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ARTICLES

COMMENTS

WHY DON'T YOU RUN FOR OFFICE?: WHAT YOU NEED TO KNOW ABOUT THE LAWS GOVERNING GETTING ELECTED

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This article is designed to be a starting point for someone exploring a run for public office in Texas. It is not exhaustive, nor authoritative, but instead a primer for the inquisitive and ambitious. Running for office and becoming a candidate is a complicated undertaking, by design. A "candidate" is a person who knowingly and willingly takes affirmative action for the purpose of gaining nomination or election to public office or for the purpose of satisfying financial obligations incurred by the person in connection with the campaign for nomination or election.[1]

What Should I Run For?

The first question is: why run for office? The next: what office will you seek? This decision should be driven by your inspiration to seek public office. What office's responsibilities include the issue(s) that have motivated you? For example, County Commissioners are very important officers in Texas state government, but have comparatively little influence over the regulation of reproductive health care, or policy related to the regulation/criminalization of narcotics, or the availability of compensatory damages in cases involving allegations of the negligent provision of health care services.[2] If you want to affect those policy choices, perhaps some other office is a better avenue to achieve your policy ambition. Are you motivated to simply serve your community in whatever capacity you can, or do you have a policy goal? If you simply want to serve your community, and the office or area of responsibility is less important to you, then you will make a more calculated choice about what race(s) you can win. For example, your ambition may be to become a District Judge. Many district court benches are held by individuals who have a lot of community support, and it may not be realistic to defeat the current occupants of those benches. Perhaps another elected position, which may be viewed as good preparation for the office you ultimately seek, is or will soon be available.

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[1] Tex. Elec. Code Ann. § 251.001(1).

[2] Tex. Loc. Gov't. Code Ann. § 81.

Many occupants of higher office have previously served in positions with relatively different responsibilities. Running for Governor, for example, is rarely a successful candidate's first race for public office,[3] though not impossible. Your first task, therefore, is to identify what office is the wise choice. "Wise," for the purposes of this article, means both realistically winnable and within your competence. For example, seeking a position on the Texas Railroad Commission without familiarity with the oil and gas business will decrease your ability to be effective and may poorly serve your constituents.[4] Other questions to consider include, but are not limited to: will voters view you as a qualified candidate? Will anything in your past come back to bite you? Will you have adequate resources to run an effective campaign? Politics is a noble, but sometimes tough enterprise.

Texas has three basic categories of public offices: federal, state, and local.[5] Local offices include: Mayor, City Council, County Commissioner, County Judge, County Court at Law judges, Sheriffs, Constables, Municipal Court judges, and others.[6] State offices include: State Representative, State Senator, Supreme Court, Court of Criminal Appeals, Attorney General, Land Commissioner, Comptroller, Agriculture Commissioner, and more.[7] Federal offices include United States Representative and United States Senator.[8] Click here to view a helpful infographic explaining the disparate areas of responsibility for various public offices in Texas.

Qualifications for All Public Offices

You should only run for an office for which you qualify. For example, one must have been licensed to practice law for eight years to be eligible to serve as a district judge.[9] Sheriffs are law enforcement

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[3] Hunter Schwarz, What jobs you should have if you want to be elected governor, WASHINGTON POST, (Sep. 12, 2014) https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/12/what-jobs-you-should-have-if-you-want-to-be-elected-governor/

[4] RAILROAD COMM'N OF TEX., About Us, https://www.rrc.texas.gov/about-us/ (last visited Mar. 24, 2024).

[5] TEX. SEC'Y OF STATE, Election Officials and Officeholders, https://www.sos.state.tx.us/elections/voter/current.shtml (last visited Mar. 24, 2024).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] TEX. SEC'Y OF STATE, Qualifications for All Public Offices, https://www.sos.state.tx.us/elections/candidates/guide/2024/qualifications2024.shtml (last visited Mar. 24, 2024).

officers and have specific required qualifications.[10] Almost every office requires a certain time period during which you have been a resident of Texas and the particular jurisdiction you seek to serve.[11] The Texas Secretary of State's website is quite helpful.[12]

Once you have decided on the office you intend to seek, then you must understand the details of eligibility. Almost all offices will require the payment of a fee accompanying an application for placement on the ballot, and some may have additional requirements.[13] For example, some judicial candidates must acquire a certain number of signatures of registered voters, with certain identifying information, on a specified form.[14] Failure to strictly follow these procedures and requirements may result in a candidate's ineligibility for placement on the ballot, compromising all the time and money previously committed to this effort.[15]

Pursuant to HB 2384, effective September 1, 2023, a candidate for the office of chief justice or justice of the Supreme Court, presiding judge or judge of the Court of Criminal Appeals, chief justice or justice of a Court of Appeals, district judge (including a criminal district judge), or judge of a statutory county court must provide the following information along with their application: the candidate's application must include the candidate's state bar number for Texas and any other state in which the candidate has been licensed to practice law.[16] The application must disclose the following: any public sanction or censure as defined by Section 33.001 of the Texas Government Code that the State Commission on Judicial Conduct or a review tribunal has issued against the candidate; any public disciplinary sanction imposed on the candidate by the state bar; and any public disciplinary sanction imposed on the candidate by an entity in another state responsible for attorney discipline in that state.[17] The application must include statements describing for the preceding five years the nature of the candidate's legal practice, including any area of legal specialization, and the candidate's professional courtroom experience.[18] The application must disclose any final conviction of a Class A or Class B misdemeanor in the 10 years preceding the date the candidate would

[10] Tex. Loc. Gov't. Code Ann. § 85.002.
[11] Tex. Loc. Gov't. Code Ann. Title 3.
[12] TEX. SEC'Y OF STATE, *supra* note 9.
[13] Tex. Elec. Code Ann. § 172.024.
[14] Tex. Elec. Code Ann. § 172.
[15] Tex. Elec. Code Ann. § 145.003 (f).
[16] Tex. Elec. Code Ann. § 141.0311(b)(1).
[17] Tex. Elec. Code Ann. § 33.001.
[18] Tex. Elec. Code Ann. § 141.0311(b)(3).

assume the judicial office for which the application is filed, if elected.[19] Failure to comply with these specific requirements can render you ineligible for the ballot, and all the time and money you have invested will have been wasted. The Texas Secretary of State's website provides additional materials on this.[20]

Getting Down to Brass Tacks

You will also need to undertake the "affirmative action" described in the first paragraph of this paper to make your candidacy official.[21] Examples of such "affirmative action" include: (A) the filing of a campaign treasurer appointment; (B) the filing of an application for a place on the ballot; (C) the filing of an application for nomination by convention; (D) the filing of a declaration of intent to become an independent candidate or a declaration of write-in candidacy; (E) the making of a public announcement of a definite intent to run for public office in a particular election, regardless of whether the specific office is mentioned in the announcement; (F) before a public announcement of intent, the making of a statement of definite intent to run for public office and the soliciting of support by letter or other mode of communication; (G) the soliciting or accepting of a campaign contribution or the making of a campaign expenditure; and (H) the seeking of the nomination of an executive committee of a political party to fill a vacancy.[22] You should consult all available resources and reach out to relevant agencies and offices to ensure compliance with all applicable campaign regulations. You must file these documents/credentials with the correct office. Depending on the candidacy, you may need to file with the local county office of the political party where you intend to stand for election, or alternatively, you may need to file with the state party's office.

You will also need a campaign treasurer.[23] Anyone can be a campaign treasurer, except someone who is already a treasurer of a PAC that has outstanding reports or civil penalties.[24] Certain small money PAC treasurers may be able to serve as your campaign treasurer, but it's important not to take any unnecessary risk.[25] A person who violates

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[19] *Id.* at (b)(4).
[20] TEX. SEC'Y OF STATE, Candidate's Guide to Nomination and General Election For 2024, https://www.sos.state.tx.us/elections/candidates/guide/2024/index.shtml (last visited Mar. 24, 2024).
[21] Tex. Elec. Code Ann. § 251.001(1).
[22] *Id.*
[23] Tex. Elec. Code Ann. § 252. 001.
[24] Tex. Elec. Code Ann. § 252.0011(a)(b).
[25] *Id.*

this prohibition is liable for a civil penalty not to exceed three times the amount of political contributions accepted or political expenditures made in violation of this section.[26]

Now, a candidate can appoint him/herself as their campaign treasurer.[27] The applicable form for this appointment is required by law and can be found on the Texas Ethics Commission's website.[28] This form is described as a "campaign treasurer appointment," or CTA.[29] A CTA is a document that appoints someone to be the campaign treasurer for a candidate.[30] This form covers all information that is required by law.[31] Candidates may not knowingly accept a campaign contribution or make/authorize a campaign expenditure when a CTA is not in effect.[32]

The CTA will be filed in different places for different offices. The CTA will be filed with (1) the Texas Ethics Commission, if running for a statewide office, a district office filled by voters of more than one county, a judicial district office filled by voters of only one county, state senator, state representative, or the State Board of Education; (2) the County Clerk, if running for a county office, a precinct office, or a district office other than one included above; or (3) the Clerk or Secretary of the governing body of the political subdivision or, if the political subdivision has no clerk or secretary, with the governing body's presiding officer, if running for an office of a political subdivision other than a county.[33]

Campaigns run on money. You will need to open one or more accounts that are separate from any other account you maintain if you plan on accepting contributions.[34] This is likely the most fraught undertaking in a campaign. This part of the campaign process will require your personal and careful attention. Title 15 of the Texas Election Code regulates political funds and campaigns.[35] It's so important to follow these requirements strictly. The candidate may be penalized by the

[26] Tex. Elec. Code Ann. § 253.0011(e)(f).
[27] Tex. Elec. Code Ann. §§ 252.0011(a); 252.004.
[28] TEX. ETHICS COMM'N, Forms & Instructions Treasurer Appointments (TA), https://www.ethics.state.tx.us/forms/TREASindex.php (revised Jan. 1, 2024).
[29] Tex. Elec. Code Ann. § 252.002.
[30] *Id.*
[31] *Id.*
[32] Tex. Elec. Code Ann. §§ 252. 011; 253.031.
[33] Tex. Elec. Code Ann. § 252.005.
[34] Tex. Elec. Code Ann. § 253.040.
[35] Tex. Elec. Code Ann. § Title 15.

Texas Ethics Commission both with the required payment of damages and penalties assessed by the Commission.[36]

You may consider whether you should form a campaign entity outside of simply your own candidacy.[37] This is a complex and demanding enterprise. The boundaries of this undertaking are outside the scope of this article, but it is advisable to consult with an expert in the formation and operation of any such entity.

Running for office is an act of patriotism. Every elected official made the decision to become a candidate and followed the applicable legal requirements. You can do this.

[36] Tex. Elec. Code Ann. §§ 252.131; 253.134.
[37] Tex. Elec. Code Ann. § 252.0032.

The following are supplementary infographics for *Why Don't You Run for Office?: What You Need to Know about the Laws Governing Getting Elected*, created to promote legal comprehension.

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Running for Public Office in Texas?

7 Steps You Need to Take to Campaign

What You Need to Know About the Laws Governing Getting Elected in Texas and How to Find Answers to Your Questions

General Information

There are 3 categories of public office in Texas: Federal, State, and Local.[1]

There are 2 types of federal public office: United States Representative and United States Senator.[2]

A complete listing of offices in Texas can be found on the Secretary of State's website.[3]

Campaign Steps

STEP 1

Choose which office you want.

Considerations should include:
- Why do you want to seek office?
- What office's responsibilities include the issue(s) that motivate you?

STEP 2

Determine if it's a race you can win.

- Is your selected office a wise choice?
- Is it both realistically winnable and within your competence?
- Will voters view you as a qualified candidate?
- Will anything in your past come back to bite you?
- Will you have adequate resources to run an effective campaign?

STEP 3

Determine if you qualify.

- The Texas Secretary of State has a helpful chart of office qualifiers.[4]
- Some qualifiers include experience, age, and residence location.
- Some offices have applicable fees that must be paid.
- Some offices require a certain number of voter signatures to run.

STEP 4

Take affirmative action.

- Once you have decided on which office you will seek, you now must undertake the "affirmative action" that will make your candidacy official.[5]
- For example, you may have to file an application for a place on the ballot; file an application for nomination by convention; file a declaration of intent to become an independent candidate, or a declaration of write-in candidacy.[6]
- A full listing of affirmative actions is found in the Texas Election Code.[7]

STEP 5

Get a campaign treasurer.

Anyone may be appointed a campaign treasurer, including the candidate, except those who are a treasurer of a PAC that has outstanding reports or civil penalties.[8]
- A CTA Form must be filed in the proper office at the appropriate time.[9]

STEP 6

Open a campaign bank account.

- You will need to open a separate bank account if you plan on accepting contributions because you cannot commingle funds.
- Title 15 of the Texas Election Code regulates political funds and campaigns.[10]
- A candidate may be financially penalized by the Texas Ethics Commission if the rules regarding donation acceptances are not strictly followed.[11]

STEP 7

Enjoy the campaign trail.

Happy Campaigning!

You now know the resources that can help you have an effective campaign. If you ever have a question, you may give the Texas Ethics Commission a call at 512-463-5800.

Source • So You Want to Run for Public Office: What You Need to Know about the Laws Governing Getting Elected by Justice Bill Pedersen, III & Louis A. Bedford, IV. Infographic created by Jamaria Rongey, Staff Reporter (2023-2024).

References

1 Tex. Sec. Of State, Election Officials and Officeholders, https://www.sos.state.tx.us/elections/voter/current.shtml(last visited Mar. 24, 2024).
2 *Id.*
3 *Id.*
4 Tex. Sec. of State, Qualifications for All Public Offices, https://www.sos.state.tx.us/elections/candidates/guide/2024/qualifications2024.shtml(last visited Mar. 24, 2024).
5 Tex. Elec. Code Ann. § 251.001(1).
6 *Id.*
7 *Id.*
8 Tex. Elec. Code Ann. § 252.001.
9 Tex. Ethics Comm'n, Forms & Instructions Treasurer Appointments (TA), https://www.ethics.state.tx.us/forms/TREASindex.php(revised Jan. 1, 2024)
10 Tex. Elec. Code Ann. § 15.
11 Tex. Elec. Code Ann. §§ 252.131, 253.134.

LAW REVIEW
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POLITICAL PARTIES: WHAT THEY ARE, AND WHY THEY MATTER

*W. David Griggs**

During an election year, the media constantly bombards us with the latest breaking news from the campaign trail. Sometimes that news is hard to comprehend, especially if we don't fully know the context of the issue being discussed, or if we have not been paying close attention. Often, the news is colored by "spin," or propaganda, from political parties or their surrogates who may have generated the news in the first place to promote their cause. If you are new to politics, or if you are just trying to stay informed, you may wonder why there is so much emphasis on political parties.

The reason is that we have a two-party system of government in the United States and generally always have.[1] "Control" of a legislative body, meaning a majority of members elected from a specific political party, determines leadership, and, therefore, defines the agenda. Maintaining that "control" by winning elections is vital for the effectiveness and longevity of the party leadership in the majority. In the federal government at the presidential level, the political party of the winning candidate has enormous influence on the administration's philosophy by influencing the appointment of executive officials, guiding administrative rule making, and in implementing public policy. Judicial appointments are also heavily influenced at all levels by political philosophy. Therefore, all three branches of government at the state and national levels are heavily dependent on the power and influence of our political parties.

How did the present-day Democratic and Republican parties develop and become so entrenched in our political system? Why are there only two major parties? How does party structure and participation make these particular parties so dominant? And why does it all matter? Let's first turn back the clock to learn about how the political phenomenon of parties began and how it developed.

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[1] The United States has generally always had two active parties during most of our history with the exception of a short period of about 20 years in the early 1800s after 1812 when the Federalist Party dissolved. This left the Jeffersonian-Democrats, who later evolved into the Democratic Party in 1828, as the primary political party prior to the formation of its new competition, the Whig Party, in the 1830s. *See* Benjamin Ginsberg, Theodore J. Lowi, Margaret Weir, Caroline J. Tolbert, Andrea L. Campbell, Megan Ming Francis & Robert J. Spitzer, *We the People* 227–232 (W.W. Norton & Co., 14th ed. 2022).

I. What are political parties, and how did they form in the United States?

Political parties are coalitions of like-minded people who organize to elect candidates and attempt to win control of the government in order to implement their policies. Basically, they are organizations of people who work to win elections.[2]

Ironically, the U.S. Constitution does not refer to political parties.[3] Given all the controversy and political dissent over the years about party factions, the nation's supreme law does not even mention them. The reason is likely that the founding fathers did not trust factions, another name for political parties. In fact, factions were seen as a threat to the new democratic government in James Madison's Federalist Papers, No. 10, where he warned of "the violence of faction" and called it a "dangerous vice."[4] The causes of a faction were thought to be "sown in the nature of man."[5]

A common thought among Federalists who pushed for ratification was that government by the masses was unstable due to factions, or conflicts among rival parties, and that the only way to deal with the causes of faction was to control their effects.[6] Thus, Madison and others called for ratification of the new democratic government as set forth by the Constitutional Convention in the form of a "republic," or representative democracy, where factions of a small minority could be defeated in an election by the diverse interests of a larger population.[7] President George Washington warned at the end of his second term in his farewell address that Americans should avoid partisan politics due to the dangers of people who intensely advocate for their own interests over those of the majority.[8] Washington was a talented and greatly respected leader who was the first and probably last president

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[2] *See id.*

[3] Richard L. Hasen, *Examples & Explanations for Legislation, Statutory Interpretation, and Election Law* 251 (Aspen Publishing, 2nd ed. 2019).

[4] Daniel Hays Lowenstein, Richard L. Hasan, Daniel P. Tokaji & Nicholas Stephanopoulos, *Election Law: Cases and Materials* 4–7 (Carolina Acad. Press, 7th ed. 2022).

[5] *Id.*

[6] *Id.* at 6.

[7] *Id.* at 5-6.

[8] Ginsberg et al., *supra* note 1, at 226; *see also* Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, Nathaniel Persily & Franita Tolson, *The Law of Democracy: Legal Structure of the Political Process* 372–374 (Found. Press, 6th ed. 2022).

to be able to circumvent the latent partisan divide. The factions were there then as they are now, and they could not be ignored for long.

II. How did our political parties develop?

Despite the warnings from two of our early presidents, political parties formed almost from the beginning, and the first two parties emerged during the first test of the Republic—the ratification of the Constitution.[9] The Federalists favored a strong national government and the Anti-Federalists (later known as the Jeffersonian-Republicans) favored a weaker national government, with more power reserved to the states.[10] Federalists were backed by New England merchants who supported tariffs to protect domestic production, while the Jeffersonian-Republicans favored free trade and the continued practice of slavery by the southern states.[11]

The Federalist Party began to wane with the election of Jeffersonian-Republicans in the early 1800s.[12] By 1828 with the election of Andrew Jackson, the Jeffersonian-Republicans evolved into the Democratic Party[13], known as the party that fought for the rights of common working people. Shortly thereafter, groups opposing Jackson's party formed the Whig Party as the Democrats' opposition.[14] The Whigs had some of the same support the Federalists had and were generally seen as their successors.[15]

The contentious issue of slavery continued to haunt the country throughout the first half of the nineteenth century and beyond. The issue delayed the Republic of Texas, formed in 1836 after independence from Mexico, from coming in as the 28th state until 1845.[16] Conflicts over slavery caused deep divisions in both rival parties

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[9] *Creating the United States*, LIBRARY OF CONGRESS, https://www.loc.gov/exhibits/creating-the-united-states/formation-of-political-parties.html (last visited Mar. 21, 2024).
[10] *Id.*
[11] Ginsberg et al., *supra* note 1, at pg. 228.
[12] *The Federalist and the Republican Party*, PBS AMERICAN EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/duel-federalist-and-republican-party/ (last visited Mar. 21, 2024).
[13] Alison Eldridge, *United States presidential election of 1828,* BRITANNICA, *https://www.britannica.com/event/United-States-presidential-election-of-1828* (last updated Feb. 20, 2024).
[14] *Whig Party*, HISTORY, https://www.history.com/topics/19th-century/whig-party (last updated July 29, 2022).
[15] Ginsberg et al., *supra* note 1, at 228–229.
[16] Anthony Champagne, Edward J. Harpham, Jason P. Casellas and Jennifer Hayes Clark, *Governing Texas* 48–49 (W.W. Norton & Co., 6th ed. 2023).

until the 1850s when the Whig party dissolved. The Republican Party was formed in 1854 in Wisconsin as the next rival to the Democrats by a group of civic and community leaders who opposed slavery.[17] The newly formed Republican Party chose Abraham Lincoln of Illinois in 1860 as its first presidential nominee.[18] The Republicans won the election that year, and the Civil War began soon after.[19]

The currently named political parties emerged out of the Civil War, but the parties have had significant changes in policy positions and membership over the past 160 years. The Democratic Party of Andrew Jackson was the conservative party of that era—still supporting states' rights and agrarian policies of the South. The Republican Party of Abraham Lincoln championed liberal voting rights for the freed slaves during and after Reconstruction and developed its base in the northern states.[20]

Throughout the rest of the nineteenth and twentieth centuries up until the Great Depression, the philosophical divide and voting alignment by the members of the two parties on issues remained relatively unchanged. However, Roosevelt's New Deal in the 1930s offered a new twist on issues for party affiliation, and Democrats began to attract minorities, labor, and liberals from the Republican base who saw the expanded federal government's role in the New Deal politically attractive.[21] Progress on civil rights and voting rights reform in the 1960s continued the shift in party affiliation as the Democrats championed these liberal issues. The remaining conservatives and moderates, once the backbone of the Democratic Party, began their slow migration to the Republican Party, especially in the South.[22] With the presidency of Barack Obama, the exodus of moderates from the Democratic Party accelerated, and after the influences of the Tea Party and the Trump presidency, the transformation of the political realignment of conservatives, especially social conservatives, to the Republican Party was complete.

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[17] *Republican Party founded*, HISTORY, https://www.history.com/this-day-in-history/republican-party-founded (last updated Mar. 14, 2024).
[18] *See id.*
[19] *See* Champagne et al., *supra* note 16, at 229–230.
[20] *Republican Party*, HISTORY, https://www.history.com/topics/us-government-and-politics/republican-party (last updated Feb. 1, 2021).
[21] *The New Deal Realignment*, INSTITUTE FOR SOCIAL RESEARCH AT THE UNIVERSITY OF MICHIGAN, https://www.icpsr.umich.edu/web/pages/instructors/setups/notes/new-deal.html (last visited Mar. 21, 2024).
[22] *Democratic Party*, HISTORY, https://www.history.com/topics/us-government-and-politics/democratic-party (last updated Jan. 20, 2021).

III. Why are there only two major parties today? Why not a third?

There have been many third-party experiments throughout our history. None have survived viability. In the nineteenth century, we had brief appearances by National Republicans, Prohibitionists, and Populists. We also had the Anti-Masonic, Liberty, Free Soil, and Greenback labor parties offer candidates. In the twentieth century, we had the most significant impact of a third party to date at the presidential level: Teddy Roosevelt's Progressive Bull Moose party garnered more than 27% of the popular vote in 1912, good enough for second place, and 88 electoral votes.[23] We also had third party efforts from the Progressive Party, the Socialist Party (again), the States' Rights (Dixiecrats) Party, George Wallace's American Independent Party, Ross Perot's United We Stand and Reform Parties, the Green Party, and the Libertarian Party.[24] Third parties have occasionally won electoral votes, but none have ever come close to garnering enough electoral votes to win the presidency.

So why only two? In our system of general election voting, the candidate who receives the highest number of votes wins regardless of whether they received a majority.[25] This is not the case in some primary election contests, such as in Texas, where the state mandates a primary runoff to determine who gets a majority of the votes to be the party's representative in the general election.[26] In the United States, where a *plurality* of the votes wins the fall general election, studies have shown that this supports a stable two-party system.[27] In contrast, parliamentary systems, popular in Europe, are generally based on a proportional representation model in multimember districts that allows each political party representation in proportion

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[23] *The Presidential Election of 1912*, TEACHING AMERICAN HISTORY, https://teachingamericanhistory.org/resource/election-of-1912?/ (last visited Mar. 21, 2024).

[24] *See* Champagne et al., *supra* note 16, at 229–230.

[25] Roger Gibbons, Heinz Eulau, Paul David Webb, *Plurality and majority systems*, BRITANNICA, https://www.britannica.com/topic/election-political-science/Plurality-and-majority-systems (last updated Mar. 28, 2024).

[26] The Texas Election Code mandates that a majority vote is required for the winners of primary elections. Therefore, a runoff primary is required if no candidate receives a majority in the general primary election. Tex. Elec. Code Ann. §§ 172.003, 172.004.

[27] Sarah Pruitt, *Why Does the US have a Two-Party System,* HISTORY (Jan. 12, 2024), https://www.history.com/news/two-party-system-american-politics.

to its percentage of the total vote.[28] Proportional systems often result in multiple parties being represented.[29]

In the 1950's, French political scientist Maurice Duverger developed "Duverger's Law," which concluded that "systems in which office is awarded to a candidate who received the most votes in a single-ballot election will produce a two-party system, rather than a multi-party one."[30] This is based on a rational-choice model that assumes that voters do not want to waste their votes on candidates who stand little chance of winning. Rather than voting for a third-party candidate who might be their first choice, a voter in a "plurality, winner take all system," like in general elections in the United States, will more likely vote for a candidate from one of the two major parties who has a realistic chance to win. [31] Thus, voters do not vote sincerely, but strategically.[32] This concept is still relevant today; it helps explain why Americans are so devoted to their political camps (parties) and why the two-party system perpetuates itself.

IV. Why are the two parties so entrenched as the only real political choices?

In recent years, the political divide in the country has become more pronounced. Social issues have become front and center in the debate, and various media outlets have taken opposing positions according to the values of their perceived audiences. We have become a polarized nation with two sides on almost every issue. One of the largest factors stirring the pot on this is the influence of cable television news, and, to some extent, social media. People who have strong opinions prefer to hear cable television commentators and politicians who feed those biases. The same goes for social media posts from those who espouse their views. This constant desire for electronic media to throw "red meat" to their viewers and subscribers has exacerbated a "tribe-like" obsession with the "news" outlets that cater to the philosophy of the voters. Candidates who buy in to this phenomenon only perpetuate the effect, and, unfortunately, add some credence to the propaganda by often appearing to speak for their political party. This often leads to false narratives and misinformed voters. However, the loyalty factor remains, regardless of the truth. That leads to even more entrenched political viewpoints on both sides.

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[28] *Plurality and majority systems*, *supra* note 25.
[29] Ginsberg et al., *supra* note 1, at 227.
[30] Issacharoff et al., *supra* note 8, at 372–374.
[31] *Id.* at 373.
[32] *Id.*

An institutional reason why the two-party system is so entrenched is because legislators have chosen to make it that way. In Texas, only the Democratic and Republican parties have qualified to hold primaries in which the voters choose their nominees. The Texas Election Code dictates that only parties whose "nominee for governor in the most recent gubernatorial general election received 20% or more of the total number of votes received by all candidates for governor in the election" *must* be nominated by primary election.[33] Texas election law also allows for the candidates of smaller parties whose nominee for governor received at least 2%, but less than 20%, of the most recent vote for governor, *may be* nominated by primary election. However, holding a statewide primary in 254 Texas counties is a daunting and expensive process, and a challenging endeavor. Smaller parties, often strapped for resources, opt to select their nominees by convention.[34] Thus, little attention is paid to their nominating efforts, while all the TV ads, media coverage, and general voter interest is on the "two" major party primaries.

Finally, the U.S. Supreme Court has generally been supportive of states that attempt to use reasonable means to limit access to the ballot by independent and third parties. In 1971, in *Jenness v. Fortson*, the Court upheld a Georgia law that required independent candidates to obtain signatures from electors equal to 5% of the number of registered voters in the district. [35] In *Munro v. Socialist Workers Party*, the Court in 1986 upheld a Washington state law that required independent candidates to receive at least 1% of the vote in an open primary as a precondition to general election ballot access.[36] The Court made it clear that states could "condition ballot access by minor-party and independent candidates upon a showing of a modicum of support among the potential voters for the office."[37]

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[33] Tex. Elec. Code Ann.. § 172.001.

[34] Furthermore, the Code states that "[i]f any nominee of a party is nominated by primary election, none of that party's nominees may be nominated that year by convention." Tex. Elec. Code Ann. § 172.002(b). This makes it hard for smaller parties to find candidates ahead of primary filing dates to qualify for the March primary ballot. Thus, for smaller parties to have a chance to file as many candidates as possible, the smaller parties generally have conventions scheduled just in time to get their nominees on the fall general election ballot.

[35] Jenness v. Fortson, 403 U.S. 431, 442 (1971).

[36] Munro v. Socialist Workers Party, 479 U.S. 189, 196–97 (1986).

[37] *Id*. at 193.

V. How does party structure and participation perpetuate party dominance?

Party structure and participation provide a powerful mechanism to keep the two major parties in control of the political process and in fierce competition with each other. Their rules allow for the mobilization of thousands of volunteers in party conventions and grassroots activism who help motivate the party faithful and turn out the vote.

The two national parties are governed by their national committees: the Democratic National Committee (DNC) and the Republican National Committee (RNC). Each coordinates party activities at the national level, plans for the national conventions, and adopts the national party platform. They also provide support for candidates, especially federal candidates, and coordinate with state committees. Each committee has a chair who presides at the meetings and at the national convention and serves as national spokesperson. DNC and RNC members are mostly elected by delegates at various state party conventions.[38]

In Texas, the Republican Party of Texas (RPT) and the Texas Democratic Party (TDP) are governed by their state committees: the State Republican Executive Committee (SREC)[39] and the State Democratic Executive Committee (SDEC).[40] Those committee representatives are elected at their respective state party conventions every two years. The state convention also elects a state chair for each party who leads the conventions, presides over the state committees, and runs the party business, including fundraising and hiring the state party staff.[41] The state conventions also adopt the respective party platforms of the RPT[42] and the TDP[43].

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[38] *See Call of the 2024 Republican National Convention*, THE REPUBLICAN NATIONAL COMMITTEE, 4–5 (2023), https://www.gop.com/rules-and-resolutions/; *see generally Who We Are*, DEMOCRATIC NATIONAL COMMITTEE, https://democrats.org/who-we-are/ (last visited Mar. 21, 2024).

[39] *General Rules for All Conventions and Meetings*, THE REPUBLICAN PARTY OF TEXAS, https://texasgop.org/rules/ (last visited Mar. 20, 2024).

[40] *Texas Democratic Party Rules*, TEXAS DEMOCRATS, https://www.texasdemocrats.org/party-rules (last updated Feb. 15, 2024).

[41] *See id.*; *see General Rules for All Conventions and Meetings*, *supra* note 39.

[42] *Platform and Resolutions as Amended and Adopted by the 2022 State Convention of the Republican Party of Texas*, THE REPUBLICAN PARTY OF TEXAS, https://texasgop.org/platform/ (last visited Mar. 20, 2024).

[43] *Texas Democratic Party 2022–2024 Platform*, TEXAS DEMOCRATS (Aug. 6, 2022), https://www.texasdemocrats.org/platform.

State and national parties recruit candidates to run for office, help them raise money to get elected, and work to get out the vote (GOTV) for their respective races. They also provide grassroots leadership opportunities for thousands of party volunteers eager to help their parties gain and maintain power. Opportunities for elective or appointive party service include, *inter alia*[44], precinct, county and state chairs, national and state committee members, and delegates to precinct, county, district, state and national conventions.[45] These volunteer party officials, together with thousands of campaign staff and volunteers, create an army of activists knocking on doors, making phone calls, sending texts and social media posts, all designed to motivate voters to participate in the election and vote for their party's candidates.

VI. Why do political parties matter?

Political parties matter because without them, representative democracy as envisioned in the Constitution, would be hard to achieve. Parties provide for the voice of the people in electoral politics. What was once thought of by our founding fathers as a "dangerous vice"[46] quickly became an essential element of our governance. Today, party politics pervades all branches of government at all levels and provides a way for citizens to get involved in government and make a difference.

Participation in government and attempts to influence the making of public policy, however, should require both an engaged public and attentive and knowledgeable representatives. That was a goal of a "republic." As Ben Franklin once said to the press at the end of the Constitutional Convention—you have "a republic, if you can keep it."[47] Have we achieved this goal after more than 235 years of experimentation? Does our representative democracy still work? Have we overcome the dangerous vice of factions that Madison and Washington warned us about? Has the growing, divisive nature of party politics and the polarization of our two "sides," or "factions," made this goal harder to reach?

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[44] *Inter alia* means "among other things." *Inter alia*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[45] Champagne et al., *supra* note 16, at 48–49.

[46] Lowenstein et al., *supra* note 4, at 4.

[47] *September 17, 1787: A Republic, If You Can Keep It*, NATIONAL PARK SERVICE, https://www.nps.gov/articles/000/constitutionalconvention-september17.htm (last visited Mar. 20, 2024).

Stay tuned, for this journey is not complete. Political parties, however, like them or not, appear to be here to stay.

The following is a supplementary infographic for *Political Parties: What They Are, and Why They Matter,* created to promote legal comprehension.

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POLITICAL *Parties*

Are political parties mentioned in the Constitution?

No.[1] The likely reason is the founding fathers did not trust political parties. They were seen as a threat to the new democratic government.[2]

President George Washington warned Americans against partisan politics as he feared people would intensely advocate for their own interests over those of the majority. [3]

THE PARTIES' DEVELOPMENT

1788

The Ratification of the Constitution

The first two political parties formed: the Federalists and the Anti-Federalists, also known as the Jeffersonian Republicans.[4]

1828

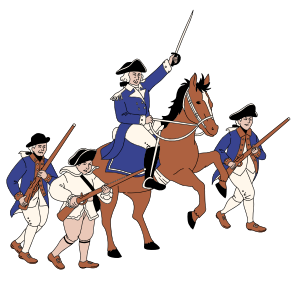
The Election of Andrew Jackson

In the 1800s, the Federalist Party began to dwindle and the Jeffersonian Republicans became the Democratic Party.[5] The Whig party emerged as the Democrats' opposition.[6]

1850s

The Dissolution of the Whig party

In 1854, the Republican Party was formed in Wisconsin and chose Abraham Lincoln in 1860 as its first presidential nominee, winning the election. [7]



1865

The End of the Civil War

Both parties remained through the end of the Civil War, the Democratic Party supported states' rights and agrarian policies while the Republican Party championed voting rights for the freed slaves.[8]

1930s

Roosevelt's New Deal

The Democratic Party began to attract minorities, labor, and liberals from the Republican base who agreed with expanding the federal government's role in the New Deal. [9]

1960s

Civil Rights Era

The Democratic Party's shift toward civil rights and voting rights caused the remaining conservatives and moderates to migrate toward the Republican Party.[10]

TWO PARTY DOMINANCE

Why not a third party?

Despite occasionally winning a few electoral votes, third parties fail to maintain viability and have not come close to winning enough electoral votes to secure the presidency.

This is further reinforced through Supreme Court decisions that allow states to condition ballot access for independent and third parties.[12]

Source • *Political Parties: What They Are, and Why They Matter* by David Griggs. Infographic created by Jennifer Montiel, Director of Technology (2023–2024).

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3 *See* Benjamin Ginsberg et al., *We the People* 226 (W.W. Norton & Co., 14th ed. 2022).

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6 *Whig Party*, History (July 29, 2022), https://www.history.com/topics/19th-century/whig-party.

7 *Republican Party founded*, History, https://www.history.com/this-day-in-history/republican-party-founded (last visited Mar. 21, 2024).

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9 *The New Deal Realignment*, Institute for Social Research at the University of Michigan, https://www.icpsr.umich.edu/web/pages/instructors/setups/notes/new-deal.html (last visited Mar. 21, 2024).

10 *Democratic Party*, History, https://www.history.com/topics/us-government-and-politics/democratic-party (Jan. 20, 2021).

11 Anthony Champagne et al., *Governing Texas* 229-230 (W.W. Norton & Co., 6th ed. 2023)

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LAW REVIEW
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DEMOCRACY IN THE BALANCE: A DISCUSSION OF THE SUPREME COURT'S RULING IN *TRUMP V. ANDERSON*

*Ryan Crocker**

On February 8, 2024, the Supreme Court heard oral arguments in the case of *Trump v. Anderson*. The core issue before the Court was whether the state of Colorado had the authority to remove Donald Trump from the ballot for his activities leading up to and during the January 6th attack on the Capitol.[1] Less than a month after oral arguments, the Court ruled unanimously to reverse Colorado's decision to exclude Trump from the presidential ballot.

Not since *Bush v. Gore*[2] has a Supreme Court decision had such a profound impact on a presidential election. The political consequences were stark. Had the Court affirmed Colorado's decision to disqualify Trump, it could have ended his bid for the White House because other states would have likely followed Colorado's lead, making it almost impossible for Trump to garner the required electoral votes to win the presidency. Instead, the Court held that states do not have the authority to enforce the Insurrection Clause under the Fourteenth Amendment.[3] The decision effectively reinstated Trump on the ballot for the duration of the campaign because there is no clear process in place (aside from a criminal conviction for insurrection under 18 U.S.C. § 2383)[4] for Trump to be disqualified before the election in November.

In addition to the political consequences of the decision, this case raised thorny issues of federalism, constitutional construction, and due process, and represented the first time the Supreme Court squarely addressed the applicability and enforcement of the Fourteenth Amendment's Insurrection Clause. This article will focus on the content of the oral arguments made by both sides, how those

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[1] Trump v. Anderson, 601 U.S. 100, 106 (2024).

[2] *See* Bush v. Gore, 531 U.S. 98, 103 (2000) (reversing the Florida Supreme Court's decision to manually count the votes in Florida, which had the effect of certifying the election results for George W. Bush).

[3] *Trump*, 601 U.S. at 117.

[4] 18 U.S.C. § 2383 (federal penal statute that criminalizes "rebellion or insurrection against the United States" and disqualifies persons convicted under the statute from "holding any office under the United States.").

arguments were received, and finally, the future impact of the Court's recent ruling.

Background:

The Insurrection Clause is found in Section 3 of the Fourteenth Amendment and was adopted in the aftermath of the Civil War to prevent former Confederates from holding state or federal office if they had previously taken an oath "to support the Constitution of the United States."[5]

The full text of Section 3 provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, ***or hold any office***, civil or military, ***under the United States***, or under any State, who, ***having previously taken an oath***, as a member of Congress, or as ***an officer of the United States***, or as a member of any State legislature, or as an executive or judicial officer of any State, ***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. But ***Congress may by a vote of two-thirds of each House, remove such disability.***[6]

In a nutshell, the provision disqualifies oath-breaking insurrectionists from holding a wide range of positions of political power, both at the state and federal level. But determining the application and enforcement of Section 3 is a major point of contention, and most of the arguments in this case focused on the meaning of the key phrases highlighted above and discussed below.

1. **"hold any office . . . under the United States"**

Is the presidency an office under the United States?

If a person is disqualified from "holding" office under Section 3, can a state prevent them from "running" for office?

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[5] Jennifer K. Elsea, Cong. Rsch. Serv., LSB10569, THE INSURRECTION BAR TO OFFICE: SECTION 3 OF THE FOURTEENTH AMENDMENT (2022).
[6] U.S. CONST. amend. XIV, § 3 (emphasis added).

During oral arguments, Trump's attorney, Jonathan Mitchell, made two points here. First, he made a textualist[7] argument that the Insurrection Clause does not apply to presidential candidates because the presidency is not an "office under the United States," within the meaning of Section 3. Second, Mitchell argued that even if Section 3 applied to presidential candidates, it only disqualifies a person from "holding" office, not "running" for office. Citing the holding in *U.S. Term Limits, Inc. v. Thornton*, Mitchell argued that by preventing Trump from running, Colorado altered a qualification for holding office, in violation of the Supreme Court's decision in *Term Limits.*

A. Trump's attorney refused to concede that the presidency is an "office under the United States."

In colloquy with Justice Kagan, Trump's lawyer acknowledged the weakness of his textualist argument that the phrase "office under" does not encompass the presidency, agreeing with Justice Kagan that it would be an odd policy stance to assume that the framers intended to exclude oath-breakers from virtually every governmental office except the presidency. Despite this, he refused to concede the point that the Insurrection Clause could be applied to a presidential candidate.

A later line of questions from Justice Jackson further explored the framers' intended meaning of the "office under" language. Based on the historical record indicating that the framers of Section 3 were primarily concerned about the South rising again through state elections for lower-level political offices, Jackson questioned why the framers would smuggle such an important office as the presidency into Section 3 by using the catch-all phrase "office under the United States." She pointed out that senators, house representatives, and electors are all specifically enumerated in Section 3, while president is conspicuously absent from the list.

In response to Justice Jackson, Mitchell noted that unlike the presidency, neither seats in Congress nor elector positions are considered "offices," which could explain why the framers specifically enumerated those positions and not "president." He also noted that the historical record reflected a concern among some framers that former president of the Confederacy, Jefferson Davis, could be elected president of the United States. For these reasons, Mitchell emphasized that the strongest textualist argument that Section 3 does not apply to

[7] Textualism is "The doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." *Textualism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Trump is that the president is not an *officer* rather than that the presidency is not an *office*, again without conceding his "office under" argument.

Aside from Justice Jackson, the justices seemed inclined to apply the same approach as the Colorado Supreme Court on this issue, preferring to interpret the phrase "office under" according to its normal and ordinary usage, rather than its "secret or technical meanings that would not have been known to ordinary citizens in the founding generation."[8] Such a construction also avoids the absurd result that a candidate disqualified under Section 3 is barred from holding practically every office except the presidency.

B. Trump's attorney challenged the Colorado decision under the Supreme Court's holding in *Term Limits*.

In support of his second point, Mitchell distinguished the disqualification under Section 3, which is defeasible by a two-thirds vote of Congress, from the categorical presidential qualifications found in Article II of the Constitution, such as age and citizenship.[9] He argued that because a supermajority in Congress can waive a Section 3 disqualification, an insurrectionist oath-breaker is not categorically barred from holding office, unlike an underage candidate or a non-citizen. Accordingly, Mitchell argued states cannot use Section 3 to exclude a presidential candidate from the ballot without express authorization from Congress in the form of enabling legislation. According to Mitchell, such action by a state runs afoul of the holding in *U.S. Term Limits, Inc. v. Thornton,*[10] which stands for the proposition that a state cannot alter the Constitution's qualifications for federal office. Mitchell asserted that by pulling Trump from the ballot before Congress decided whether to waive the disqualification, Colorado precluded such a waiver and effectively changed a qualification for the presidency.

Even if Congress enacted legislation to enforce Section 3, Justices Barrett and Alito questioned how Congress could authorize the states to use the Insurrection Clause to prevent a disqualified candidate from running for office, when Section 3 only disqualifies a person from

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[8] Anderson v. Griswold, 543 P.3d 283, 320 (Colo., 2023) (quoting District of Columbia v. Heller, 554 U.S. 570, 577 (2008)), *rev'd*, 144 S.Ct. 622 (2024).

[9] U.S. CONST. art. II, § 1, cl. 5.

[10] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995) (holding that the power to add or alter "congressional qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States.").

holding office. In response, Trump's attorney noted that Congress is not bound by the holding in *Term Limits*, which only applies to the states, and therefore, so long as the legislation was "congruent and proportional"[11] to the purpose of Section 3, the enabling legislation would be constitutional, pursuant to Section 5 of the Fourteenth Amendment, which gives Congress the power to enact legislation to enforce its provisions.[12] Here, Mitchell reiterated that without such enabling legislation, the states cannot use Section 3 to remove a candidate from the ballot.

Colorado's attorneys countered this position by arguing that states have broad powers under the Tenth Amendment and Article II of the Constitution to run elections, which includes the power to exclude unqualified presidential candidates from the ballot.[13] They further contended that disqualification under Section 3 is no different than disqualification for age or citizenship, for which candidates are routinely pulled from the presidential ballot. Justice Kagan challenged Colorado's position that a Section 3 disqualification should be treated the same as a disqualification for age or citizenship. She stated that unlike the Article II presidential qualifications of minimum age and natural born citizenship, which are absolute, a disqualification under Section 3 can be waived by a two-thirds vote of Congress, such that it is not an absolute bar on holding the office of the presidency. Kagan also pointed out the relative difficulty in adjudicating whether a candidate has "engaged in insurrection," compared to a determination of a candidate's age or citizenship status.

The argument that Colorado's removal of Trump from the ballot violated the Supreme Court's holding in *Term Limits* may be the strongest legal basis for a reversal of the Colorado Supreme Court's decision. Although *Term Limits* was decided in the context of congressional rather than presidential qualifications, it is difficult to distinguish the facts of this case from other cases where federal courts

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[11] *See* City of Boerne v. Flores, 521 U.S. 507, 508 (1997) (holding that when Congress enacts legislation to enforce the Fourteenth Amendment, pursuant to its Section 5 authority, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

[12] U.S. CONST. amend. XIV, § 5.

[13] *See* U.S. CONST. amend. X (reserving to the states all "powers not delegated to the United States by the Constitution"); U.S. Const. art. II, § 1, cl. 2 (granting the states exclusive power to appoint presidential Electors to the Electoral College, which confers broad power to the states to run presidential elections).

have followed *Term Limits* and held that a state cannot add to or alter a constitutionally imposed qualification for an elected office.[14]

2. "an oath . . . to support the Constitution"

Does the President swear an oath to support the Constitution?

If you have ever watched a presidential inauguration, you would be forgiven for assuming that the answer is yes. But even this issue was contested by Trump's legal team. The presidential oath is phrased slightly differently than the language found in Section 3 and does not include the magic words "to support the Constitution". Instead, it arguably goes even further by including a commitment to "preserve, protect, and defend the Constitution"—a phrase which is at the very least consistent with the plain meaning of the word "support."[15]

In their appellant briefs, Trump's team argued that an "oath to support the Constitution" is a term of art referring only to the oaths taken by lower-level officers, but it was not pressed in oral arguments, probably because it is one of Trump's weaker arguments. Standing alone, it would seem unavailing to argue that Section 3 does not apply to the president merely because his oath doesn't track the language of the Insurrection Clause verbatim.

3. "as an officer of the United States"

Is the president an officer of the United States?

The president is commonly referred to as the chief executive officer of the United States and is the Commander in Chief of the armed forces. Despite this commonsense understanding, a large portion of oral arguments was devoted to discussing the issue of whether the president is an officer of the United States. Here, Trump's team argued that "officer of the United States" is a specific term of art within the meaning of the Constitution, which does not encompass the president because it refers only to appointed officials, not elected officials. This interpretation takes cues from the text of other

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[14] *See, e.g.*, Schaefer v. Townsend, 215 F.3d 1031, 1037 (9th Cir. 2000) (following *Term Limits*, the Ninth Circuit held that a provision of the California Election Code, requiring congressional candidates to reside in the state well in advance of the election, altered the residency requirement for Representatives in Article I § 2, thereby violating the Qualifications Clause).

[15] U.S. CONST. art. II, § 1, cl. 8.

constitutional provisions, such as the Commissions Clause, Appointments Clause, and the Impeachment Clause, all of which use the phrase "officer of the United States" to refer only to appointed federal officials, not the president.

For instance, the Commissions Clause of Article II, § 3 states that the president "shall commission all the Officers of the United States," and obviously the president cannot commission himself, so it follows that the president must not be an Officer of the United States, as that term is used in the Commissions Clause.[16]

Likewise, the Appointments Clause of Article II, § 2 provides that the president "shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . ."[17] Trump's attorneys used this to argue that Officers of the United States only refers to appointed, not elected officials.

Finally, the Impeachment Clause, found in Article II, § 4, states that "the President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[18] In colloquy with Justice Gorsuch, Mitchell argued that by referring to the president and vice president separately from Officers of the United States, the Impeachment Clause reinforces the position that Officer of the United States has a consistent meaning throughout the Constitution and does not include the president. Based on these provisions, Trump's attorney emphasized that the "officer of" argument is the stronger of their two textualist arguments that Section 3 does not apply to Donald Trump (the other being the "office under" argument discussed above).

The counter argument offered by Colorado's lawyers was that a narrow construction of "officer" is non-sensical in the context of Section 3 because it means that a person who held the most powerful position in our government could engage in insurrection and then hold office, while no other government officer could. They also made the point that when read in the context of Section 3's deliberately broad, inclusive language, the phrases "office under" and "officer of" are best read as two sides of the same coin, referring to any federal office or to anyone who holds one. On that basis, Colorado argued

[16] U.S. CONST. art. II, § 3.

[17] U.S. CONST. art. II, § 2, cl. 2.

[18] U.S. CONST. art. II, § 4.

that Section 3 covers all positions of federal power requiring an oath to the Constitution.

The justices responded with some ambivalence to Trump's argument that the president is not an officer of the United States. On one hand, they seemed to take the point that the term "officer of the United States" has a precise meaning elsewhere in the Constitution. However, Justices Kagan and Sotomayor noted that such a close reading leads to the absurd result that a former president who engaged in insurrection would be exempt from Section 3's disqualification, while all other officers would not. Justice Sotomayor also noted that this argument was particularly convenient for Trump, because he is one of only three former presidents (including Washington and Adams) who never took an oath as a United States congressman or state governor.

The argument also presupposes that the framers of the Fourteenth Amendment intentionally excluded former presidents from the insurrectionist disqualification; an assumption that strains credulity.

4. "engaged in insurrection"

Did Donald Trump engage in insurrection on January 6th?

At first blush, determining whether Donald Trump engaged in insurrection against the United States might seem to be the most important issue of this case. However, the Court's questions during oral arguments did not focus much on whether Trump actually engaged in insurrection on January 6th, 2021. Rather, the Court probed procedural and evidentiary issues, such as whether the factual record in the courts below contained inadmissible evidence, specifically the January 6th House Select Committee report and certain expert testimony; whether the Colorado trial court's factual findings should be given deference by the Court; and whether, if affirmed, the Colorado ruling would have preclusive effect on the courts of other states. Justice Alito also voiced the concern that affirming Colorado's decision would have the likely consequence of creating a patchwork of inconsistent factual findings by state courts across the country.

Justice Alito questioned the lower Colorado court's evidentiary ruling to admit the House January 6th Committee report as evidence during the initial trial. Because the testimony before the House committee was not subject to the rules of evidence, Alito opined that the Committee's report contained hearsay and other inadmissible testimony, which other courts would have likely excluded from trial.

Alito also challenged the Colorado district court's qualification of an expert witness to interpret the meaning of certain statements made by Trump leading up to the Jan. 6th attack, noting that other courts may have disallowed such expert testimony, under the *Daubert* standard for the admissibility of scientific evidence, which requires such evidence to be testable, peer-reviewed, and generally accepted within the relevant scientific community.[19]

Due in part to these discrepancies, several justices expressed reservations regarding how much deference to give the factual findings of the Colorado court below. However, given that the Supreme Court does not typically resolve questions of fact, a de novo[20] review of the factual record is also unlikely. During Colorado's oral arguments, Justice Barrett asked Colorado Solicitor General, Shannon Stevenson, how the Court should decide the fact issue of whether Trump engaged in insurrection. Stevenson replied that the Court has broad discretion to decide how much deference to give to Colorado's factual findings on the issue but suggested that the Court could adopt a *Bose Corp* independent review of the factual record if necessary.

Here, Stevenson was referring to the case of *Bose Corp. v. Consumers Union of U.S., Inc.*, where the Supreme Court held that an appellate court's independent review of the factual record is entirely compatible with the clear error standard of review applied to the factual findings of lower courts.[21] Under Federal Rule of Civil Procedure 52(a), "findings of fact shall not be set aside unless clearly erroneous," however this deferential standard of review does not foreclose the reviewing court from conducting a full and independent examination of the factual record to evaluate the lower court's conclusions of fact.[22] Despite the holding in *Bose Corp*, the Court seemed disinclined to wade into the mire of such a fact review in this case.

Justice Alito also questioned whether, if affirmed, the Colorado decision could have a preclusive effect on other courts, under the doctrine of issue preclusion (i.e., non-mutual collateral estoppel).[23]

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[19] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993).

[20] *De novo* means to review the case "anew" or as if for the first time. *De novo*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[21] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984).

[22] Fed. R. Civ. P. 52.

[23] Collateral estoppel is "a doctrine barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one. — Also termed *issue preclusion* . . ."; "Nonmutual collateral estoppel is estoppel asserted either offensively or defensively by a

Alito expressed the concern that if other courts were precluded from deciding for themselves whether Trump is disqualified under Section 3, then an elected judge in Colorado's state district court would effectively decide this issue for the entire country. In response to these concerns, Trump's lawyer, Jonathan Mitchell, pointed out that in this particular case, that could not happen because the preclusive effect of Colorado's decision is determined by Colorado state law, which does not recognize non-mutual collateral estoppel. In other words, the Colorado court's factual finding will not have a cascade effect that prevents other states from deciding the issue for themselves. However, Alito's concern on this point is still valid because many other states do recognize non-mutual collateral estoppel, and if one of those states decided the issue of Trump's disqualification, it would preclude other states from deciding the issue.

Based on the Court's limited focus on the issue in oral arguments, it was not surprising that the Court sidestepped the political landmine of Trump's involvement in the events of January 6th and decided this case on other grounds.

5. "But Congress may . . . remove such disability"

Does the fact that Congress may remove a Section 3 disqualification imply that only Congress can enforce Section 3?

Or is Section 3 self-executing, like other provisions of the Fourteenth Amendment?

Right out of the gate in oral arguments, Justice Thomas asked Trump's attorney directly whether Section 3 was self-executing and thus enforceable by the states. Mitchell replied by citing a circuit court case styled *In re Griffin*, which was decided in 1869, just one year after the Fourteenth Amendment was adopted. In *Griffin's Case*, a petitioner for habeas relief sought to have his criminal sentence vacated on the ground that the trial judge presiding over his case was disqualified as an insurrectionist under Section 3 of the newly ratified Fourteenth Amendment.[24] Griffin was successful in the district court in Virginia, obtaining an order of discharge from imprisonment.

Recognizing the potential disruption that such a ruling would cause, future Chief Justice of the Supreme Court, Salmon P. Chase, acting as

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nonparty to an earlier action to prevent a party to that earlier action from relitigating an issue determined against it." *Collateral Estoppel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[24] In re Griffin, 11 F. Cas. 7, 22 (C.C.D. Va. 1869).

a circuit court justice at the time, authored an opinion that reversed the district court's ruling and placed the enforcement of Section 3 exclusively within the purview of Congress, stripping the states of any role unless expressly authorized under Congressional enabling legislation.[25]

Mitchell argued that although *Griffin's Case* was not a precedential Supreme Court decision, it was nevertheless highly persuasive authority because the case established the prevailing interpretation regarding enforcement of Section 3. In support, Mitchell noted that a year after the decision in *Griffin's Case*, Congress enacted the Enforcement Act of 1870, which provided a mechanism for federal prosecutors to bring a *writ of quo warranto*[26] against an incumbent official, seeking his ouster from office under Section 3. Finally, Mitchell argued that under the holding in *Griffin's Case*, congressionally established remedies such as the *writ of quo warranto* were understood to be exclusive of state court remedies.

Justice Sotomayor pushed back here and questioned the persuasive authority of *Griffin's Case*, noting that it was not a binding precedent on the Court, and pointing out that Justice Chase himself contradicted his holding in *Griffin's Case* a few years later in *The Case of Davis*, involving the punishment of Jefferson Davis for treason. In that case, Chief Justice Chase referred to Section 3 as self-executing, writing, "it executes itself, . . . and needs no legislative action to give it effect or force . . ."[27]

Justice Kagan also clarified that Mr. Mitchell was relying on *Griffin's Case* and the Enforcement Act of 1870 to argue that states are preempted from enforcing Section 3. However, the federal statutory basis for that preemption argument, the Enforcement Act of 1870, was repealed in 1948 and has not since been replaced. Despite this, Mitchell contended that the action of Congress in the aftermath of *Griffin's Case* provides a strong indication that Section 3 should be enforced exclusively by Congress.

In response, Colorado asserted that Trump's position ignored the role of the states in running presidential elections under Article II and the Tenth Amendment and argued that states have the power to ensure

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[25] *Id.* at 27.

[26] *Quo warranto* means "by what authority" in Latin. A *writ quo warranto* is a legal process "used to inquire into the authority by which a public office is held." *Quo warranto*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[27] Case of Davis, 7 F. Cas. 63, 93 (C.C.D. Va. 1871).

that their citizens' votes are not wasted on a candidate that is constitutionally barred from holding office. On the specific question of whether states can enforce Section 3 without enabling legislation from Congress, Colorado's position echoed the reasoning of the Colorado Supreme Court, which declined to follow *Griffin's Case* and held that Section 3 was self-executing. The Colorado court reasoned that "while Congress *may* enact enforcement legislation pursuant to Section 5, congressional action is not *required* to give effect to the constitutional provision."[28]

Colorado's decision noted that all other provisions of the Fourteenth Amendment are self-executing and "there is no textual evidence to suggest that the framers intended Section 3 to be any different."[29] The Colorado court also held that a contrary interpretation would lead to absurd results: "if Section 3 required legislation to make it operative, then Congress could nullify it by simply not passing enacting legislation. The result of such inaction would mean that . . . any individual who engaged in insurrection against the government would nonetheless be able to serve in the government, regardless of whether two-thirds of Congress had lifted the disqualification. Surely that was not the drafters' intent."[30]

Several justices criticized Colorado's position that the Electors Clause of Article II grants states the implied authority to disqualify presidential candidates under Section 3. Justice Thomas questioned why, in the aftermath of the adoption of the Fourteenth Amendment, there are no other examples where a state disqualified a national candidate under Section 3. Justice Roberts followed up by pointing out that the main thrust of the Fourteenth Amendment was to restrict state power and authorize Congress to enforce it, so it would be the last place to look for an implied state power to enforce the presidential election process.

The pointed questions from the justices on the issue of enforcement signaled that the Court may adopt the reasoning of *Griffin's Case*, and the Court's opinion ultimately did just that.

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[28] Anderson v. Griswold, 543 P.3d 283, 320 (Colo., 2023)(quoting District of Columbia v. Heller, 554 U.S. 570, 577 (2008)), *rev'd*, 144 S.Ct. 622 (2024); *see also* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (holding that Section 5 gives Congress authority to "determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," but not disputing that the Fourteenth Amendment is self-executing).

[29] *Anderson*, 543 P.3d at 314.

[30] *Id.*

The Court's Decision in *Trump v. Anderson*

The Supreme Court issued its opinion in *Trump v. Anderson* on March 4, 2024, less than a month after oral arguments. The central holding of the Court was decided unanimously in favor of Trump—states cannot use Section 3 to disqualify a presidential candidate from the ballot; but the broader question of how Section 3 should be enforced divided the Court.

Only five justices joined in the majority opinion, which followed the rationale of *Griffin's Case* and held that enforcement of Section 3 requires Congressional enabling legislation, enacted pursuant to Congress's Section 5 power.[31] The remaining four justices wrote separate concurring opinions to distinguish their positions on this point.

The concurring opinion of Justices Sotomayor, Kagan, and Jackson (the "Sotomayor Concurrence") took issue with the Court's departure from a vital principle of judicial restraint: "If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."[32] The justices reasoned that the principles of federalism embedded in the structure of the Constitution provided an "independent and sufficient" basis to reverse the decision of the Colorado Supreme Court.[33] Citing *Term Limits,* they noted that "States cannot use their control over the ballot to 'undermine the National Government,'"[34] and agreed with the majority that allowing Colorado to enforce Section 3 by pulling a presidential candidate from the ballot would "create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles."[35]

Accordingly, the Sotomayor Concurrence opined that it was unnecessary for the Court to go further and render an opinion on other issues. On these grounds, the concurrence sharply criticized the majority's holding that "Congress must enact legislation under Section

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[31] Trump v. Anderson, 601 U.S. 100, 109-10 (2024).

[32] *Trump*, 601 U.S. at 118 (2024) (Sotomayor, J., concurring in judgment) (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring in judgment)).

[33] *Id.* at 119.

[34] *Trump*, 601 U.S. at 119 (Sotomayor, J., concurring in judgment) (quoting U. S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 810 (1995)).

[35] *Trump*, 601 U.S. at 119 (Sotomayor, J., concurring in judgment).

5 prescribing the procedures to ascertain what particular individuals should be disqualified" under Section 3.[36]

The opinion further stated that the holding is unsupported by the Constitution, noting that "all the Reconstruction Amendments (including the due process and equal protection guarantees and prohibition of slavery) 'are self-executing,' meaning that they do not depend on legislation," and nothing in Section 3's text supports the majority's view that implementing legislation enacted under Section 5 is essential for the enforcement of Section 3.[37] Finally, the opinion challenged the majority's reliance on *Griffin's Case*, referring to the case as "a nonprecedential, lower court opinion by a single Justice in his capacity as a circuit judge."[38]

The Sotomayor Concurrence closed by stating "Section 3 serves an important, though rarely needed, role in our democracy . . . Today, the majority goes beyond the necessities of this case to limit how Section 3 can bar an oath breaking insurrectionist from becoming President. Although we agree that Colorado cannot enforce Section 3, we protest the majority's effort to use this case to define the limits of federal enforcement of that provision."[39]

Writing separately to "turn the national temperature down" and to emphasize that "our differences are far less important than our unanimity," Justice Barrett authored a brief concurrence that largely echoed these points of disagreement with the rationale of the majority.[40] Justice Barrett opined that because "this suit was brought by Colorado voters under state law in state court, it does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced."[41]

What Comes Next?

Based on the tenor of the oral arguments, the Supreme Court's decision to reverse the Colorado high court was no surprise. However, it was less clear what the rationale for their decision would be, and the Court's reasoning has profound implications for how the Insurrection

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[36] *Id.* at 121.

[37] *Id.*

[38] *Id.* at 122.

[39] *Id.* at 123.

[40] *Trump*, 601 U.S. at 118-19 (Barrett, J., concurring in judgment).

[41] *Id.*

Clause will be interpreted moving forward. For instance, the Court implicitly rejected Trump's textualist arguments regarding the meaning of "office under" and "officer of" the United States. The opinion assumes that Section 3 does indeed apply to the office of the presidency and does indeed disqualify all former presidents who engage in insurrection from holding office. However, the Court also held that Colorado's decision to exclude Trump from the ballot was not authorized by the Constitution. Citing its precedent in *Term Limits*, the Court too held that "the Constitution makes Congress, rather than the States, responsible for enforcing Section 3 against federal officeholders and candidates."[42]
Under this ruling, states have no authority to enforce Section 3 against presidential candidates and without enabling legislation from Congress, there is no clear path to enforce a Section 3 disqualification.

So, unless and until Congress passes legislation that provides a remedy, the Insurrection Clause has little utility. Hypothetically, an avowed insurrectionist could run for office, be elected to office, but could not hold office. Accordingly, we are left with a curious result: millions of American voters can be induced to essentially waste their votes on a candidate who is disqualified from *holding* the office for which he was elected. A functional democracy depends on voters having a meaningful choice, not the mere appearance of choice. At the very least, voters deserve to choose between presidential candidates who are qualified to hold the office of the presidency without a miracle vote of Congress. Hopefully, *Trump v. Anderson* serves as a clarion call for Congress to enact legislation that clearly defines a process for adjudicating whether a candidate is disqualified under Section 3. The country obviously needs it.

[42] *Trump*, 601 U.S. at 106.

The following is a supplementary infographic for *Democracy in the Balance: A Discussion of the Supreme Court's Ruling in Trump v. Anderson* created to promote legal comprehension.

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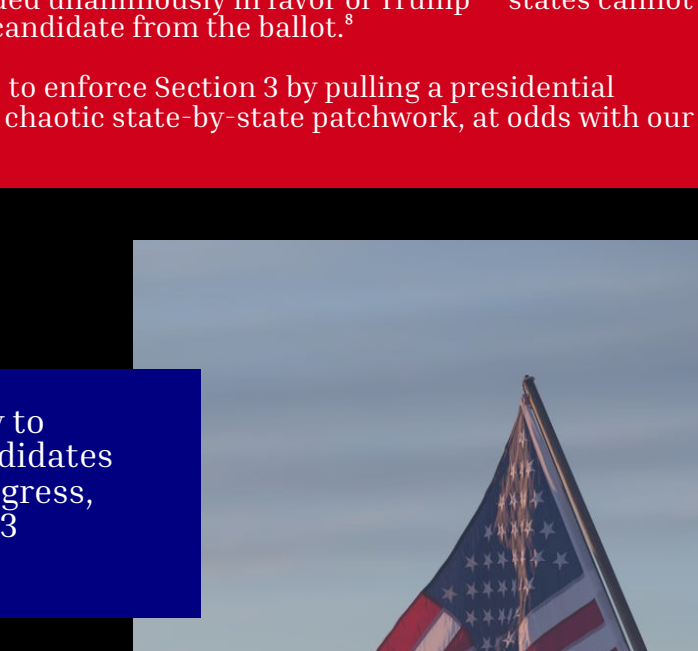
Democracy in the Balance: A Discussion of the Supreme Court's Ruling in Trump v. Anderson

In the case of *Trump v. Anderson*, the core issue before the Court was whether the state of Colorado had the authority to remove Donald Trump from the ballot for his activities leading up to and during the January 6th attack on the Capitol.[1]

What is the Insurrection Clause and why is it important in this case?

The Insurrection Clause is found in Section 3 of the Fourteenth Amendment and was adopted in the aftermath of the Civil War to prevent former Confederates from holding state or federal office if they had previously taken an oath "to support the Constitution of the United States."[2]



An insurrectionist is someone who commits a violent rebellion in resistance to the government. [3]

In a nutshell, the provision disqualifies insurrectionists from holding a wide range of positions of political power, both at the state and federal level.

Donald Trump's attorney, Jonathan Mitchell, argued before the Supreme Court to reverse Colorado's decision. He primarily argued that states cannot use Section 3 to exclude a presidential candidate from the ballot without express authorization from Congress in the form of enabling legislation.

How did the Supreme Court reach its decsion?

The Supreme Court first considered the precedent set in *U.S. Term Limits, Inc. v. Thornton* as a basis for the reversal of Colorado's Supreme Court decision. In *Term Limits*, the Supreme Court held that states cannot alter or add a qualification for holding office.[4]

Here, Mitchell argued that by preventing Trump from running, Colorado altered a qualification for holding office.

However, Colorado maintained that the 10th amendment grants states broad powers, which includes disqualifying presidential candidates from the ballot.[5]

The Supreme Court also considered whether Section 3 was self-executing and could be enforced by states without Congress.

Mitchell asserted that although *In re Griffin's Case* was not a precedential Supreme Court decision, it was nevertheless highly persuasive because the case established the prevailing interpretation regarding enforcement of Section 3, which is that Section 3 is exclusively within the purview of Congress.[6]

Colorado argued that all other provisions of the Fourteenth Amendment are self-executing and there is no evidence to suggest that the framers intended Section 3 to be any different.[7]

The Court ultimately followed the rationale in *Term Limits* and *In re Griffin* to reach their decision.

The central holding of the Court was decided unanimously in favor of Trump — states cannot use Section 3 to disqualify a presidential candidate from the ballot.[8]

The Court believed that allowing Colorado to enforce Section 3 by pulling a presidential candidate from the ballot would "create a chaotic state-by-state patchwork, at odds with our nation's federalism principles."[9]

What does this Mean?

Under this ruling, states have no authority to enforce Section 3 against presidential candidates and without enabling legislation from Congress, there is no clear path to enforce a Section 3 disqualification.

Unless Congress passes legislation that provides a remedy, the Insurrection Clause has little utility.

Hypothetically, an insurrectionist could run for office, be elected, but could not hold office. Additionally, millions of American voters can be induced to essentially waste their votes on a candidate who is disqualified from *holding* the office for which he was elected.

A functional democracy depends on voters having a meaningful choice, not the mere appearance of choice. At the very least, voters deserve to choose between presidential candidates who are qualified to hold the office of the presidency without a miracle vote of Congress.

Hopefully, *Trump v. Anderson* serves as a call for Congress to enact legislation that clearly defines a process for adjudicating whether a candidate is disqualified under Section 3.

Source: *Democracy in the Balance: A Discussion of the Supreme Court's Ruling in Trump v. Anderson* by Ryan Crocker. Infographic created by Erika Chavana, Staff Reporter (2023-2024).

[1] Trump v. Anderson, 601 U.S. 100, 106 (2024).
[2] Jennifer K. Elsea, Cong. Rsch. Serv., LSB10569, The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment (2022).
[3] *Insurrection*, Black's Law Dictionary (11th e.d. 2019).
[4] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995).
[5] *See* U.S. Const. amend. X (reserving to the states all "powers not delegated to the United States by the Constitution"); U.S. Const. art. II, § 1, cl. 2 (granting the states exclusive power to appoint presidential Electors to the Electoral College, which confers broad power to the states to run presidential elections).
[6] In re Griffin, 11 F. Cas. 7, 27 (C.C.D. Va. 1869).
[7] Anderson v. Griswold, 543 P.3d 238, 314 (Colo., 2023).
[8] Trump v. Anderson, 601 U.S. 100, 117 (2024).
[9] *Trump*, 601 U.S. at 119 (Sotomayor, J., concurring in judgment).

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SIGN, SIGN, EVERYWHERE YOU SIGN: A TEXAN'S GUIDE TO SIGNATURE VERIFICATION LAWS FOR MAIL-IN BALLOTS

*Garrett Littlejohn**
Accessible Law Student Comment

A person's signature plays an essential role in everyday life; from driver's licenses and receipts to loans and leases, people use signatures to verify their identity and commit to legal obligations.[1] Come election season, many Texans will be relying on their signatures to apply for and authenticate mail-in ballots. But if an election official decides that a mail-in voter's signature on their ballot doesn't match their mail-in ballot application, the voter could lose their opportunity to participate in the election altogether.[2] Understanding the mail-in ballot application, submission, and evaluation process can help a voter protect their rights when their ballot is rejected due to a mismatched signature.

How does a Texas citizen vote by mail?

Voting by mail can be a useful tool for some citizens who may have trouble getting to in-person voting locations. To vote by mail in Texas, a Texas citizen must be: 65 years or older; sick or disabled; expecting to give birth within three weeks of election day; out of the county of residence on election day and during the period for early voting by personal appearance; or confined to jail, but otherwise eligible to vote.[3]

If a citizen meets one or more of those criteria, the first step is to submit an application for a ballot.[4] That application form can be obtained online, from the office of the Texas Secretary of State, or from the early voting clerk in the county where the citizen is

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[1] Adobe Document Cloud Team, *When are signatures legally relevant?*, ADOBE BLOG: FUTURE OF WORK (July 29, 2021), https://blog.adobe.com/en/publish/2021/07/29/when-are-signatures-legally-relevant.

[2] Tex. Sec'y of State Election Advisory No. 2023-13, https://www.sos.state.tx.us/elections/laws/advisory2023-13.shtml.

[3] Tex. Elec. Code Ann. §§ 82.001–82.004.

[4] Tex. Elec. Code Ann. § 84.001.

registered to vote.[5] The citizen then submits the application—which requires the applicant's signature—to the citizen's early voting clerk.[6] For the application to be valid, the early voting clerk must receive the application before the close of business or by noon, whichever is later, on the eleventh day before election day.[7] That application can be submitted by in-person delivery, regular mail, common or contract carrier, fax, or email.[8]

If the application is approved, the early voting clerk will mail a ballot to the citizen.[9] Finally, it's time to vote: once the citizen receives their ballot in the mail, they must complete all the fields on the ballot and ensure that the early voting clerk receives the ballot no later than 5:00 PM on election day (or by the fifth day after the election if the citizen is voting from abroad).[10] Importantly, the citizen is required to sign the outside of the envelope in which the ballot is submitted, which the early voting clerk provides.[11]

What's the history behind Texas signature-verification laws?

There is a good reason why voters must sign their ballot and application. Election officials use those signatures to confirm the identity of mail-in voters, helping ensure the security of the election.[12] The process for doing so involves painstakingly comparing a voter's signature on their mail-in ballot envelopes to the same voter's signature on their application.[13] Counties often create special committees to complete this process called Signature Verification Committees (SVC).[14]

In the past, the verification methods that SVCs employed were informal and varied from county to county.[15] There was no training required for SVC members, and Texas law did not prescribe standards

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[5] VOTETEXAS.GOV, *Application for a Ballot by Mail*, https://www.votetexas.gov/voting-by-mail/application-for-ballot-by-mail.html (last visited Feb. 4, 2024).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Tex. Elec. Code Ann. §§ 86.003–86.004.
[10] Tex. Elec. Code Ann. §§ 86.005, 86.007.
[11] Tex. Elec. Code Ann. § 86.002(a).
[12] Tex. Sec'y of State Election Advisory No. 2023-13, https://www.sos.state.tx.us/elections/laws/advisory2023-13.shtml.
[13] *Id.*
[14] Tex. Elec. Code Ann. § 87.027.
[15] Richardson v. Tex. Sec'y of State, 485 F. Supp. 3d 744, 752–53 (W.D. Tex. 2020).

for the signature-comparison process.[16] Voters usually had no opportunity to fix their ballots if the SVC found a mismatch; Texas law required only that the voter be notified of their ballot's rejection within ten days *after* election day.[17] During the 2016 and 2018 general elections, Texas counties rejected at least 5,313 ballots because the signature on the ballot did not match the mail-in ballot application.[18]

In 2020, however, two disgruntled Texans, joined by four election advocacy organizations, argued in a lawsuit that the signature-comparison procedures in Texas—or lack thereof—were unconstitutional.[19] Chief U.S. District Judge Orlando Garcia agreed, concluding that the signature verification process in Texas was "inherently fraught with error" and that voters were provided "no meaningful opportunity to cure improperly rejected ballots."[20] Accordingly, Judge Garcia ordered the Texas Secretary of State to implement plans to remedy the signature verification process.[21] And although the Fifth Circuit Court of Appeals subsequently stayed Judge Garcia's order, the stage was set for real change.[22]

Where do the Texas signature verification laws stand today?

The state legislature passed a group of laws in 2023 that addressed the concerns of Texas voters by standardizing SVC procedures, mandating training for committee members, and setting new requirements for giving voters an opportunity to correct rejected mail-in ballots.[23]

Today, Texas voters are entitled to a prompt notification—within two days of rejection—when an SVC rejects their ballot.[24] That notification could be by mail, telephone call, or email, and it must include a description of the issue along with a "corrective action form."[25] At that point, the voter can decide whether to cancel their ballot or verify their signature.[26]

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[16] *Id.*
[17] *Id.* at 783.
[18] *Id.* at 753.
[19] *Id.* at 751.
[20] *Id.* at 791.
[21] *Id.* at 812.
[22] *See* Richardson v. Tex. Sec'y of State, 978 F.3d 220, 224 (5th Cir. 2020).
[23] Tex. Elec. Code Ann. §§ 87.027–87.028.
[24] Tex. Elec. Code Ann. § 87.0271(b).
[25] Tex. Elec. Code Ann. § 87.0271(b-1).
[26] *Id.*

Verifying the signature involves submitting the corrective action form by mail, online through the Texas Secretary of State's Ballot by Mail Tracker, or in-person at the voter's local early voting clerk's office.[27] If the voter chooses to submit the form in-person, the last day to do so is the sixth day after the election.[28] Either way, it is imperative that the voter submit the corrective action form as soon as possible to avoid disqualification.[29]

The era of unorganized and opaque signature-verification processes is increasingly in the past. When voting by mail, being accurate and truthful on all of the documents submitted to the early voting clerk's office is essential. Thankfully, Texans can sleep a little sounder knowing that if there is a mistake on their forms, their voice still has an opportunity to be heard.

[27] Tex. Elec. Code Ann. § 87.0271(c), (e-1)(2); Tex. Sec'y of State Election Advisory No. 2023-13, https://www.sos.state.tx.us/elections/laws/advisory2023-13.shtml.
[28] Tex. Elec. Code Ann. § 87.0271(b-1).
[29] Tex. Sec'y of State Election Advisory No. 2023-13, https://www.sos.state.tx.us/elections/laws/advisory2023-13.shtml.

A Guide to Colorado's Recent Efforts to Remove President Trump From the Ballot

*Alexis Williams**
Accessible Law Student Comment

With the Colorado Supreme Court recently affirming a decision refusing to allow former President Donald Trump to be listed as a presidential candidate on their state's presidential primary ballot, there is a new and vibrant conversation concerning a state's ability to do such a thing. That decision, *Anderson v. Griswold*, came from the Colorado Supreme Court on December 19, 2023.[1] The decision discusses the "how" and "why" behind removing presidential candidate Donald Trump from the ballots.[2] As to the "why," the court discusses in detail the insurrection clause contained within Section Three of the Fourteenth Amendment to the U.S. Constitution.[3] However, on March 4, 2024, the United States Supreme Court issued a unanimous decision holding that states do not have the authority to remove a presidential candidate from their ballots.[4] The Supreme Court's decision will be discussed further below, but this article will primarily focus on the historical background and substance of Section Three as well as state instruments used to apply Section Three. Additionally, this article will not delve into President Trump's actions with regard to insurrection as the Supreme Court did not address this issue in their decision.[5]

What is the origin of this case?

Anderson began as a case between Colorado electors ("the electors"), against Jena Griswold in her official capacity as Colorado's Secretary of State.[6] The electors filed a petition in the District Court for the City and County of Denver seeking to remove President Trump from the Republican presidential primary ballot.[7] The electors invoked both

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[1] Anderson v. Griswold, 543 P.3d 283, (Colo. 2023), *rev'd sub nom.* Trump v. Anderson, 601 U.S. 100 (2024).

[2] *Id.*

[3] *Id.* at 296.

[4] Trump v. Anderson, 601 U.S. 100 (2024).

[5] *Id.*

[6] *Anderson*, 543 P.3d at 296.

[7] *Id.*

federal and state law in support of their request.[8] The district court permitted President Trump and the Colorado Republican State Central Committee ("CRSCC") to intervene in the action, and a five-day trial ensued.[9] The district court found that President Trump engaged in insurrection as defined by Section Three, but that Section Three did not apply to the President.[10] Thus, the petition to keep him from the ballot was denied.[11] The Supreme Court of Colorado, however, disagreed.[12] It found that "President Trump is disqualified from holding the Office of the President under Section Three."[13] Accordingly, the court reasoned, he could not be listed on the presidential primary ballot.[14]

Unsurprisingly, President Trump appealed the Colorado Supreme Court's decision, and the Supreme Court agreed to take up the case.[15] Many briefs were filed, and the Supreme Court heard oral arguments on February 8, 2024. As stated previously, the Supreme Court ruled on this case on March 4, 2024, and that holding will be discussed further below.[16]

What is Section Three?

The *Anderson* decision cites both state and federal sources to back the controversial holding.[17] As for state sources, Colorado's Uniform Election Code of 1992 (the "Election Code") provides a large basis of discussion within the opinion.[18] However, Section Three likely provides the more pertinent basis for removing President Trump from the ballot. Section Three states the following:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously

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[8] *Id.*

[9] *Id.*

[10] Anderson v. Griswold, No. 23CV32577, 2023 WL 8006216, at *33, *43, *45 (Colo. Dist. Ct. Nov. 17, 2023) *aff'd in part, rev'd in part,* 543 P.3d 283 (Colo. 2023).

[11] *Id.*

[12] *Anderson*, 543 P.3d 297.

[13] *Id.*

[14] *Id.*

[15] Pet. for Writ of Cert., Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719), 2024 WL 81676, at *34; Trump v. Anderson, 144 S. Ct. 539 (2024) (granting writ of cert.).

[16] Trump v. Anderson, 601 U.S. 100, 101 (2024).

[17] *Anderson*, 543 P.3d at 297.

[18] *Id.* at 300.

> taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, 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. But Congress may by a vote of two-thirds of each House, remove such disability.[19]

Congress ratified Section Three in 1868 to prevent those who fought for the Confederacy from holding positions of power in the United States.[20] However, since the 1890s, Section Three has been "almost completely forgotten."[21] It was not until January 6, 2021, that Section Three came back into political discourse, and courts are now carefully interpreting it to determine whether it provides a remedy to those who feel that President Trump should not be able to hold office in the United States.[22]

What is the Election Code?

While Section Three dictates what disqualifies one from holding various positions within the United States government, the Colorado Supreme Court found that Colorado Election Code was the instrument for implementing a Section Three disqualification within the state.[23] Several provisions of the Election Code were used by the electors to support their claim.[24] A provision of great importance in this case can be found in part 12 of article 4 of the Election Code, which states that "each political party that has a *qualified* candidate . . . is entitled to participate in the Colorado presidential primary election."[25] Further, the Election Code provides the ability to challenge "the listing of any candidate on the presidential primary election ballot."[26] Such a challenge must be made in a writing that provides "notice in a summary manner of an alleged impropriety that gives rise to the complaint."[27] If the challenge is submitted properly, "a hearing

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[19] U.S. CONST. amend. XIV, § 3.

[20] Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91–92 (2021).

[21] *Id.* at 88.

[22] *Id.* at 87.

[23] *Anderson*, 543 P.3d at 297.

[24] *Id.* at 300.

[25] Colo. Rev. Stat. Ann. § 1-4-1203 (West 2023) (emphasis added).

[26] Colo. Rev. Stat. Ann. § 1-4-1204(4) (West 2019).

[27] *Id.*

must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties."[28] Many other provisions of the Election Code were cited in the *Anderson* decision, but ultimately the Colorado Supreme Court found that the Election Code was a proper vehicle "to challenge President Trump's status as a qualified candidate based on Section Three."[29] The Court then went even further to state that the Election Code was not only a proper means to challenge President Trump's status, but it was the *only* means the Electors had for such a challenge.[30]

What were the arguments against using Section Three to remove President Trump from the ballot?

President Trump vehemently opposed the *Anderson* decision. One argument President Trump asserted is that Congress is the only body that can answer questions regarding a candidate's eligibility to run for President, and that by taking that decision upon themselves, the Colorado Supreme Court had essentially "usurped Congressional authority."[31] President Trump also argued that Section Three only serves to prevent those who are not qualified from holding office, and it cannot be used to prevent one from running for office, or even being elected to office.[32] In support of that argument, President Trump analyzed the language of Section Three that creates the power of Congress to remove a disqualification at any time; he contended that what Section Three means is that "Congress can remove that disability after a candidate is elected but before his term begins."[33] Lastly, President Trump argued that Section Three does not apply to him because presidents are not "officer[s] of the United States" pursuant to the use of that term "throughout the Constitution."[34] In support of that argument, he argued that an "officer of the United States" refers only to appointed officials, not elected officials such as presidents and members of Congress.[35] The constitutional bases for that argument

[28] *Id.*

[29] *Anderson*, 543 P.3d at 297.

[30] *Id.*

[31] Pet. for Writ of Cert., *supra* note 15, at 18.

[32] *Id.* at 31.

[33] *Id.*

[34] Tr. of Oral Arg. at 3, Trump v. Anderson, 601 U.S. 100 (2024). The full transcript of the oral arguments in the *Trump* case, held on February 5, 2024, can be found on the U.S. Supreme Court website here: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-719_5he6.pdf.

[35] *Id.*

can be found in "the Commissions Clause, the Impeachment Clause, and the Appointments Clause."[36] This is just a short overview of some of the arguments that were made, and those interested in learning more can listen to the entirety of the oral arguments and view the briefs that were submitted.[37]

How did the U.S. Supreme Court rule?

The Supreme Court ultimately held that "responsibility for enforcing Section Three against federal officeholders and candidates rests with Congress and not the States."[38] The majority opinion placed great weight on the history and context of the Fourteenth Amendment.[39] The Supreme Court stated that the Fourteenth Amendment "restricts state autonomy," and was used to greatly expand the power of the federal government during a time when the nation needed unity over state power.[40] Further, the Supreme Court clarified that "States may disqualify persons holding or attempting to hold *state* office," but it emphasized that "States have no power under the Constitution to enforce Section Three with respect to federal offices, especially the Presidency." [41]

Although the decision was unanimous, two separate opinions supported the general conclusion while differing on the approach to reach it.[42] Justice Barrett issued a concurring opinion stating that the Court need only consider the issue of Colorado enforcing Section Three and stressing the need for unanimity in attempting to "turn the national temperature down, not up."[43] Justices Sotomayor, Kagan, and Jackson issued a concurring opinion concluding that the majority opinion went too far because it unnecessarily decided "novel constitutional questions" such as who can enforce Section Three and how it must be done.[44]

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[36] *Id.*

[37] To listen to oral arguments and read briefs filed with the U.S. Supreme Court, visit the U.S. Supreme Court's website at https://www.supremecourt.gov/.

[38] Trump v. Anderson, 601 U.S. 100, 117 (2024).

[39] *Id.* at 108.

[40] *Id.* at 109.

[41] *Id.* at 110.

[42] *Id.* at 117–23 (Barrett, J., concurring at 117–18) (Sotomayor, J., concurring at 118–23).

[43] *Id.* at 118 (Barrett, J., concurring).

[44] *Trump,* 601 U.S. at 119 (Sotomayor, J., concurring).

Conclusion

While the ultimate decision regarding whether the States have the power to utilize the Fourteenth Amendment in removing presidential candidates was unanimous, there remain many unanswered questions as to how bans on potential insurrectionists should be addressed in the future. This can be seen not only within the concurring opinions, but also in the recent discourse surrounding this case.[45] The legal landscape surrounding these questions is changing and evolving rapidly, so it is important to stay apprised of current events and decisions.

[45] *Id.* at 117–23 (Barrett, J., concurring at 117–18) (Sotomayor, J., concurring at 118–23).