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NEWS

‘The World Is Watching’: Supreme Court Prepares for Historic Hearing on Trump’s Eligibility

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United States Supreme Court



Jimmy Hoover



The U.S. Supreme Court will convene to hear arguments on a historic question Thursday: Is former President Donald Trump eligible to hold office again?

It’s a question that has dominated the legal and political world since the Colorado Supreme Court dropped its bombshell ruling in December that Trump is disqualified under Section 3 of the 14th Amendment for having “engaged in insurrection” through his role in the Jan. 6, 2021, attack on the U.S. Capitol.

It is now the justices’ turn to confront whether the Republican presidential frontrunner is an oath-breaking insurrectionist barred by the Constitution from returning to power. With Super Tuesday less than a month away, the court agreed to hear Trump’s appeal on a lightning fast timeline and scheduled Thursday’s hearing outside of its normal argument session.

“I don’t know that [the stakes] could be much higher,” said Alexander Reinert, a Cardozo School of Law professor who has argued before the court and clerked for Justice Stephen Breyer during the *Bush v. Gore* term. “We’re talking about whether one branch of government will find that one of the leading candidates for executive office, for the highest office in the land, is not going to be on the ballot.”

This will be the first time the Supreme Court has wrestled with the meaning of Section 3 of the 14th Amendment, sometimes referred to as the “insurrectionist bar” of the Constitution. The section states that, “No person shall... hold any office, civil or military, under the United States... who, having previously taken an oath... as an officer of the United States... to support the Constitution of the United States, shall have engaged in insurrection.”

Passed by Congress after the Civil War in 1866 and ratified in 1868, the disqualification clause was originally intended to prevent Confederate oath-breakers from returning to seats of power during Reconstruction. But for all the novel issues the case presents, it is hard to miss the parallels with *Bush v. Gore* from December 2000, with the court taking up a case that could affect the outcome of a presidential election on such a tight timeline.

“There’s no way the individuals in that courthouse are missing the significance of this case,” said Reinert. “They’re going to be the decider.”

Unlike nearly a quarter-century ago, however, the livestreaming of Supreme Court arguments and the rise of social media has created an environment in which the general public and legal community can comment on those hearings in real time.

There will be three attorneys arguing Thursday, but most people’s attention will be directed towards the justices’ questions rather than the advocates’ responses. In the rapid fire interrogation of a Supreme Court argument, justices often reveal which way they are leaning in a case and seasoned court watchers can even predict the outcome with a surprising level of accuracy.

Reinert, however, suspects the bench may be more guarded come Thursday.

“They realize that not just the country will be watching but that the world will be watching this,” he said. “I think they’ll be more hesitant than usual to suggest that they’ve made up their minds on these difficult questions.”

In the weeks since they granted Trump’s petition to review Colorado’s high court decision, the justices have faced an avalanche of “friend-of-the-court” briefs arguing for and against using Section 3 to disqualify Trump from the 2024 presidential race.

The former president’s lawyers have prioritized a somewhat technical argument to defeat the legal challenge to his eligibility first brought by Colorado voters back in September: namely, that Trump, as president, never took an oath as an “officer of the United States,” a term that they say applies only to lower government officials.

That argument has some resonance with law professor Josh Blackman, who with legal scholar Seth Tillman have been the principal advocates for the theory that Section 3’s use of the term “officer of the United States” excludes the presidency.

Blackman, who plans to attend Thursday’s hearing after unsuccessfully seeking argument time of his own at the hearing, told the *National Law Journal* he will be on the lookout for any questions from the bench about the meaning of the term “officer.”

Such an inquiry could reveal hesitation on the part of the justices to wrestle with the underlying facts of Jan. 6 and decide the case on a technical issue, said Blackman, who teaches constitutional law at South Texas College of Law Houston

“I don’t think there will be many questions about whether [Jan. 6] was an insurrection or whether Trump engaged in it,” Blackman predicted.

Reviewing the factual record in the case—developed after a five-day trial in Colorado state court—would get “very messy,” he said. “There’s just no easy way to do this on appeal.”

Blackman, who filed an amicus brief supporting Trump in the case, has identified Justices Neil Gorsuch and Amy Coney Barrett as potentially key players in the Trump ballot case and said he tried to frame his amicus arguments in a way that would appeal to their instincts as textualists.

Harder to pin down is the justice who has played arguably the biggest role in the Supreme Court’s election cases over the past decade.

“[Chief Justice] John Roberts is like a box of chocolates, you never know what you’re gonna get,” Blackman said.

The chief justice has been known to be “very quiet in very high profile cases,” thus making it difficult to predict which way he is leaning, Blackman added. “Look for Roberts’ first question, how soon it comes, because he might be quiet for a long time.”

The court has formally allotted 80 minutes for the 10 a.m. hearing, though—like most cases since the Supreme Court introduced “seriatim” questioning nearly four years ago—it is almost certain to go longer.

Jonathan F. Mitchell, a conservative Texas constitutional lawyer who served as the state’s solicitor general, will argue on behalf of Trump. Jason Murray, a Denver-based trial litigator, will make his debut at the Supreme Court on behalf of the Colorado voters. And Colorado Solicitor General Shannon Wells Stevenson will argue about issues of state election law on behalf of Colorado’s top election official, who has not taken a position on the underlying question of Trump’s eligibility.

It is unclear how long the Supreme Court will take to issue its decision, though the justices’ expedited review of the case suggests they will resolve Trump’s eligibility for office well in advance of their summer recess in July.

The case before the high court is *Trump v. Anderson*, No. 23-719.

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