No Ballot for You!

Challenging a Candidate's Qualifications to Run and Serve in Office

BY DANIEL H. STEWART, ESQ.

In March 2024, the U.S. Supreme Court decided *Trump v. Anderson* and unanimously rejected the attempt to keep former President Donald Trump off Colorado's 2024 ballots. Colorado had advanced a novel but straightforward argument: the events of January 6, 2021, rendered former President Trump ineligible for future federal office per the 14th Amendment to the U.S Constitution. Unable to serve, Colorado's election officers were duty-bound to keep Trump off the ballot, or so the argument went. It did not matter that Trump was the near-certain Republican nominee for president, or that he had a realistic shot at reelection.

Colorado's opponents framed the question in more consequentialist terms. The U.S. presidency is a national office, its occupant picked by a national election. No one state could filter federal constitutional law through a state process to potentially decide the 2024 presidential election without the nation's voters having a say. Presidents become presidents by winning elections, not trials. Anything else would be anti-democratic and anti-American, or so that argument went.

Ultimately, the Supreme Court agreed with Trump: Colorado could not use the 14th Amendment to bar Trump from the ballot.

The Colorado affair unsettled many. What about the will of the voters? Cocooned in my lawyer bubble, such sentiment caught me off-guard. To be sure, *Trump v. Anderson* was all sorts of unusual – facts, parties, arguments, and potential repercussions. But for election lawyers or those otherwise involved in administering election laws, the core of the *Trump v. Anderson* dispute was not that unique. Challenges to a candidate's qualifications to serve and run for office happen all the time.

The preferred remedy for ineligible candidates is blocking their access to the ballot. Just as it is probably easier to avoid dessert now than it is to work off the calories tomorrow, it is better to resolve candidate qualification concerns before voters select an ineligible one. There are dozens of Supreme Court decisions on the topic, and countless more state precedents. Election statutes detail office and ballot qualifications, and I am unaware of any state that does not have a procedure to challenge one's qualifications to run and serve. Nevada is no different.

In this article, I will discuss the laws to qualify for the ballot and office in Nevada. There are two different, but overlapping, groupings of election laws in play: those mandating office requirements, and those gatekeeping ballot access. Both sets of laws interrelate; a candidate who cannot serve in office can be kept off the ballot. And a candidate kept off the ballot cannot win office.

Qualification Requirements

Office qualifications are largely found in constitutions. For federal office, the U.S. Constitution apparently sets both the floor and the ceiling. *See U.S. Term Limits Inc. v. Thornton*, 395 U.S. 779 (1995); *Chiafalo v. Washington*, 591 U.S. 578, 589 (2020). The U.S. Constitution's eligibility requirements are well-known: age, residency, citizenship, natural-born citizenship and term limits for presidents, impeachment and conviction, no double officeholding, and (if Congress ever acts) no insurrection from prior office holders.

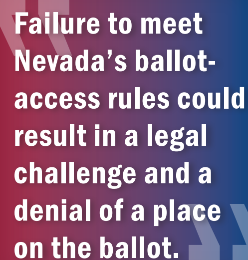
The Nevada Constitution imposes similar requirements, but adds that one must be a qualified elector, and cannot be an embezzler of public money or guilty of taking bribes. The qualified-elector provision precludes felons and traitors, but (sadly) used to bar candidates on more ignoble grounds including race and gender. If you could not vote, you could not serve, giving Nevada a way to backdoor office-holder prejudice.

Statutory qualifications may exist as well. For instance, Chapters 2, 2A, 3, and 4 of the Nevada Revised Statutes set qualifications for the Nevada Judiciary. Sec. 8, Art. 6 of the Nevada Constitution provides express authority for the Legislature to "fix by law [justice of the peace] qualifications[.]" The document, however, is silent on what the Legislature may require of appellate and district judges, but the Nevada Supreme Court has recognized such lawmaking power over the entire judiciary. *See In re Candelaria*, 245 P.3d 518 (2010) (approving requirement of years of licensed experience), *Nev. Judges Ass'n v. Lau*, 910 P.2d 898 (1996) (approving possible term limits for judges). Failure to meet these statutory qualifications will result in removal from the ballot. *See Candelaria*, 245 P.3d at 519.

In Nevada, one may challenge a candidate's office eligibility right after filing to run (NRS 293.182), or even *if* and *after* the candidate wins (NRS 293.410). Presumably (although the question is a bit murkier post *Trump v. Anderson*), these same challenge procedures apply to federal candidates who fail to meet federal qualifications too, except where the law says otherwise.

Ballot Access

While constitutional and statutory law set office qualifications, a state also has constitutional authority to regulate access to its ballots. *See* Art. I, Section 4; Article II, Section 1, and the 10th Amendment; *see also Clingman v. Beaver*, 544 U.S. 581, 586 (2005). That states *must* control access to their ballots, though, is a more modern phenomenon. Prior to the rise of the Australian (secret) ballot from 1888-1896, states did not provide ballots – parties, candidates, and voters did, or voters voted with their voices. *See Minnesota Voters Alliance v. Mansky*, 585 U.S. 1, 7 (2018).



With ballots becoming state real estate, states now had the right and obligation to manage that space responsibly. Not just anyone or anything could appear on the ballot. In Nevada, candidates for partisan office may appear on a general election ballot under three different scenarios only: (1) win a major party primary; (2) be nominated by a recognized minor party; and (3) gather enough signatures on a petition to run as an independent (non-partisan) candidate.

To qualify as a major party, at least 10 percent of the state's registered voters must be members of the party in the year of the primary election. *See* NRS 293.128. Democrats and Republicans are the only major parties in Nevada. And to run in a major-party's primary, a candidate must have been a party member beginning January 1 of the election year, must timely complete and file the necessary paperwork (including an affirmation of various qualifications), and pay the filing fee.

Minor parties simply must register with the Secretary of State, and their candidates must be nominated by an internal process. Independent candidates – even those for federal offices – must gather and submit a certain number of signatures on an official petition. All must also file and pay the fee.

Failure to meet Nevada's ballot-access rules could result in a legal challenge and a denial of a place on the ballot.

Altogether, the laws setting qualifications and policing access to the ballot do limit democratic choice. And qualification and access laws do seem to put multiple rights and constitutional values in tension. In competing claims from voters, candidates, parties, and states, whose rights win out?

According to the Supreme Court, "ballot access must be genuinely open to all, subject to reasonable requirements." *Lubin v. Panish*, 415 U.S. 709, 719 (1974). But a "State has an interest, if not a duty, to protect the integrity of its political process from frivolous or fraudulent candidates [,]" *Bullock v. Carter*, 405 U.S. 134, 145 (1972), and "avoiding voter confusion caused by an overcrowded ballot …" *Clements v. Fashing*, 457 U.S. 957, 965 (1982).

The Nevada Supreme Court has held that "the right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law." *Gilbert v. Breithaupt*, 104 P.2d 183 184 (1940).

The U.S. Supreme Court, though, rarely speaks of a "right to hold public office," focusing instead on the way that restrictions on candidates affect the rights of voters. "'[T]he rights of voters and the rights of candidates do not lend

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themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.'" *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972). "Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, [i]n approaching candidate restrictions, it is essential to examining in a realist light the extent and nature of their impact on voters.'" *Id.*

By the time voters receive their ballots, a winnowing has already taken place. Whether by legal process or self-selection, ineligible candidates will likely not appear. Other candidates may have been left off because they did not win a primary, receive a nomination, or gather enough signatures of support. There is nothing unusual or undemocratic about this reality; it is how we run elections. Democracy requires order, too. Secret, valid, understandable ballots magnify voters' will and effectuate their choices. And whatever its holding, *Trump v. Anderson* did not espouse a general skepticism or disapproval of long-established laws setting and enforcing qualification and ballot-access requirements.

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