South Dakota Newspapers, #68
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"We the People"
December 20, 2023

"A Law Court Will Affirm Colorado's Ruling on Trump"

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In his landmark opinion for the U.S. Supreme Court in Marbury v. Madison (1803), Chief Justice John Marshall defined the over-arching responsibility of the High Bench: "It is emphatically the province and duty of the judiciary to say what the law is." Marshall, the greatest name in our constitutional jurisprudence, observed that the Supreme Court is a law court, not a political court, a crucial distinction for a nation founded on the rationale that ours is a government of laws, not men.

With notable exceptions, the Court, historically, has been a venerated institution precisely because the citizenry believed that the Justices served, as Alexander Hamilton anticipated in Federalist No. 78, as a "mouthpiece" for the Constitution, rather than as legislators who would impose their personal and political preferences. Hamilton and his fellow framers of the Constitution wanted a law court, not a political court.

It was in the Hamiltonian-Marshallian spirit that the Colorado Supreme Court, acting as a law court, ruled that Donald Trump engaged in insurrection on January 6, 2021, and therefore is ineligible for certification on the ballot since he is disqualified under Section 3 of the 14th Amendment from running for the presidency.

The Colorado Supreme Court agreed with the fact-finding conclusion of the state trial court, following a five-day trial, that Trump, based on overwhelming evidence, had engaged in insurrection, which triggered Section 3. That provision bars from "any office, civil or military, under the United States," anyone who takes an oath "as an officer of the United States ... to support the Constitution of the United States [who] shall have engaged in insurrection or rebellion."

Denver District Judge Sarah B. Wallace had held that Trump "acted with specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification." Judge Wallace, however, inexplicably said that Section 3 did not encompass presidents. The state supreme court overturned that ruling by holding, correctly, that the American Presidency is, indeed, an "office" and that the president is a "civil officer," bound by the Constitution. The U.S. Supreme Court has, since the dawn of the republic, referred to the president as an officer. In the Aaron Burr Treason Trial in 1807, for example, Chief Justice Marshall held that the president is an officer, amenable to the judicial process and required to comply with subpoenas. In 1988, in Morrison v. Olson, Chief Justice Rehnquist wrote for the Court, upholding the special counsel statute, and said the president is a "principal" or "superior" officer.

Trump called the Colorado ruling "fatally flawed," and it is expected that he will shortly appeal to the US Supreme Court. The decision, however, is not flawed, but rather a "masterful" opinion, in the words of retired appellate judge Edward Luttig, one of the nation's most respected conservative jurists. Indeed, the opinion was beautifully crafted in a manner that fits the expectations of the Supreme Court Justices who style themselves textualists and originalists. The Colorado opinion is firmly grounded in the textual language and the structure of Section 3 of the 14th

Amendment, precisely the exalted approach to constitutional interpretation advocated by Justices Alito, Thomas, Gorsuch, Kavanaugh and Barrett. In a word, it is mother's milk for that quintet.

As such, if the Justices remain true to their philosophy of constitutional construction and the Court acts as a law court, then the result should be affirmation of the Colorado State Supreme Court decision. Traditionally, appellate courts do not disturb the findings of fact established by the trial court, unless there is demonstrable error. In this instance, it would be very difficult to find error since all eight of the Colorado judges—the trial court judge and the seven Supreme Court Justices, including the three dissenters—agreed that Trump had engaged in insurrection. The Court might engage in a de novo review—that is, a fresh review of the facts—if it looks for an exit ramp in the event it does not want to uphold the Colorado Supreme Court, but that is rare; critic's knives would be out if the Court were to abandon the traditional approach of deference to the trier of fact.

There would remain the question of application of the law—in this instance, Section 3 of the 14th Amendment. The language of that provision is crystal clear, reflecting the aims of the 39th Congress that wrote it to protect Americans from the possibility that an officer who had engaged in insurrection might regain power. Application of the law by the Supreme Court does not contemplate at all the lack of a conviction of Trump by a court of law, since there is nothing in the text or the legislative history pertaining to a requirement of a conviction before someone can be banned from the ballot. That's because Congress, in writing Section 3, anticipated the potential return to office of men who had not been convicted or would not be prosecuted, but had engaged in insurrection. Protection of the republic was of paramount importance.

If the Supreme Court acts as a law court, in the spirit of Alexander Hamilton and John Marshall, it should affirm the Colorado Supreme Court’s ruling.

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