

Should President Trump Be Allowed on the 2024 Ballot?

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[00:00:00] Jeffrey Rosen: Last month, the Supreme Court of Colorado and the main Secretary of State determined that President Trump engaged in an insurrection after taking an oath to uphold the Constitution, and that he's therefore, disqualified from serving as President of the United States under Section 3 of the 14th amendment. Hello friends I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People weekly show of constitutional debate. The National Constitution Center's a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:37] Jeffrey Rosen: In this episode, we'll delve into the meaning and purpose of Section 3 of the 14th Amendment and the arguments for and against President Trump's eligibility to run for president for a second term, a question the Supreme Court has decided to review. Joining me to answer these questions are two of America's leading experts on Section 3, and it's an honor to convene them today. Gerard Magliocca is the Samuel R. Rosen Professor at the Indiana University Robert H. McKinney School of Law. He's the author of four books, including biographies of John Bingham and Bushrod Washington, and has written extensively about Section 3. Gerard, it's wonderful to welcome you back to We the People.

[00:01:19] Gerard Magliocca: Thanks, Jeff. Nice to be here.

[00:01:20] Jeffrey Rosen: And Josh Blackman is professor of law at the South Texas College of Law Houston, where he holds the centennial Chair of constitutional law. His latest book and introduction to constitutional law was a top five bestseller on Amazon and he's filed a brief with Seth Tillman in Trump v. Anderson on behalf of the petitioner. Josh, it's wonderful to welcome you back to We the People.

[00:01:41] Josh Blackman: Thanks so much, Jeff.

[00:01:43] Jeffrey Rosen: Let's begin with an overview of this complicated and historic case. Gerard, what are the constitutional issues and how do you think the US Supreme Court should decide there?

[00:01:54] Josh Blackman: Well, where to begin? The Supreme Court in granting review did not specify which issues it wanted briefed or argued so, the argument is gonna be something of a free for all and could last five or six hours probably, unless they do something to limit things between now and then. But basically and in no particular order, the issues include, was January 6th an insurrection within the meaning of Section 3? Did Donald engage in an insurrection if January 6th was an insurrection? Is the presidency in office that is covered by Section 3? Was Donald Trump an officer of the United States, subject to Section 3 when he took the oath to the President? Can Section 3 be enforced by court without an act of Congress setting forth some procedures to implement that? Is the whole case justiciable at all? And I have not exhausted the issues with that list of six.

[00:02:57] Josh Blackman: So, my view is the Colorado Supreme Court's decision should be affirmed. I think the majority got it correct. And I think then if that decision is affirmed, that would also permit Congress, if it so desires, to give Donald Trump Amnesty, as it can do by a vote of two thirds of each House. It also, to some extent, allows states to pursue the primaries according to state laws. As everyone knows, some states have rejected these challenges to Trump's qualifications because they say state law doesn't permit such a challenge in a primary and may not permit it at all. And affirming the Colorado Supreme Court doesn't necessarily mean that all states must bar Trump from the ballot although the Supreme Court could try to say that. It could allow each state to kind of do what it wants, at least in the primary process. Though that gets a bit more murky.

[00:03:51] Jeffrey Rosen: Thank you for that great overview and for outlining the six questions. So hopefully, we'll delve into them in a moment. But Josh Blackman, let me ask you broadly how you think the US Supreme Court should resolve this case.

[00:04:05] Josh Blackman: Thanks again, Jeff, for having me on. It's a pleasure to be with Gerard. He's one of the leading lights in this area and also a really good guy, so I'm always happy to see my old friend. So I do have a dog in the fight. A lot of the arguments that had been advanced were advanced by myself and my colleagues, Seth Barrett Tillman, many years ago, long before Donald Trump was even on the horizon. Tillman, since 2008, has taken the position of the President is not an officer of the United States. It's not a new position, it was articulated many years ago, but Tillman's the most forceful voice for that position in today's market. He persuaded me around 2012 or 13. So I've been on the Tillman boat for a while.

[00:04:44] Josh Blackman: I think it's possible and maybe even likely that a number of justices find this argument attractive. It would love to say that Trump is not subject to Section 3 without having to say what insurrection is. The other argument which we advanced in the last two years

or so is that Section 3 requires what's called enforcing legislation. That is Congress must pass some procedure by which a person who is disqualified can be removed from office or otherwise. No such legislation has been used to knock Trump off the ballot and said they've been using state law. And, you know, the leading authority is a case called Griffin's case from Chief Justice Chase, which we'll talk a lot about it.

[00:05:21] Josh Blackman: But if I had to, sort of, predict which is not worth very much, I think the first argument on Office for the United States and the second argument, self execution, will receive at least the majority of the court, which will result in reversing the decision of this Colorado Supreme Court. Whether the five vote block, I couldn't tell you, but I'm very skeptical, and maybe Gerard agrees that you get a majority to affirm across the board.

[00:05:43] Jeffrey Rosen: Thank you very much for that. Well, let's now delve into those two arguments that you just flagged and then we'll move on to the others. The first is, is the president and officer of the United States and covered by Section 3 or not? Gerard, tell us your views on that including what the framers of Section 3 thought about whether or not the presidency was covered.

[00:06:04] Gerard Magliocca: Right. So first, let me say that as it's great to be on with Josh and I know that Josh and Professor Tillman had this view prior to January 6, 2021, because Professor Tillman emailed me about it prior to January 6, 2021, when I had posted the initial draft of my first article on Section 3. So this is a long-standing conversation that we've been having. I testified about this question in the trial, in the Colorado case, I don't want to rehash that. But basically, there's two thoughts here. One is that a lot of people describe the President as an officer of the United States during the time that the 14th Amendment was under discussion, including President Johnson, John Bingham, leading members of Congress. The evidence on that side of things is pretty strong. The evidence on the other side is not as strong. That's true. No matter what you think about what that term might have meant in 1787. That is to say, I'm happy to concede, although others disagree with the view of whether officer of the United States included the president in 1787. But my view would be well, even if it did exclude the president. During Reconstruction, people define the President as an officer of the United States.

[00:07:26] Gerard Magliocca: Now, the second thing is kind of more of a purposive approach, which is to say, "Look, everyone agrees that Donald Trump is the only president who never took an oath to the Constitution before he became president." Right. He never served in an elected position, in an appointed position or military position, unlike all other presidents. So, if you were to say that Section 3 does not apply to Donald Trump, because the President is not an officer of the United States, it would mean that he alone among all presidents, would not be covered by Section 3, at least all presidents since 1868. A question why would that make sense? Doug, is there a reason for that?

[00:08:08] Gerard Magliocca: Now, if the texts were unambiguous, then you'd say, "Well, we just have to do it because that's what it says." But the text is not unambiguous. And I would say then that there's gotta be a reason to say that Trump is to be excluded from Section 3. Where, if President Biden did exactly the same thing and all other aspects of the case were satisfied to say that Section 3 applied, well, Biden would be covered because he was a senator before he became president. But Trump would not be covered because he wasn't any government official before he became president. And I just don't think that really makes sense.

[00:08:47] Jeffrey Rosen: Josh, please tell We the People listeners your view about why the President is not an officer of the United States.

[00:08:54] Josh Blackman: The starting point here really is the fact that officer the United States is not a phrase that was made up in 1868. It was used in four provisions of the Constitution in 1788. I think Gerard alluded to this. The Appointments clause says, "The president appoints officers of the United States." The President is not an officer of the United States. The Commission's clause says, "The President will commission the officers of the United States." President does not commission himself. The impeachment clause separates the President, the Vice President from officers of the United States. And the key one is the oath clause says that there'll be an Article 6 oath for the officers of the United States, the President has not taken Article 6 oath, he's never done it.

[00:09:34] Josh Blackman: This is what the trial court found persuasive that in these four clauses, the President is not an officer of the United States. Then with with 1868, we have a drafting process of Section 3, which Gerard read about to some length. We don't know exactly why they chose the words they did that this precise wording sort of adopting these caucuses, these private meetings that were not in the capital. But do you know if there were many different approaches. Many different drafts. Some versions would have disenfranchised all former rebels. Some approaches would have said, "All rebels cannot hold any office." But the ultimate wound up it's something of a compromise. And the compromise said that certain people can't hold certain positions, and they reach for language, and they reach for language from the oath clause. In fact, Section 3 very closely tracks the oath clause.

[00:10:26] Josh Blackman: Now, you might say, "Wait a minute, Blackman and Tillman, that sounds creative, but who said this in 1868?" So two points. First, we have not found any record of anyone saying, in Section 3 debates, that the President is an officer of the United States. There's actually some evidence to the other point that the presidency is in office under the United States. Gerard found evidence to that fact. But we've not found anything saying the President is in office to the United States, but there is evidence to the contrary. We recently filed an amicus brief focusing on a Louisville Kentucky newspaper, and the Louisville Kentucky newspaper was discussing some other issues and said "Oh, by the way, the President is not an Officer of the United States." He points to the same evidence we do. He points to the Commission's clause. He

points the impeachment clause. He points to justice stories that the President is not an Officer of the United States.

[00:11:11] Josh Blackman: So at least some people who are familiar with the topic, in 1868 said, "The President is not an Officer of the United States." This is a textual argument. And I'm-I'm glad that Gerard agreed that you have to sort of go into purpose and intentions. Original public meaning rejects that approach of jurisprudence in a recent case called *Bostock*, you might recall, Justice Gorsuch said, "We don't care if the framers of the Civil Rights Act 64 want to protect gays and lesbians. What matters is the work they chose within the work controls, law controls and the President is not an Officer of the United States."

[00:11:44] Jeffrey Rosen: Well, let's turn now to the question of precedent. Gerard, as you mentioned, there are two leading opinions on this case by a Supreme Court justice, both by Chief Justice Salmon Chase and they point in opposite directions. Tell us about those two decisions and what you think the Supreme Court should make of them.

[00:12:04] Gerard Magliocca: Right. The main case that will be discussed is called *Griffin's* case. And this involved a habeas petition that was brought by a black defendant who was convicted of a crime in Virginia under Military Reconstruction. And he brought a habeas petition before Chief Justice Chase who was acting as a circuit justice in Virginia at the time, saying that the state judge that had presided over his criminal trial was not an eligible judge because he was someone who had served under the Confederacy and was subject to Section 3. So, Chief Justice Chase rejected this petition. And in part he did so because he said that, "Well, there was no act of Congress enforcing Section 3 at the time that this trial occurred, and that an act of Congress was required to enforce Section 3."

[00:12:57] Gerard Magliocca: Okay, I have many objections to both the reasoning of this opinion, which we can go into further, but that was what *Griffin's* case said. Now, at about the same time the Chief Justice had been presiding over Jefferson Davis's treason trial in Virginia, and one of Davis's arguments there was that he could not be prosecuted for treason because Section 3 of the 14th Amendment applied to him and was the exclusive sanction that he was being subjected to, so it precluded a treason prosecution. And the Chief Justice agreed with that view, although because he was sitting in a circuit trial alongside another judge who disagreed, the question was in effect certified for an appeal to the US Supreme Court.

[00:13:51] Gerard Magliocca: The idea there being, "Okay, in that Davis case, Davis's lawyers argued that Section 3 of the 14th Amendment applied of its own force, no act of Congress was required for Davis to invoke it as a defense in his trial." And the Chief Justice must have agreed with that because he sided with Davis's position in that case, now that wasn't an opinion. Okay. So in that sense, it's something one has to sort of construe rather than saying there are two different opinions, but they are contradictory. There are explanations that have been given unpersuasive to me that they can be reconciled. But more to the point, even if you can reconcile

them, it seems to me that at best, he was right in Davis, wrong in Griffin. That is, that actually may be the first cut. Yeah, it is applying of its own force, was correct. And then Griffin got it wrong in saying that an act of Congress was required, but there'll be plenty of room for discussion of that when the court hears the case.

[00:14:58] Jeffrey Rosen: Josh, in your brief with Professor Tillman, you argued that the Chief Justice's positions are consistent because he was holding that Section 3 may be used as a shield but not a sword. Tell us more about that distinction.

[00:15:14] Josh Blackman: This is a point that's more of federal courts and about Section 3. But the Constitution when we say it's self-executing really has two different meanings. So for example, if the police prosecute you, and they decide to deny you some right, for example, they try to admit evidence that was seized illegally, or perhaps they beat you in their custody, and they're prosecuting you. You can always raise the Constitution as a defense that is, "The government's prosecuting me for some crime, but in the course of this prosecution, you know, they violate the 4th Amendment. They violate the 5th Amendment. They did something wrong." You don't need any sort of federal legislation to raise the constitution of defense. Everyone agrees about that.

[00:16:02] Josh Blackman: What if you want to go on the offense? That is, what if you wanna seek some sort of affirmative relief against the government for violating the Constitution, you need what's called the cause of action. And we have that, it was called Section 1983. There's a statute that traces its roots to reconstruction. There was an act shortly after the 14th Amendment was passed in various forms. And this says that if any state official deprives you of your rights under the color of law, and you can go seek a remedy against that official. We've always had section 1983. So we've never really had to think about this distinction, but it's been there for a very long time.

[00:16:41] Josh Blackman: What happened in Davis's case and what happened to Chase's case reflects this distinction. In the case of Jefferson Davis, it was a criminal prosecution. And Davis made an argument that perhaps you might find strange, they said that Section 3 displaced any possible treason prosecution. In other words, because Davis says, "I can't hold any sort of future office. You can't prosecute for treason, that's the sole punishment." Now he might right, might be wrong, but he's saying, "As a criminal prosecution a defense is you can't raise it." Whereas in Griffin's case, it was what's called a habeas case. Who was Griffin? Gerard's written about this. He was a man, a Black man who was charged with shooting someone else, he didn't kill them, but he tried to shoot someone else, as it seems the guy almost got lynched for it. Right? He was seeking habeas relief in federal court. And what Chase was saying is you need some sort of statute in order to say that the judge who sentenced Griffin was disqualified.

[00:17:43] Josh Blackman: So these cases can be reconciled. There's a point a federal court's not really a question of Section 3. I will just put you in some little bit of caution. We don't

exactly know what Chase said during the Jefferson Davis trial. Right. A- and this sort of gets into the weeds, the director had two versions of the case have ever reported. One report in 1869, where Chase said absolutely nothing about whether Section 3 requires federal legislation. And there was another version of the case reported some years later, maybe even after Chase's death. That said, "The Chief Justice told the reporter to put on the record that Section 3 executes its own force." I caution slightly because the reporter of that case is not the most reliable person.

[00:18:27] Josh Blackman: Number one, he was actually the lawyer in Griffin's case, it's a bit of a coincidence, but more importantly, he was a former Confederate General, who apparently tried to kidnap Abraham Lincoln. He might have had an incentive to, perhaps, give Jefferson Davis more credit than he was do. We don't know why that sentence was there. It was not reported the time. But even if it's there, I think you can reconcile these based on a fairly deeply rooted aspect of Federal Court jurisprudence.

[00:18:49] Jeffrey Rosen: Gerard, further thoughts on that distinction about Section 3 as a sword, not a shield. And then, give us a sense of the history and original understanding of Section 3 and enforcement. In your article about Section 3 amnesty, you note that after Griffin's case, Congress passed the first Ku Klux Klan Act known as the Enforcement Act of 1870 to protect voting rights guaranteed by the 15th Amendment. One of those sections which gives federal prosecutors the right to bring warrants against state officials who obstructed Black voting rights has been invoked by Jack Smith, the special prosecutor to charge President Trump with fraud to deny voting rights. And the 1870 Act also said that people who didn't resign if they were ineligible, we're guilty of a misdemeanor. What is that history, which is about the effort to enforce Black voting rights through the Enforcement Act? Tell us about whether or not Section 3 is enforceable against President Trump without action from Congress.

[00:19:52] Gerard Magliocca: Okay, well, let me try to unpack that with three points. First, on the question of sword versus shield, you know, Mr. Griffin was using Section 3 as a shield to try to stay out of jail. So I don't think that the cases can be reconciled with that idea in mind because Chief Justice Chase did not allow Mr. Griffin to use Section 3 to shield himself from President, it was his defense basically, in his appeal of his criminal conviction. I guess I don't find that a particular really good way to distinguish between those two cases. Okay, on enforcement. First thing to note is that Congress immediately following ratification of the 14th Amendment, indeed, even right before ratification was giving people amnesty. That is they were exercising their power to, with a two-thirds vote in each House, to give people waivers under Section 3. That was done before there was any federal enforcement legislation. It was also done in Virginia in 1868. At the time when Justice Chase was saying that he needed an act of Congress to enforce Section 3.

[00:21:03] Gerard Magliocca: So what were people getting waivers from? They were getting waivers from a disqualification that Section 3 imposed upon them and that states could enforce or the army could enforce, against them by removing them from office. So that tells us that an act

of Congress is not required for enforcement because they were giving waivers to people from enforcement before any act of Congress was there to do the enforcing. Now, when Congress passed the Enforcement Act in 1870, they had a civil remedy for enforcing Section 3 through a quo warrant to action and a criminal remedy for people who were sort of willfully refusing to leave office when they were ineligible.

[00:21:48] Gerard Magliocca: I think the main thing that that tells us is that you don't require a con- or a criminal conviction is not required for disqualification. So one argument that's been made by others is that, "Well, President Trump was not charged with insurrection. He's not been convicted of insurrection, therefore, he can't be disqualified." So that's wrong because hardly anybody was convicted of anything at the time related to their activities in the civil war. Yet they were disqualified. And when Congress got around to doing an Enforcement Act, they provided that it could be done civilly through a suit filed by a United States attorney to remove someone from office. I think it just reinforces the point that this is a civil action. It's not a punishment. It's simply saying you are not meeting the qualifications for office and that it can be enforced in the absence of a criminal charge.

[00:22:49] Jeffrey Rosen: Josh, your response to the history just mentioned about why he thinks that the history of enforcement under Section 3 suggests that the clause is indeed self-executing.

[00:22:58] Josh Blackman: Sure. Griffin was seeking what's called a collateral challenge that he was convicted in a state court and he sought relief in a federal court that is that the judge who presided over his trial is disqualified. That is affirmative relief. It was affirmative relief in 868. And even today, you need federal legislation to seek habeas relief. You need some sort of remedy to allow the courts to hear this. True, he was trying to stay out of jail, but this was seeking for relief in a federal court. And it might be useful to walk through some landmark cases that people perhaps don't fully understand. One of the first 14th Amendment cases was the slaughterhouse cases, right. This is where a bunch of butchers, objected to a Louisiana law that limited where you could slaughter animals.

[00:23:41] Josh Blackman: And they argue that it violates the privileges or immunities clause to have this violation of rights and a living. What's not well known is that the butchers didn't sue the government. Instead, this was an enforcement action by the Louisiana Attorney General against the butchers. And they raised, as a defense, the prosecution. Wait a minute. This is a shield, the 14th Amendment's a shield, you can't prosecute us because the privileges or immunities clause provides a remedy.

[00:24:09] Josh Blackman: A case aside the very next day is Brad Hawkins, Illinois, very infamous case where the court said that a woman has no constitutional right to be an attorney, [inaudible 00:24:18] actually invoke enforce legislation. She cited by federal habeas corpus act as sort of a weird claim. But she came to court not based on the 14th Amendment, but based on a statute. Every other case you know about from Brown versus Board of Education on down

involves a federal legislation. The quo warranto statute, which is actually very useful, shortly after Chief Justice Chase rose opinion, we've not seen any debates in Congress saying, "Oh, Chase is wrong, Chase is wrong." Instead, they said, "Well, let's pass a statute." And in some regards, maybe Congress responded to Griffin's case that, "Is it well?" Maybe Chase is right, maybe Chase is wrong, but we should respond by creating this mechanism, this quo warranto which is used to enforce Section 3.

[00:24:59] Josh Blackman: So even if Chase may not have been correct, and I think he was, Griffin's case settled the matter. And for 150 years, people favorably sat at Griffin's case, it's been cited all over the board, in federal courts and state courts. It's only until recently when some good friends of mine decides otherwise, because we're questioning Griffin's case. Other than liquidation, when you have this precedent that's so deeply entrenched, it becomes the law. I think even in any event, the court should find, Griffin's case not binding, but highly persuasive of the evidence as we understood in 1868.

[00:25:31] Jeffrey Rosen: Well, let's turn now to the question of whether or not January 6th was an insurrection. How did the Colorado court and main Secretary of State find that it was and what procedures do you think the Constitution requires for deciding whether or not something was or wasn't an insurrection?

[00:25:51] Gerard Magliocca: Basically, we can understand an insurrection through a common law approach primarily looking at cases that, before the Civil War, looking at other legal authorities to understand that it basically involves the public use of violence by a group of people that are attempting to hinder or prevent the execution of of the law. And then for Section 3 purposes, I would say, prevent the execution of the Constitution because the Constitution or oath is referred to as well as the kind of Constitution itself in the text of Section 3. Now, the process for determining that. Look, Section 3 doesn't tell us the answer to that. Everyone at the time understood the Civil War to be an insurrection. So that issue didn't arise in the immediate aftermath of the Civil War.

[00:26:45] Gerard Magliocca: Now, what do we have? We have the state election ballot eligibility challenge process to evaluate that. And that varies from state to state. In Colorado, it involved a bench trial that lasted for a week. In Maine, it involved an all day administrative proceeding before the Secretary of State, and I understand now that essentially the appeal of that decision has been put on hold now that the Supreme Court has granted certiorari. There is no uniform process for that. That's too bad, but I don't think it means that there is a problem. One has to look at the individual adjudications that have taken place and evaluate whether they're consistent with due process and if so, then that is enough, at least for the purpose of the factual findings that were made.

[00:27:39] Gerard Magliocca: I would add that the factual findings regarding January 6 also drew quite a bit from the congressional report, right, which was a report of a house of Congress,

not just a state court. I think that that should give confidence in the factual findings. Now, whether you then want to say that that means that therefore, Donald Trump engaged in insurrection or that it was an insurrection, those are obviously legal questions that the court is gonna have to review, de novo.

[00:28:12] Jeffrey Rosen: Josh, how do you think the court should rule if it decides those questions de novo, was January 6, an insurrection? And like the history of using the law to prosecute as insurrection forms of political protests that their defenders said were legitimate, give the court pause as it tries to identify adequate procedures for deciding what insurrection an is.

[00:28:39] Josh Blackman: This is what I think Justice Frankfurter would've called thicket, right. For starters, no one from January 6th has been charged with insurrection. Jack Smith, who's not a shrinking violet, has charged people with seditious conspiracy, obstructing official proceedings and so on. But no one is charged with insurrection to federal statute. The statute was signed to law by President Lincoln in the midst of the Civil War. The second point I'll make is we don't think you need a conviction under the insurrection statute to be disqualified by Section 3. We don't take that position. We think it'd be a very good indication that there was a determination of insurrection. The third point is even if January 6th was an insurrection, you still have to prove that Trump himself engaged in it.

[00:29:28] Josh Blackman: Now, this is undisputed, he didn't go to the Capitol, he didn't break a window, he didn't knock over a flagpole and stab someone with this. He didn't put on a viking helmet and start screaming at a speaker's desk. Right? He didn't do these things. He did give a speech. There's a First Amendment issues there. He did issue some tweets in the weeks leading up to the event. And he did, according to some, not take actions to stop the actions at the Capitol. Right? We've written in our article, that is Seth and I, that whatever Trump did, does not amount to engaging. He may have given aid and comfort, he may have supported it, but didn't personally engage, and this is a specific intent crime.

[00:30:09] Josh Blackman: So if the court actually gets past the execution issue, and gets past the office of the United States issue, perhaps one off ramp is to say that whatever happened on January 6th, Trump didn't engage in it. But I am skeptical the court wants to do this. Why? You can see where this leads, Jeff, your question hinted it. Where the various Black Lives Matter riots and rallies in the summers of 2021 and 2020, where those insurrections was the occupation of a city block in the state of Washington. The no go zone was at an insurrection. What will protest the White House instruction that Donald Trump wants to vote insurrection act for. Whatever the court says here with insurrection will come back to haunt it very, very quickly, which is why I can't imagine the court affirms across the board. I think it's easy enough to say that no one has been charges insurrection, not even the federal government thinks it was an insurrection. That's good enough for us.

[00:31:05] Jeffrey Rosen: Gerard, further thoughts on that question of whether this is a dangerous line to draw 'cause it risks calling political protests an insurrection. At the time of the founding during both Fries' Rebellion and the Whiskey Rebellion. There were concerns that the federal government was converting what John Adams called a riot into an insurrection. And one reason Adams pardoned the Fries' Rebellion, rebels, including John Fries, was because he didn't wanna criminalize political protest, which had been done on the Sedition Acts. Is there a danger here and might that lead the court to require very high procedures for deciding whether or not something's an insurrection?

[00:31:47] Gerard Magliocca: Well, I'm not sure it's so much a procedural question as a substantive one, right? Now, I would distinguish between two things. One is the question of whether January 6 was an insurrection. I don't think it's a close case on that point. Now, other examples would be harder cases. But I don't think they have to really worry too much about that, because this is such a core thing in terms of an attack on the national capitol to disrupt a peaceful transfer of authority to the duly elected next administration. I think that's an easier one. On the question of engagement, look, clearly, they're gonna talk about Brandenburg and First Amendment cases, that argument. I mean, I think that's true. Not so much because it's a strong argument, but because they're very familiar with the First Amendment. They deal with it all the time. So I'm sure they're gonna be more comfortable addressing the case from that vantage point, than they would be with some of these other issues we've just discussed, which are more unfamiliar to them.

[00:32:47] Gerard Magliocca: Look, they will have to think about how Brandenburg, how the First Amendment interacts with the 14th Amendment, first of all, because Section 3 is of course, a modification of the First Amendment, number one. Number two, well, okay, what do you think about the application of the Brandenburg standard, if that's the standard to be applied to what Trump did and the facts that were found? I don't know that they're going to look to that first to resolve the case. I'm sure they are gonna look to things that are a little cleaner, or simpler as at least possible ways of resolving the case. I'm not really terribly concerned about the problems that it's gonna pose because, to some degree, this is something where they- they've got a very clear record before them.

[00:33:41] Gerard Magliocca: The slaughterhouse cases that Josh mentioned, that there's the line about how the Civil War is kind of to reason to be called history but familiar to us all. And I think that that's kind of true for January 6th, given that they are all there on near to the scene of all of that occurring. And I think from that vantage point, they'll be able to confidently resolve this if they get to those questions.

[00:34:11] Jeffrey Rosen: Josh, more thoughts, please, on whether or not President Trump engaged in insurrection. As you say, none of the January sixth defendants have been so charged and Congress, in its findings held that President Trump had assisted or aided the insurrection, but not that he didn't engage in the insurrection. If the court did reach this question, how would they

take into account these facts? And might they hold that the Colorado court didn't apply a version of the Brandenburg standard and require the findings to meet First Amendment standards? Tell us more about how you would resolve office.

[00:34:51] Josh Blackman: Section 3 defines two offenses, number one, engaged in insurrection or rebellion. Number two, given aid and comfort to the enemies. So there are two specific offenses, engaged in insurrection, two, give an aid or comfort to enemies. Giving aid or comfort is similar to, we might call accomplice liability or indirect liability, right, that you helped the crime, you facilitated, you didn't engage in it yourself. Engage is a specific intent crime. So I think the actions that are described in the January 6th report, maybe rise a little giving aid and comfort to an insurrection, but that's not what the text says. It gives aid or comfort to enemies, that is foreign people, foreign belligerent nations and not an issue here are engaging insurrection.

[00:35:34] Josh Blackman: So I don't think Trump engaged in it. The harder question is actually the First Amendment issue, the Brandenburg question. In fairness, Seth and I wrote about this on January 7 of 2021. We flagged this issue right at the get go. And during the Trump impeachment, we were viciously attacked, saying, "No, no, no. The First Amendment doesn't apply in impeachment trials, doesn't matter what Brandenburg says," and we thought that was wrong then. But here we are, we're in court and Brandenburg ought to apply. There's some irony, the government's arguing that Trump's speech on January 6th was in his private capacity, not in his governmental capacity. I agree with that. If Trump is speaking as a private citizen, he has a full panoply of First Amendment rights.

[00:36:15] Josh Blackman: Brandenburg was a case that had some not so pleasant facts. You had a Ku Klux Klan member who was ranting about having a march on Washington and doing some awful things. He was basically charged with inciting violence, inciting a crime, but the courts have done, "no, you can't prosecute him because the so-called criminal activity was in the future. It wasn't imminent." And that's a key phrase, imminent. The Colorado Supreme Court when they're applying Brandenburg said, "We will consider not only the speech, but also the tweets leading up to it." A- and that's not clear and in fact, they've had some debates about this issue. Brandenburg didn't squarely say that you can look to everything that came before to determine context as I read it. "Let's look at this speech., and did this speech by itself incite violence?"

[00:36:59] Josh Blackman: If you limit it just to speech, I think he's protected by Brandenburg. Sure, he said, "Fight like hell." Bill said, "March peacefully." I think unbalanced is we protected speech, and if it's protected speech it certainly can form the bases. Now, Gerard made a points from offhand that Section 3, you know, modified the First Amendment. My goodness. There's a point that Bowden Paulson made, "You need a serious theory of retroactivity to say that Section 3 implicitly repealed the First Amendment at least in part." A comment of a Landingham, who was a member of Congress rabble rouser, he's from Ohio, but he opposed the Civil War. And he

engaged in free speech and there's some evidence his speech was protected. If there's some argument that the First Amendment's repealed, it might have been discussing with the Landingham proceedings, it wasn't. So, I'm gonna be very hesitant to say that the 14th Amendment repeals the First Amendment implicitly, I think that's a very tricky and risky argument to make.

[00:37:54] Jeffrey Rosen: Another beat on how the US Supreme Court might resolve this question. Would it be plausible for a civil libertarian justice to hold that the Brandenburg standard applies, that you can't be held liable for engaging in his direction under Section 3 for protected speech and therefore, that the Colorado Supreme Court was wrong to disqualify him and- and what are the procedures for taking account of these First Amendment arguments in the course of a Section 3 proceeding?

[00:38:21] Gerard Magliocca: I don't think that Section 3 repealed the First Amendment. I just said that it modified it just as it modified all of the prior constitutional amendments are in the sense of mending what came before. Secondly, Brandenburg is a criminal case. Right? And of course, we think about sort of sending someone to prison for their speech. That's a very, very serious matter and there should be a very high standard to do that. Here, we are not sending Donald Trump to prison, in this- in this proceeding. We are looking simply to say whether he's disqualified from serving as president again. So the same kinds of concerns that are behind Brandenburg don't quite work in this context. Now, that said, that doesn't mean you necessarily need to throw out the Brandenburg standard. It could simply be to understand it filtered through Section 3 and the fact that it's a civil proceeding and a civil remedy rather than a criminal one.

[00:39:20] Gerard Magliocca: Beyond that, I wasn't there on January 6th, right. So I mean, I'm a little hesitant to sort of offer a direct opinion about what happened and what didn't happen. I think that the Colorado Supreme Court's analysis of that was- was sound. And I don't know that that's going to be the thing that's going to trouble the court the most. I mean, I would say that, you know, because the First Amendment is a more familiar terrain for them. I would be sort of thinking that they will spend a good deal of the argument talking about the issues that Josh has flagged, because I just think that's more in your wheelhouse, to put it a certain way.

[00:40:11] Gerard Magliocca: Do I think that that is something that should lead to a finding that Trump did not engage in insurrection? No, no, I don't. And I do think, by the way, the specific intent was satisfied. The Trial Court pointed to the fact not only things that occurred before the speech on January 6, but also the things that occurred afterwards, namely the lack of action once the violence began for several hours to prevent the violence from continuing and that that was evidence of intent. So I think that standard was satisfied based on the factual findings made.

[00:40:51] Jeffrey Rosen: Josh, Mike the Judge says, examine who should make this decision, state election officials, state courts or whether it's a determination that only the US Supreme

Court can make. And it doesn't make sense to have different states come to different conclusions about whether or not a President Trump engaged in insurrection, which is the US Supreme Court if it gets to this question have to decide it for the whole country.

[00:41:17] Josh Blackman: Right. Putting aside the question about self-execution, if we are electing a president on a national vote, and all 50 states impose different procedures before disqualifying the president, we are in a very, very dangerous place. So just to draw a contrast, the Colorado trial court that you're testified in, held a full hearing for a week, it was a pretty elaborate proceeding. In Maine, you had an elected partisan Secretary of State who has tweeted critically of Trump before, had a hearing that lasted just about a day. Because, Colorado said, right, and you might imagine other states have even less process. So for better or worse, this case comes to Supreme Court now with a full record on which the court can rule. And whatever the court does here, I hope and pray that the court resolves authoritatively.

[00:42:10] Josh Blackman: Seth and I make this point in our brief, we think the self-execution point is correct. And the court rules on self-execution grounds and all the state litigation ends. But Jeff, this doesn't end the crisis. Right. Why? January 6, 2025, we have a joint session of Congress. And it could be that a Congress with a democratic vote says, "We will determine that Trump is not qualified. And any electoral votes for Donald Trump were not given in a regular fashion." That's the statute it uses, regularly given. And you can imagine they disqualify Trump, which actually isn't clear, we either make that the Republican vice president becomes president because no President qualified, or you can have what's called a contingency election, where Biden moves and Joe Manchin can become president, crazy things can happen.

[00:42:59] Josh Blackman: I saw a recent poll that said 80% of Democrats think Trump should not be qualified. So if the Supreme Court kicks this case in any sort of procedural grounds, it just leaves chaos for a year that if Trump wins the nomination, which looks pretty likely, if Trump wins the general election, which is possible, the polls show he might, then we could have a democratic control Congress. We know for the sake of the Republic, we do not want Trump to be president. And I don't know that an appeal could lie from the joint session of Congress, the Supreme Court. I'm not sure, maybe it can, maybe it can't, I don't know. But it will be absolute chaos, if that happens. So I hope that whatever the court does, they resolve this issue on the merits, say that, "The President is not an officer of the United States. The presidency is not in office." There was no insurrection, there's a Brandenburg defense, right?

[00:43:43] Josh Blackman: Maybe the liberals would have that argued appeal to them. Something. Don't actually rule on self-execution. Don't rule that, "Oh, this only kicks in when the President holds office. Oh, don't do it now. There's a brief by Republican Senate committee." Rule the issue or give Gerard what he's looking for and say, "Knock them off the ballot." Right. Own your decision now. Do it now and let the people, you know, pick a different candidate. But a middle ground which something that, I know the chief often likes, I think will be very, very dangerous here and I don't think it'll be appealing to the court.

[00:44:18] Jeffrey Rosen: Well, the middle ground brings us to the sixth of the issues that Gerard identified at the beginning of the show. Is Section 3 justiciable? The Supreme Court has, in a series of cases, held there is a political question doctrine that says that when a decision is texturally committed to another branch of government, and when it raises pragmatic or prudential considerations, like calling the court's legitimacy into question or risking chaos, then judges should refuse to decide it at all. Gerard, tell us about what the argument is, in this case about whether or not this is a political question. What do you think some justices might accept that argument?

[00:45:03] Gerard Magliocca: Well, I'm worried that they might, and for the reasons, largely that Josh has stated. So, the inclination not to decide this case might lead them to say, "Hey, why don't you come back to us after the Republican convention if Trump is the nominee? Or, why don't you come back to us after November if Trump wins because maybe neither of those things or one of those things won't happen?" Now, one way they could get to that which we haven't discussed so far is the argument that, "Well, maybe you can't hold office under Section 3, but you can run for office." So the running part, you have to let everybody run. And so then you can't really resolve it until the election is over. Now, I can understand why somebody might find that appealing. But if we had not had January 6th 2021, we might say, "Well, hey, let the joint session do it. That seems fine. That's something that 12th Amendment seems to contemplate," and so on.

[00:46:01] Gerard Magliocca: But now, we've seen it in action once and we've seen how bad that can become and it would be worse the next time. So to say, "Either it's a political question, only Congress can decide in, in the joint session." Or to say, "Look, we can't do anything about it until after the election. So there's like this very narrow time window between November and January that where this will all get resolved somehow, or else a joint session has to resolve it." Those are both alternatives that are gonna be very unattractive because of what occurred on January 6 of 2021.

[00:46:42] Gerard Magliocca: There is a plausible argument for the kind of idea of, "You can run for office, but you can't hold office." I just think that's unworkable and looks very different, frankly now than it would have looked in 2019, if we had been having this conversation. I certainly hope that they won't do that. And I would add that I hope that you don't get a situation even where say there's just a concurring opinion that forms the fifth vote that says that. Because you could just have one or two of them saying that and that might lead to us all being back here in November, or December or whatever, kind of discussing this all over again. I just think that that's not where we need to go. We need to have this resolved now.

[00:47:33] Jeffrey Rosen: And it's significant that both of you agree that the court should resolve this substantively one way or the other and not kick it down the road. Josh, talk us through the options if President Trump wins the nomination and this goes to the Congress to count the electoral votes. What is the electoral Count Act say about raising objections and don't the House and Senate both have to agree to disqualify someone? And since they're in different

hands, wouldn't that mean that he would not be disqualified in the counting or how could this play out?

[00:48:05] Josh Blackman: It's going to be wild, as they say. The Electoral Count Act was modified in the last year or so. And there's a key phrase, objections can be raised if a vote is not regularly given. That's a key word, regularly given. It used to be that if one senator and one representative raise objection, that's enough. Now the threshold is higher. If a fifth of each House objects to a vote, then the joint session breaks up and they each go to their respective Houses. And they vote and if a majority of each House rejects electoral vote, then the votes not counted. And if a majority of the House and majority of the Senate decides that Trump's not disqualified, they can vote to reject every single electoral vote in favor of Trump. Now, what happens then? Again, I don't know. One or two things can happen. One, they can say that, "Well, the President is not qualified. So maybe the Republican vice president takes office." Or two, if no candidate receives a majority of electoral votes, then they can have what's called a contingency election in which some of the top three could actually be elected and Trump's not it, could be Biden, maybe Joe Manchin, who if he gets a single electoral vote somewhere which, you know, I don't think he will, but he could. Maybe win West Virginia. I don't know.

[00:49:27] Josh Blackman: Then we have just absolute insanity. If you think there were allegations at the 2020 elections about stopping the steal, which again, I think is nonsense. This is my view by substantial majority of Americans as stealing their votes. And even if it doesn't happen, the specter of it happening, the threat of it happening, I think will be destabilizing ways that we carefully understand. So I was kind of shocked to see that the Republicans, Senate committee said "Don't decide this now, wait till he actually gets elected then decide it." That's just playing with a loaded gun to Court Justice Jackson, right. The courts resolve this now. Whatever it is, give us a ruling, authoritative resolution and let us move on with our lives. Gerard and I, we're getting older in our old age. We can't do this another year. All this much hair is dry by the time we're done, if that's we got another year.

[00:50:20] Jeffrey Rosen: Ah, well, it will give us a lot to podcast about, no- no- no question about that. Gerard, since the House the Senate have to agree to disqualify a candidate under Section 3, isn't President Trump' safe if he wins the Electoral College, since the House will vote to disqualify him? And take us through the various scenarios that might occur if the Supreme Court kicks this down the road.

[00:50:43] Gerard Magliocca: Well, first of all, he wouldn't necessarily be safe because we don't know what the Congress will look like in January, depends on how the congressional elections go this fall. So who's to know? Second is, I can imagine, I guess in that scenario that, the day after Inauguration Day, there would be a whole lot of lawsuits filed trying to say in some sense, "Donald Trump's not the real president. So whatever he did, it's not lawful." And that will, either be a nuisance or cause real problems. Just depending on what that's about and how seriously people take it.

[00:51:20] Gerard Magliocca: One scenario I was trying to think through and I'm not sure I have a good answer to this is, okay, for example, suppose you were to say, "Well, he can run for office, he can't hold office." So when exactly can someone then bring a court challenge, right? Is it like, the day after election day when they're gonna bring some contest in a state that says, "He didn't really win Florida because he's not eligible?" Is it like after the electors have voted and then somehow you're gonna challenge what they did in a couple of weeks, you know, between the electors meeting and the joint session meeting? I'm not really sure how that would work.

[00:52:04] Gerard Magliocca: One possibility, I guess is you just have election contests being filed the day after election if he wins, saying, "Okay, he didn't really win my state." And then, I don't know, that has to get kicked up somehow to the Supreme Court, or to a state Supreme Court. It's just something we can't really handle. I mean, I think that's the basic problem. It's not like Bush versus Gore, where sometimes elections are very close and you have to have recounts, and it's too bad but you just got to do the best you can to resolve it. This is not that kind of situation. I just don't think the system can really take it on without some very bad ramifications.

[00:52:57] Jeffrey Rosen: Josh, more thoughts on this case, compared to Bush v. Gore. In Bush v. Gore, the court, famously or notoriously, reached a decision on pragmatic grounds that it was more important to avoid chaos of unextended recount than to follow the text and original understanding of the Constitution and came up with a previously unrecognized right of non-arbitrary treatment of voters to stop the recount. Gerard has just said that the case for chaos is much higher in this case than it was Bush v. Gore. Do you believe as a result that for pragmatic and prudential as well as textureless reasons, the court should rule definitively here? Help us distinguish this case from Bush v. Gore.

[00:53:41] Josh Blackman: Bush v. Gore sort of came out of nowhere, right? In the span of a few weeks, entire strands of constitutional doctrine were sort of just made up on the fly. It was not the courts' best work. In fact, in Morgan's Harper last term, the courts sort of clean up some of the vestiges from Bush against Gore. The insurrection case is a little bit different, right? You know, there's not a lot of scholarship on it, but Gerard's written on it. I've written about it. Kurt Lash also, Tillman, Bowden Paulson, a few others have written on it. And I think all these should have been vetted. I know Gerard's position. He knows mine. Then, we to argue each other's position right with their- their eyes closed. So we have pretty good arguments, I think, on both sides of the court once ruled one way or the other.

[00:54:27] Josh Blackman: But the chaos argument, I think, counsels in favor of some sort of definitive ruling one way or the other. We're not just talking about a couple of hanging chads in Boca Raton which is where my grandparents lives, right? We're talking about a national election where the candidate can't be written in. I mean, Trump has had a hard word to write if we can write into word Trump. You can't even write the guy's name on the ballot if you want to. So the court has a lot on its plate. I think Gerard made this point earlier. Will the arguments go six

hours? Instead of granting on maybe six or seven questions presented, they just said one. Is he disqualified? My goodness.

[00:55:05] Josh Blackman: So there'll be a free for all and we'll see what happens there. I think there might be some wrangling or arguing. We'll see about that. Let's get a ruling. I don't think we're at the stage where the Supreme Court says, "Trump is off the ballot," and then people, you know, reject the Supreme Court, put him on the ballot. Conversely, if the Supreme Court says Trump could be on the ballot, I hope and pray that the Democrats in Congress say, "You know what, we're going to follow the Supreme Court." Democrats say, "You know what, Mr. Roberts, you made your ruling go enforce it. We're gonna disqualify Trump."

[00:55:35] Josh Blackman: You wanna talk about a constitutional crisis if that phrase is one. The Supreme Court says that Trump is not disqualified, and the joint session of Congress says, "He is disqualified." And then we have litigation about this. You know, for all the talks about legitimacy and Justice Thomas's RV and everything else, this is an actual crisis. This is something we really have to be worried about. So I hope whatever the court does that President Biden says, "Okay." and we do what Al Gore did, accept the court's ruling and move on. It'd be nice for the court has unanimous ruling. I think that would be helpful. In fact, I think my officer position can garner nine votes, it won't upset any applecarts. The self-execution argument is harder because there's some pretty strong positions and what the 14th Amendment means, and whether you need legislation. I think opposition can get nine votes and we'll see what happens.

[00:56:24] Jeffrey Rosen: Well, it's time for closing thoughts in this really illuminating and an important discussion. Gerard, in a paragraph, how should the US Supreme Court resolve this case? Walk us through the various arguments and how the court should resolve it?

[00:56:39] Gerard Magliocca: Well, the Supreme Court should affirm the Colorado Supreme Court. If you go through the list of issues that I outlined at the beginning. If you go through and tick them off one by one. The answer on each of them is that Section 3 is satisfied in relation to what Donald Trump did. You get to the end, and that means you have to follow the logic of that to its conclusion. Now, the conclusion, "It's a big deal. It's unprecedented for a presidential candidate." That's all true. But I think when you work through the details and the facts of the case, it becomes a more compelling conclusion than if you simply just look at it and say, "Oh, how can the Supreme Court take someone off the ballot like that?"

[00:57:23] Gerard Magliocca: And my hope is that through programs like this and other things that will come along in the next month, people will become more and more aware of the issues. And look, they're gonna reach their own conclusions. I mean, I don't know that the Supreme Court is gonna be unanimous on this. It's hard for me to see that happening. But they should take the step that the Colorado Supreme Court did and follow what was, I think, a well reasoned opinion.

[00:57:53] Jeffrey Rosen: And Josh, last word in this important discussion is to you in a paragraph, how should the US Supreme Court decide this case?

[00:58:02] Gerard Magliocca: The opposite of what Gerard said. I'm mostly joking. I think this case is hard. Right? I'm not gonna come out here and say that this is a slam dunk for/or against Trump. I think there's some really difficult questions. But the interpretive principle sort of was been guiding me throughout this process is when you have a provision that limits the franchise, you have a provision that says that you can't vote for the candidate of your choice, it should be interpreted with an eye towards democracy, right, to letting people pick their leaders. I know many people don't like Trump, that's fine. Right? But if the American people decide to make Donald Trump president, then we get the country we deserve. Right? That's what we get. And I think the Supreme Court will not stand in the way of that happening. And Trump has to run the tables from every possible issue. If I'm even right about one of my issues, then this case is over. And I suspect one of those issues will be grounds for resolving this dispute.

[00:58:58] Jeffrey Rosen: Gerard Magliocca and Josh Blackman for educating We the People, listeners and the people of the United States about the urgently important constitutional stakes of this case. Thank you so much.

[00:59:11] Josh Blackman: Thank you.

[00:59:11] Gerard Magliocca: Thank you, Jeff.

[00:59:15] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollack and Samson Mostashari, was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Daraiseh. Please recommend the show to friends, colleagues or anyone anywhere who is eager for a weekly dose of constitutional illumination and debate. Sign up for the newsletter at constitutioncenter.org/connect and always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, and the devotion to the Constitution of people like you from across the country, who are inspired by our nonpartisan mission. Support it by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including the podcast, constitutioncenter.org/donate. What a great way to begin the new year by giving a donation of any amount, \$5, \$10 or more to the NCC to show your support for We the People. On behalf of the National Constitution Center. I'm Jeffrey Rosen.