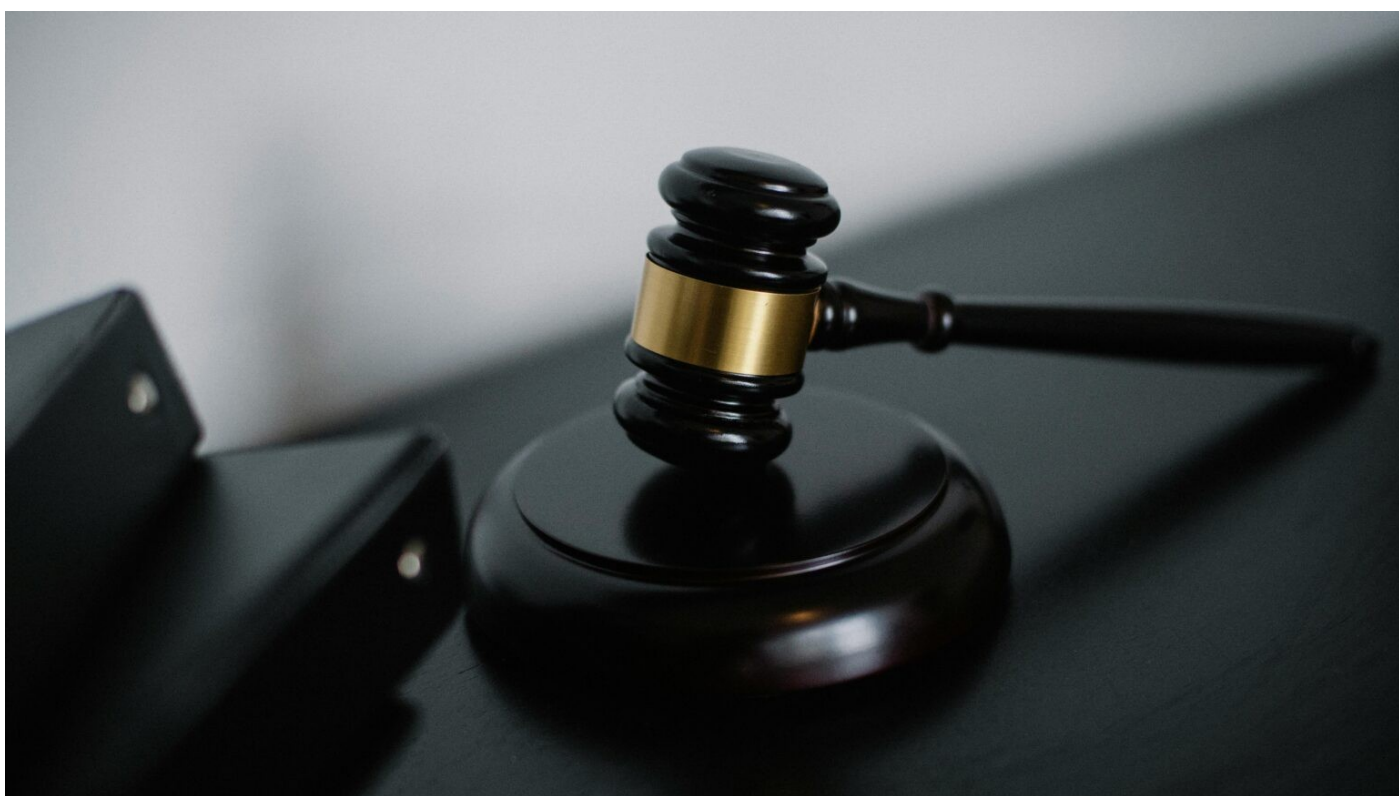


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# Opposing jurisprudence of the two courts on the eligibility of populist candidate to run in the elections

23.4.2025

Recently, two constitutional (and supreme) courts have heard highly political cases concerning the eligibility of right-wing populist candidates to stand for elections. The prior judgment was the reversal by the Federal Supreme Court of the ruling of the Colorado Supreme Court that *Donald Trump*, former president at the time of the trial, could no longer serve in office due to his involvement in the Capitol attack against the US government, and therefore his name should be removed from the ballot. Soon after, the Romanian Constitutional Court dismissed the presidential candidacy of *Diana Iovanovici-Șoșoacă*, a radical member of the far-right political party *S.O.S. Romania*, as incompatible with the values enshrined in the constitution on the role of the president.

These two judgments have stimulated a heated debate on which legal interpretation is right and how constitutional judiciary could protect democracy and rule of law without undermining its legitimacy.

### Thin Lens of American Supreme Court

In the American law and history, Section 3 of the Fourteenth Amendment, namely Disqualification or Insurrection clause, reflected the constitutional design of the Reconstruction Era following the American civil war. Accordingly, if any person engaged in a rebellion or insurrection, they shall not hold any public office. As one of the most prominent constitutional law scholar Bruce Ackerman points out, Trump's support to the *Proud Boys*, which had a considerable impact on the January 6 riot, provided a typical model of "insurrection" as it was understood by the ordinary people at the time the amendment was ratified.

However, in the *Trump v. Anderson*, the Supreme Court decided to interpret that historical clause in a way of merely textualist. The unanimous decision of the Court stated that the states are only authorized to take a decision regarding the candidates who attempt to hold state office rather than federal office. To disqualify state candidates in compliance with state statutes should not extend to federal candidates. For example, if Trump were running for governor of Colorado, the Colorado courts would have dismissed his candidacy. In other words, while Trump's candidacy for the office of governor of Colorado can be revoked, the Court cannot interfere with his candidacy for the presidency of the United States.

Besides, the majority of the Court (although the Court's decision was unanimous, the 4 justices [Sotomayor, Kagan, Jackson, Barrett] of the 9-members Court in their concurring opinion noted that in this case, it was not necessary to go beyond annulling the state court's decision and to decide how and which body should enforce Section 3 of the 14th Amendment) goes beyond: the framers purposively empowered the federal government against states' powers, and that the disqualification clause can only be enforced by Congress through legislation rather than by the courts through adjudication. In so doing, the Court narrowed the power of not only state but also federal courts to decide on the interplay between electoral qualification and political freedoms. More importantly, it neglected to interpret the constitutional provision designed to prevent attempts to threaten the democratic rule of law order in a way that would be appropriate to the current circumstances.

## Thick Lens of Romanian Constitutional Court

The Romanian Constitution defines the mandate of the constitutional court as “to guard the observance of the procedure for the election of the President of Romania and to confirm the ballot returns” (m. 146/f) The Court considered the duty of guardianship role in terms of elections not only procedurally, but also substantively. In its judgment of 5 October 2024, the Court emphasized that the role of the president is defined in the Constitution, which requires fidelity to constitutional values. A presidential candidate must therefore be someone who is in accordance with the fundamental principles on which the constitution is established, and a candidate against whom the evidence proves that the conditions of democracy and the rule of law are not fulfilled should not be allowed to run in the election. The Court’s constitutional review, unlike the US Supreme Court, offers a value-laden approach.

According to the Court, Romania’s constitutional identity has been built upon Western-type democratic system. A candidate who does not embrace such constitutional identity and aspires to alter it should not be permitted to become president. Diana Iovanovici-Șoșoacă who opposes the European Union and NATO, disseminates pro-Russian propaganda and claims that Romania is a dictatorship jeopardizes national security. Therefore, the Court decided to dismiss the candidacy of Iovanovici who is incapable of exercising the mandate of a president entrusted with protecting national security and the unity and territorial integrity of the country. Thus, by interpreting the articles of the Constitution on the role and duties of the president, the Court determines who is not eligible to stand for presidential elections.

## Taking both Democratic Order and Legitimacy Seriously

The US Supreme Court, while interpreting the constitutional clause, has turned the prohibition of holding public office into a mere issue of vertical authority. It led to transforming the constitution from a political-legal document aiming at protecting and entrenching democracy into a solely technical document that organizes the duties of state organs or branches of government. Conversely, the Romanian Constitutional Court has extended its jurisdiction regarding the regulation of elections into an extra-legal field. Moving the duty of politicians to act in accordance with the constitution to the stage before they take office and making political assessments rather than legal arguments leaves the Court’s jurisprudence vulnerable to being labelled authoritarian liberalism or liberal hubris. Indeed, this was followed by the Court’s subsequent decision annulling the entire process of the presidential elections after the far-right party’s candidate had finished ahead in the first round of the elections. Both courts are thus in

danger of tearing down their legitimacy.

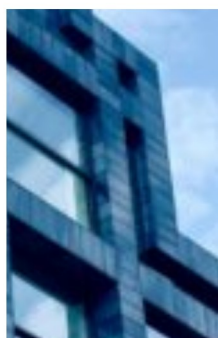
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