about if he is kept off the ballot? Your guess is as good as mine. But if they want to be faithful to their oath — and this case is ultimately about being faithful to the oath to support the Constitution — they will have to set those things aside.