

Should courts throw Trump off the ballot? Not so fast.

Never mind whether Donald Trump *should* be president a second time: The U.S. Supreme Court now looks likely to determine whether he even *can*. The justices must do so, mindful that the legal issues involved are murky — and that the implications of a court determining whether a candidate may participate in a democracy’s elections are substantial.

5 The Colorado Supreme Court on Tuesday decided 4-3 that Mr. Trump’s name may not appear on the ballot for the state’s upcoming primary election. The reasoning: Section 3 of the 14th Amendment prohibits anyone who has “engaged in insurrection or rebellion against” or “given aid or comfort to the enemies” of the United States after taking a state or federal oath to uphold the U.S. Constitution from holding high office ever again. According to the court, the presidency is one of these
10 high offices, and Mr. Trump, having egged on his supporters as they stormed the U.S. Capitol, is an insurrectionist. (...)

{Did} Mr. Trump really engage in insurrection? The Colorado court, armed with dictionary definitions and the defense’s counsel’s own words (according to which Jan. 6 was “more than a riot but less than a rebellion”), lays out the evidence. The armed mob that forcibly entered the Capitol with the
15 purpose of preventing the peaceful transfer of power, they say, was surely carrying out an insurrection. By fomenting myths of election fraud; by urging supporters at least 12 times to travel to D.C.; by exhorting them to “take back our country” when they arrived; by ignoring pleas to tell them to leave; Mr. Trump “engaged,” they say, in that insurrection, too.

As Justice Samour points out in his dissent, however, what’s missing from the majority’s
20 analysis is due process of law. Not only has Mr. Trump not been convicted of insurrection either by a jury of his peers or from the bench by a judge; he hasn’t even been charged with it. (...)

Of course, in the United States, not just anyone can be president. Only aspirants over age 35 who are natural-born citizens may occupy the Oval Office. The difference is that these criteria are objective. Whether someone has engaged in insurrection is less so. Disqualifying a candidate based on
25 an accusation (...) is dangerous. What’s to stop a Republican politician from seeking to bar his Democratic opponent because the opponent attended Black Lives Matter protests, claiming that those protests, some of them nominally in service of abolishing the police, qualify as insurrection? To be clear, there is no moral equivalence between Black Lives Matter protesters and the Jan. 6 Capitol mob. But that is the point: the potential for abuse is ample.

30 The courts don’t have an easy job. (...) The Colorado Supreme Court is correct that the judiciary has a “solemn duty to apply the law, without fear or favor.” Here, however, across multiple aspects of the case and on the insurrection question especially, the law is unclear. In the absence of clarity, a body of unelected officials should be reluctant to prevent the country’s citizens from choosing an elected official to lead them. The Supreme Court, hopefully, understands that.

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