# CONSTITUTIONAL PROTECTIONS AND PROCEDURAL RIGHTS IN ELECTORAL PETITIONS:

## THE CASE OF TRUMP V. ANDERSON

*By Noam Kozlov,*

## ABSTRACT

*President Donald J. Trump engaged in an insurrection*. On its face, this conclusion seems to have originated in a criminal proceeding, following a thorough jury trial that adhered to all standards offered by the Constitution to protect the rights of criminal defendants. However, this is not the case. In a civil proceeding, following a five-day bench trial in a state district court, the Colorado Supreme Court decided that Mr. Trump engaged in an insurrection against the United States, violating his oath to the Constitution.[1] Colorado's supreme court decided that in doing so, Trump became ineligible for seeking re-election in 2024 and ordered Colorado's Secretary of State to remove his name from the Republican primary ballot.[2] This unprecedented decision sparked much controversy, especially among constitutional and election law commentators. This article attempts to examine Colorado's decision from a different angle: analyzing the procedural framework of the decision and the procedural validity of the judicial process.

This article will argue that regardless of the constitutional and election law questions raised by the ruling, the Colorado Supreme Court ruling grossly violated Mr. Trump's procedural due process rights. While the decision took place in a civil proceeding, where procedural protections typically offered to criminal defendants are not present, the electoral petition should have been characterized as a quasi-criminal

[1] Anderson v. Griswold, 2023 Colo. LEXIS 1177.
[2] *Id.*

proceeding.[3] Accordingly, while the Constitutional protections of the criminal process do not apply in full force, due process dictates the implementation of some of these constitutional and procedural protections even in a civil case. This is not a novel conclusion. Courts and commentators have long recognized the applicability of some constitutional and procedural protections to quasi-criminal proceedings. However, in the context of electoral petitions that involve criminal allegations, the issue remains overlooked and ignored, even though such proceedings serve as an almost textbook example of quasi-criminal cases that should enjoy some of the constitutional and procedural protections typically offered to criminal defendants. Therefore, while this comment is nominally concerned with *Trump v. Anderson*, it attempts to, more broadly, shed light on an overlooked and underdeveloped body of law — the procedural rules governing quasi-criminal election petitions.

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## I. INTRODUCTION

On December 19, 2023, the Supreme Court of Colorado issued an unprecedented and detrimental ruling: Donald J. Trump cannot appear on the ballot

[3] See *Infra* **Part III**.

in the State of Colorado, as he is not eligible to serve as President of the United States due to his involvement in an insurrection.[4] This decision immediately sparked controversy. Some saw it as a great triumph of the principle of the rule of law,[5] as even the most powerful people in the nation are held accountable for their actions, and the nation ejects from within its ranks those who threatened the sanctity of democratic rule and peaceful transfer of power. Others, however, saw the decision as a violent attack on democracy and an attempt to deprive many voters of their right to elect the candidate whom they see fit to serve as the next president of the United States.[6] While the political repercussions of the decision are immense, the Colorado Supreme Court ruling is first and foremost a legal decision that will inevitably be challenged in the United States Supreme Court.[7] Accordingly, the decision is unprecedented not only in its political consequences but also in the court's legal reasoning. While much of the attention has been allocated to the constitutional and election law aspects of the decision, especially the court's interpretation of Section 3 of the Fourteenth Amendment, it seems that these discussions overlook a vital component of the ruling — to arrive at its decision, the court first needed to make the *factual* determination that Trump's actions did constitute an *insurrection*. For this factual analysis to be made, the court needed to hear evidence to determine the nature of Trump's conduct on January 6th, 2021. Only then could the court assess whether

[4] Anderson v. Griswold, 2023 Colo. LEXIS 1177, at 141.

[5] Kimberly Wehle, *The Colorado Supreme Court Decision Is True Originalism,* THE ATL. (Dec. 21, 2023), https://www.theatlantic.com/ideas/archive/2023/12/colorado-supreme-court-decision-originalism-trump/676934/; Isabella Murray, *Experts Dissect Key Arguments in Colorado Supreme Court 14th Amendment Ruling,* ABC NEWS (Dec. 22, 2023), https://abcnews.go.com/Politics/experts-dissect-key-arguments-colorado-supreme-court-ruling/story?id=105809634.

[6] Miranda Nazzaro, *Republican Lawmakers Slam Colorado Ruling,* THE HILL (Dec. 19, 2023), https://thehill.com/homenews/house/4368711-gop-lawmakers-slam-colorado-courts-trump-decision/.

[7] Indeed, the decision was challenged and overturned by the Supreme Court. However, the Court, too, concentrated on the principled constitutional question at hand, somewhat overlooking the procedural challenges posed by the Colorado ruling. Therefore, it seems that the importance of a procedural examination of the ruling has only been underlined by the path taken by the Supreme Court. *See* Trump v. Anderson, 601 U.S. 1, 11-12 (2024).

that conduct constituted incitement of an insurrection and whether Trump was thus precluded from seeking office again.

This factual determination may be overlooked because it appears that *everyone knows* what Trump did on January 6th. However, when a person is accused of committing a crime, it is not enough to point out that everyone knows what they did. Instead, the accusing party needs to present reliable, admissible evidence to prove its case. But in the current case, no firsthand witnesses appeared before the court in the five-day trial. Furthermore, the respondents were precluded from subpoenaing some firsthand witnesses who previously testified as to Trump's conduct on that day.[8] Instead, the court mainly based its factual conclusions on the final report of the House Select Committee to Investigate the January 6th Attack on the United States Capitol ("the report"). This report is hearsay, because committee members based their report not on their own firsthand experiences, but on testimony they heard from witnesses who testified in front of the committee.[9] Thus, the court should have been precluded from using the report as evidence. The court, however, explained that the report fell within a hearsay exception outlined in § 803(8)(c) of the Colorado Rules of Evidence.[10] This exception, virtually identical to a similar exception found in Rule 803(8) of the Federal Rules of Evidence, allows the admission of "factual findings resulting from an investigation made pursuant to authority granted by law."[11] The court was incorrect, however, and this was not sufficient for the report to be deemed admissible. It will be argued later in this article that due to the quasi-criminal nature of the proceeding in question, some of the constitutional and procedural protections offered to criminal defendants should apply to the case. Among them, the respondent-defendant in the proceeding, accused of committing a serious federal

[8] Anderson v. Griswold, 2023 Colo. LEXIS, at 181, 198.
[9] H.R. REP. NO. 117-000, at 3 (2022). (hereinafter: The Report).
[10] Fed. R. Evid. 803(8)(c).
[11] Colo. R. Evid. 803(8).

crime, should be entitled to confront the witnesses against him.[12] Otherwise, the introduction of evidence without such confrontation violates the respondent's due process rights, and thus, such unconfronted evidence should be deemed inadmissible.[13]

As it will be shown, this is not a novel argument. Courts have long recognized that quasi-criminal proceedings should offer some of the constitutional and procedural guarantees provided to criminal defendants.[14] Specifically, the right to confront one's witnesses should sometimes be extended to quasi-criminal proceedings by virtue of the due process clause.[15] However, this general understanding has been overlooked and almost ignored in election law proceedings. It will be argued in section V that election law cases involving direct criminal allegations against the respondent serve as textbook examples of quasi-criminal proceedings. Accordingly, some of the constitutional and procedural protections offered to criminal defendants should also be extended to quasi-criminal cases.

## II. BACKGROUND: COLORADO SUPREME COURT'S RULING

While we are interested here in only a specific aspect of the Colorado Supreme Court's ruling ("the ruling"), it may be helpful to briefly discuss the background to the decision. President Trump was elected as the forty-fifth President of the United States. He then ran for re-election during the 2020 campaign, losing to current

[12] See *infra* **Part V**.
[13] *Id.*
[14] Elizabeth Anne Fuerstman, *Trying (Quasi) Criminal Cases in Civil Courts: The Need for Constitutional Safeguards in Civil RICO Litigation*, 24 COLUM. J.L. & SOC. PROBS. 169, 173 (1991); John Henry Crouch, *Criminal Procedure in Mississippi: A Summary of the Right to Assistance of Counsel, The Right of Confrontation, and Juvenile Quasi-Criminal Proceedings*, 47 MISS. L.J. 91, 125 (1976); Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should BE Treated Like Criminal Defendants Under the Felony Impeachment Rule,* 36 PEPPERDINE L. REV. 997, 1001 (2009).
[15] See infra note 118 and the accompanying text.

President Joseph R. Biden, Jr.[16] Trump, however, refused to recognize his defeat, arguing that election fraud deprived him and his voters of their so-called rightful victory.[17] Despite dozens of challenges by his legal team, virtually no widespread election fraud was found.[18] Accordingly, the Electoral College elected President Biden as the forty-sixth President,[19] and Congress was set to ratify his election on January 6th.

Trump and some of his supporters refused to accept this upcoming ratification of Biden's victory. Trump held a rally on the morning of January 6th at the Ellipse in Washington, D.C., where he spoke to the attendees. In his speech, President Trump persisted in rejecting the election results, telling his supporters that "[w]e won in a landslide" and "we will never concede."[20] He urged his supporters to "confront this egregious assault on our democracy," "walk down to the Capitol…[and] show strength," and that if they did not "fight like hell, [they would] not…have a country anymore."[21] Before his speech ended, portions of the crowd began moving toward the Capitol.[22] Trump's supporters then forcibly entered Congress,[23] where they started desecrating the building and searching for elected officials while chanting "Hang Mike

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[16] Peter Baker, *Biden Inaugurated as 46th President,* N.Y. TIMES (Jan. 26, 2021), https://www.nytimes.com/2021/01/20/us/politics/biden-president.html#:~:text=418-,Biden%20Inaugurated%20as%20the%2046th%20President%20Amid%20a%20Cascade%20of,is%20still%20ravaging%20the%20country.

[17] Ed Kilgore, *Trump's Long Campaign to Steal the Presidency: A Timeline,* NEW YORK MAG. (July 14, 2022), https://nymag.com/intelligencer/article/trump-campaign-steal-presidency-timeline.html.

[18] Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but not a Wipe-Out,* BROOKINGS (Nov. 30, 2021), https://www.brookings.edu/articles/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/; Maryclaire Dale, *Trump's Legal Team Cried Vote Fraud, but Courts Found None,* ASSOCIATED PRESS (Nov. 22, 2020), https://apnews.com/article/election-2020-donald-trump-pennsylvania-elections-talk-radio-433b6efe72720d8648221f405c2111f9.

[19] Mark Sherman, *The Electoral College Makes It Official: Biden Won, Trump Lost,* ASSOCIATED PRESS (Dec. 15, 2020), https://apnews.com/article/joe-biden-270-electoral-college-vote-d429ef97af2bf574d16463384dc7cc1e.

[20] Anderson v. Griswold, 2023 Colo. LEXIS at 8-9.

[21] *Id.*

[22] *Id.*

[23] The Report, *supra* note 9, at 465.

Pence,"[24] in an attempt to persuade Vice President Pence from ratifying the election. However, Vice President Pence ratified the election a few hours later, and President Biden was subsequently sworn into office on January 20.[25]

Following the events that unfolded on January 6th, a Congressional Investigatory Committee was established.[26] For the proposes of this article, it is enough to note that the bipartisan committee conducted a thorough investigation of the events, hearing eye-witness testimony from Trump's staff and inner circle, as well as direct witnesses who came in contact with Trump on January 6th and testified about his actions.[27] Following its investigation, the Committee published its final report on December 22, 2022,[28] where it laid out its findings concerning the events that unfolded on January 6th. The report included specific findings concerning Mr. Trump's conduct,[29]concluding that Trump and his team orchestrated a deliberate, pre-meditated scheme to overthrow the results of the 2020 election [30] The scheme included the spread of false assertions regarding alleged election fraud, an attempt to block the ratification of the elections, and finally, a direct call on supporters to "fight" on Capitol Hill to prevent said ratification from taking place.[31] The Committee concluded that there was sufficient evidence to charge Trump with the federal crime of aiding and assisting an insurrection, a federal felony under 18 U.S.C. 2383.[32]

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[24] *Id.* at 38.
[25] *See* Baker, *supra* note 16.
[26] *See* The Report, *supra* note 9.
[27] Anderson v. Griswold, 2023 Colo. LEXIS at 53 (while the committee had bipartisan representation, the court still noted that the report would have been viewed more favorably had Speaker Pelosi not rejected some of the candidates chosen by the Republican party); The Report, *supra* note 9, at 3.
[28] Deepa Shivaram, *The House Jan. 6 committee releases its final report on the Capitol attack,* NPR (Dec. 22, 2022), https://www.npr.org/2022/12/21/1144489935/january-6-committee-full-report-release.
[29] *See* The Report, *supra* note 9, at 109.
[30] *See* The Report, *supra* note 9, at 109.
[31] *Id.*
[32] 18 U.S.C. §2383; The Report, *supra* note 9, at 109.

However, Trump has never been indicted on the crime (despite facing multiple other federal charges).[33]

In the buildup to the 2024 election, Trump decided to run for president once again. Accordingly, he decided to participate in the Republican primary elections and petitioned the Colorado Republic State Committee (CRSC) to include his name in the Colorado primary.[34] The CRSC agreed, and Trump was subsequently put on the ballot in Colorado.[35] However, a group of Colorado voters filed an election petition with a Denver district court.[36] They argued that Trump's actions on January 6th constituted an insurrection against the United States, thus violating Trump's oath to the Constitution.[37] Petitioners further argued that Section 3 of the Fourteenth Amendment,[38] which precluded a person who violated his oath to office from holding public office again, applied to the office of presidency.[39] Therefore, Trump, who violated his oath to office by engaging in insurrection, could not hold the presidential office again. Accordingly, petitioners argued that the court should order Colorado's Secretary of State to dismiss Trump from the ballot.[40]

The district court conducted a five-day trial during which it assessed evidence offered by the parties.[41] The primary evidence presented to the court was the report, as well as the testimony of Timothy Heaphy, Chief Investigative Counsel for the Committee, who testified on the Committee's proceedings.[42] On November 17, the

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[33] Politico Staff, *Tracking the Trump Criminal Cases,* POLITICO (June 13, 2023) https://www.politico.com/interactives/2023/trump-criminal-investigations-cases-tracker-list/; Amy O'Kruk & Curt Merrill, *Donald Trump's Criminal Cases, in One Place,* CNN (Dec. 11, 2023), https://edition.cnn.com/interactive/2023/07/politics/trump-indictments-criminal-cases/.
[34] Anderson v. Griswold, 2023 Colo. LEXIS at 9.
[35] *Id.*
[36] Anderson. v. Griswold, 2023 Colo. Dist. LEXIS 362, 54 (hereinafter *Anderson District Ruling*).
[37] *Id.*
[38] U.S. CONST. amend. XIV, § 3.
[39] Anderson District Ruling, *supra* note 36, at 3.
[40] *Id* at 4-5.
[41] *Id.* at 9.
[42] *Id.* at 24.

district court issued its decision.[43] The court ruled that sufficient evidence was presented to conclude that Trump engaged in an insurrection.[44] The court based this conclusion almost entirely on the report and its findings.[45] As explained above, the court concluded that the report was admissible as evidence since it fell within the hearsay exception laid in section 804(8)(c) of Colorado's Rules of Evidence, which dictated that "factual findings resulting from an investigation made pursuant to authority granted by law" can be admissible in a civil proceeding.[46] The court then concluded that despite Trump's participation in the insurrection, he was not disqualified from running for president since the office of president did not fall within the definition of Section 3 of the Fourteenth Amendment.[47]

Both Trump and the petitioners appealed this decision.[48] On December 19th, the Supreme Court of Colorado granted the petitioners' appeals and decided in a four-to-three ruling that Trump was precluded from appearing on the Colorado ballot.[49] The Supreme Court sided with the district court's decision in concluding that the report was admissible under Colorado's Rules of Evidence.[50] The court further stipulated, contrary to the district court's assertion, that Section 3 did apply to the office of president. Thus, President Trump violated his oath to office and the Fourteenth Amendment, which made him ineligible to serve as president.[51] Therefore, the court concluded that President Trump should not appear on the Colorado ballot.[52]

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[43] *Id.* at 131.
[44] *Id.* at 91.
[45] Anderson, *supra* note 36, at Section F.
[46] Colo. R. Evid. 803(8).
[47] Anderson District Ruling, *supra* note 36, at 131.
[48] Anderson, *supra* note 36, at 10.
[49] *Id.* at 7-8.
[50] *Id.*
[51] *Id.*
[52] *Id.*

This decision by the court creates several different issues. The topic mostly discussed by commentators is the constitutional question raised by the court: does Section 3 of the Fourteenth Amendment apply to the office of president?[53] Another aspect of the decision is whether Trump's conduct can be defined as an "insurrection" for the purposes of Section 3.[54] While these legal questions are important, they overlook the underlying basis for the court's decision.

For the court to even discuss the applicability of the Fourteenth Amendment, or the scope and meaning of the term "insurrection",[55] the court first needed to rule that petitioners provided sufficient evidence to prove that Trump committed the conduct that was attributed to him. After all, if the court could not decide that Trump did make the remarks that petitioners accused him of asserting, then the case would fail before even reaching the constitutional issue. If the petitioners failed to present valid evidence concerning Trump's conduct on January 6th, then it cannot be found that he engaged in an insurrection, and accordingly, the applicability of the Fourteenth Amendment becomes irrelevant altogether.

The following analysis will attempt to address this overlooked aspect of the decision. Indeed, the current case is not alone in its insufficient consideration of the

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[53] Andrew Prokop, *The Fraught Debate over Whether the 14th Amendment Disqualifies Trump, Explained,* VOX (Dec. 19, 2023), https://www.vox.com/politics/23880607/trump-14th-amendment-lawsuits-federalist-society#:~:text=The%20argument%20for%20disqualifying%20Trump,Constitution%2C%20from%20holding%20office%20again; Mark A. Graber, *Does 14th Amendment Bar Trump from Office? A Constitutional Scholar Explains Colorado Ruling,* MO. INDEP. (Dec. 20, 2022), https://missouriindependent.com/2023/12/20/does-14th-amendment-bar-trump-from-office-a-constitutional-scholar-explains-colorado-ruling/; Rebecca Shabad, *What is Section 3 of the 14th Amendment?,* NBC (Dec. 20, 2023), https://www.nbcnews.com/politics/2024-election/trump-14-amendment-section-3-explained-colorado-ballot-ruling-rcna130581.

[54] Nicholas Riccardi, *The Constitution's Insurrection Clause Threatens Trump's Campaign. Here is How That is Playing Out,* ASSOCIATED PRESS (Dec. 25, 2023), https://apnews.com/article/trump-insurrection-14th-amendment-2024-colorado-79373b5043976588b599fc00ede049e8#:~:text=The%20Colorado%20Supreme%20Court%20on,against%20it%20from%20holding%20office..

[55] *Id.*

procedural and evidentiary issues surrounding election litigation.[56] Too often, procedural aspects of election law are overlooked and even ignored. But it is precisely when we are concerned with elections, the core of our democracy and the heart of the rule of law,[57] that adhering to the procedural protections offered by law should be at the top of our priorities. After all, if Trump's right to stand for election, and the right of millions of Americans to vote for Trump, were deprived in a procedure that failed to adhere to the requirements of due process, it would constitute an unforgivable blow to our democratic system.

## III. QUASI-CRIMINAL PROCEDURES

Civil and criminal proceedings are two different species in the realm of procedural due process, separated by an ocean of distinct and often contradictory laws. While criminal cases are almost exclusively tried in front of a jury, civil cases are sometimes tried in a bench trial.[58] Where criminal cases are governed by strict procedural and constitutional protections such as the Confrontation Clause,[59] Miranda rights,[60] an increased standard of proof,[61] asymmetric presumptions that favor the defendant,[62] and others,[63] the civil litigation world is typically viewed as a more equal

[56] See *infra* note 107.
[57] CRISTINA NICOLESCU-WAGGONNER, NO RULE OF LAW, NO DEMOCRACY: CONFLICTS OF INTEREST, CORRUPTION, AND ELECTIONS AS DEMOCRATIC DEFICITS 3 (2016); Guillermo O'Donnell, *Why the Rule of Law Matters*, 15 J. DEMOCRACY 32, 33 (2004).
[58] Lynn Langton, & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts 2005*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1 (2008): https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf.
[59] U.S. CONST. amend. VI.
[60] Miranda v. Arizona, 384 U.S. 436, 468 (1966).
[61] Mike Redmayne, *Standards of Proof in Civil Litigation*, 62 MOD. L. REV. 167, 168 (1999); Louis Kaplow, *Burden of Proof,* 121 YALE L. J. 738, 747 (2012).
[62] Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview,* 79(2) YALE L. J. 165, 171 (1969).
[63] Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1150 (1960).

playing field,[64] with fewer protections and privileges offered to the civil respondent than to the criminal defendant.[65] This distinction also makes sense — while the criminal procedure is characterized by an asymmetrical process, where the all-powerful government is faced against a typically disempowered defendant and where the trial's result might deprive the defendant of their freedom and sometimes their life,[66] the stakes of the civil case are seen as less consequential.[67]

However, this theoretical clear-cut distinction does not always stand in the test of reality.[68] For example, in some cases, the government chooses to refrain from the convoluted criminal process and instead impose regulatory or administrative sanctions (such as fines for DWI),[69] or deprive a person's freedom by means other than incarceration (such as the forced commission to a mental institution).[70] In addition, sometimes civil suits filed by private litigants require proof of criminal conduct on the part of the respondent.[71] These cases and others, while nominally conducted in the realm of civil procedure, exhibit some characteristics of the criminal world.[72] Consequently, a large body of text deals with these 'quasi-criminal' procedures.[73] It is generally agreed that while such cases should, by and large, adhere to the civil law's

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[64] Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 773 (2016); Laura I. Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91, 95 (2014-2015).
[65] *Id.*
[66] *Id.*
[67] *Id.*; Susan R. Klein, *Redrawing the Criminal-Civil Boundary,* 2(2) BUFF. CRIM. L. REV. 681 686 (1999).
[68] *Id.*; Jennifer Hendry & Colin King, *Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids,* 11 CRIM. L. & PHIL. 733, 734 (2016).
[69] Stefan A. Riesenfeld, *Homicide Committed through the Operation of a Motor Vehicle While,* 24 CALIF. L. REV. 555, 557 (1936); Robert B. Sturges, *The Elements of Drunken Driving*, 3 CRIM. JUST. Q. 67, 70 (1975); Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C. R.-C. L. L. REV. 397, 415 (1984).
[70] Firak, *The Right to Appointed Counsel*, *supra* note 53, at 411.
[71] Fuerstman, *supra* note 14; Bryant M. Bennett, *Clear and Convincing Proof: Appellate Review*, 32 CALIF. L. REV. 74, 75 (1944); David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J. L. & TECH. 429, 430 (2013).
[72] *See generally* Fuerstman, *supra* note 14.
[73] *Id.*

standards and procedures, their special status should require the adoption of specific doctrines, rules, and privileges typically found in criminal law. For example, when the plaintiff accuses the respondent of criminal conduct, such as fraud, the plaintiff will be held to an increased burden of proof— that of "clear and convincing evidence," as opposed to the usual "preponderance of evidence" standard applicable to civil procedures.[74] Similarly, when the government uses administrative regulations to prosecute DWI cases in a civil jurisdiction, the respondent-defendant will still enjoy the protections of *Miranda.*[75] Finally, in some cases, due process will dictate that the defendant will be entitled to confront the witnesses against her,[76] to prevent a case where ex-parte witness testimony will form a damaging civil proceedings (for instance, in civil commitment cases).[77]

Overall, the unique nature of quasi-criminal cases is a well-documented and broad phenomenon found in various areas of civil law.[78] It is also generally agreed that respondents in such quasi-criminal cases should be offered some, but not all, of the constitutional and procedural rights that criminal defendants enjoy.[79] While there is a disagreement on the scope and nature of the privileges that should be offered to such respondent-defendants, and the Court has yet to lay a general framework for the

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[74] *See* Fuerstman, *supra* note 71.

[75] Lisa Perunovich, *Limiting a Driver's Limited Right to Counsel in DWI Proceedings: State v. Rosenbush, 931 N.W.2D 91 (Minn. 2019),* 46 MITCHELL HAMLINE L. REV. 367, 383 (2020); Zachary S. Whelan, *Driving for Second Chances: A Foundation for Establishing the First DUI Expungement Law in New Jersey,* 73 RUTGERS U.L. REV. 181, 196 (2020).

[76] Rorry Kinnally, *A Bad Case of Indigestion: Internalizing Changes in the Right to Confrontation After Crawford v. Washington Both Nationally and in Wisconsin,* 89(3) MARQUETTE L. REV. 625, 633-634 (2006); Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause,* 92 B.U. L. Rev. 1865, 1892 (2012); Esther K. Hong, *Friend or Foe: The Sixth Amendment Confrontation Clause in Post-Conviction Formal Revocation Proceedings,* 66 SMU L. REV. 227, 260 (2013); Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause,* 81(3) NEBRASKA L. REV. 1258, 1281 (2003).

[77] Bradley Morin, *Science, Crawford, and Testimonial Hearsay: Applying the. Confrontation Clause to Laboratory Reports*, 85 B.U. L. REV. 1243, 1273 (2005); But see In Re: The Civil Commitment of W.X.G., 2011 N.J. Super. Unpub. LEXIS 399 (2011). SVP-444-06 (2011); David Alan Sklansky, *Hearsay's Last Hurrah,* 1 SUPREME COURT REV. 1, 8 (2009).

[78] *Id.*

[79] *Id. See also* Fuerstman, *supra* note 14.

appropriate treatment of quasi-criminal cases,[80] it seems that the extent and scope of the privileges is usually determined based on the level of resemblance of the quasi-criminal procedure to a typical criminal case.[81]

## IV. THE TRUMP CASE AS A QUASI-CRIMINAL PROCEDURE

The effect of the Colorado ruling is arguably no less detrimental than that of a typical criminal case: Trump was deprived of the right to stand for election, and millions of Coloradoans were deprived of the right to elect the candidate they see fit for the highest office of the land. Regardless of whether the court had jurisdiction to issue such a ruling and whether the ruling was warranted or not, both sides of the debate can agree that the ruling has an immense, unprecedented effect on the nation.[82] This, however, is not enough for the case to be considered a quasi-criminal procedure. After all, many consequential cases have been decided in a civil jurisdiction. Instead, what needs to be assessed is whether the procedure resembles a criminal case. If it does not, then the applicability of constitutional and procedural protections from the realm of criminal law would be irrelevant and unwarranted. However, if the case does resemble a criminal procedure to an extent sufficient for deeming it a quasi-criminal case, then we may move on to consider what, if any, criminal-law doctrines should be applied to the case.

As explained above, *Trump v. Anderson* centered around a critical question – *did Trump engage in an Insurrection against the United States?* I argue that the court effectively assessed whether Trump aided and abetted the crime of federal insurrection.[83] While

[80] Kinnally, *supra* note 76, at 633-34.
[81] *See* Fuerstman, *supra* note 14.
[82] *See* Wehle, *supra* notes 5 and Nazzaro, *supra* note 6.
[83] Anderson, *supra* note 1, at 55, 59.

the court did not explicitly equate its assessment with the criminal law federal offense of insurrection, its decision process starkly resembles a decision in a criminal case.

First, the court defined the different elements of the "offense" in question. The court decided that the offense contained two elements: the "insurrection" element and the "engagement" element.[84] The court explained the actus reus and mens rea of each Insurrection, the court explained, is, "a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country."[85] The term engagement was defined by the court as to "require an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose."[86] Thus, for the actus reus of the offense to be satisfied, the court deemed that President Trump needed to act in a way furthering or attempting to further, concentrated public use of force to hinder or prevent the U.S. government from taking actions necessary to accomplish a peaceful transfer of power.[87] The court also explained the mens rea of the offense — Trump was required to have acted *intentionally*. He needed (1) to be aware of all elements of the offense (i.e., that an insurrection was taking place and that he was acting in furtherance of said insurrection) and (2) to also intend to further the insurrection through his actions.[88]

After setting forth the elements of the offense in question, the court moved on to decide whether Trump *did* exhibit both the actus reus and mens rea required for the offense to be fulfilled. Concerning Trump's actus reus, the court explained that he actively ordered his aids to spread the "Stop the Steal" conspiracy,[89] later calling on his

[84] *Id.* at 100.
[85] *Id.*at 56.
[86] *Id.* at 60.
[87] *Id.* at 123.
[88] *Id.* at 109.
[89] *Id.* at 113-114.

supporters to march on the capitol and "fight"[90]. The court also decided that Trump had acted with the knowledge that his supporters were about to take unlawful actions to stop the peaceful transfer of power, making him aware of the insurrection, and showing Trump had intent to further the plot.[91] Thus, Trump exhibited both the actus reus and mens rea of the offense, and the court concluded that he engaged in an insurrection.[92]

Regardless of the accuracy of this conclusion by the court, its decision resembles the criminal decision-making process. Consider a scenario where Trump was criminally charged with engaging in an insurrection under 18 U.S.C. 2383 and the case was adjudicated in a bench trial. How would the court go about deciding the case? The court would first lay forth the crime that Trump was accused of engaging in insurrection. The court would explain the different elements of the crime and what the prosecution was required to show to prove its case. The elements of the offense laid out by the court will not be very different from those laid out by the Colorado court, as discussed above. After all, the Colorado court itself used criminal law authorities to define "engagement in insurrection."[93] After laying down the elements of the offense, the criminal court would assess the evidence presented by the parties and decide whether the evidence brings to the conclusion that the actus reus and mens rea requirements of the offense have been fulfilled. This was also the path taken by the Colorado court: it assessed Trump's conduct, as well as Trump's state of mind, and decided that Trump had engaged in insurrection with the intent of doing so.[94]

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[90] *Id.* at 9.
[91] *See infra* note 94 and the accompanying text.
[92] Anderson, *supra* note 36*,* 124.
[93] *Id.* at 103.
[94] *Id.* at 62-65 ("On this point, and relevant to President Trump's intent in this case…"); ("With full knowledge of these sometimes-violent events, President Trump …"); ("The record reflects that President Trump had reason to know of the potential for violence on January 6."); ("[t]he evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion…").

This last point is especially crucial. Civil law is seldom concerned with the *intent* of the actors.[95] While some torts require proof of intent,[96] and other specific rules also concern themselves with the subjective state of mind of the actor,[97] civil law is generally satisfied with objective standards and at most requires proof of negligence.[98] Often, no proof of state of mind is needed at all.[99] Accordingly, the fact that the Colorado court discussed Trump's subjective state of mind goes to show that the procedure in question took the form of a quasi-criminal case.

Consequently, the dissent in the Colorado ruling effectively treated the case as a quasi-criminal one, stipulating that Trump should have been offered more procedural and constitutional protections than are typically granted in normal civil law cases.[100] The dissent stated that the special nature of the proceeding created "the need to provide ample due process (more than is available in typical civil cases) to anyone alleged to have violated Section Three."[101] The dissent emphasized the extreme consequences of the decision, as well as its quasi-criminal nature.[102] All of these, the dissent asserted, created the need to offer Trump some of the protections and privileges typically available to criminal defendants.[103] However, the four judge majority disagreed.[104]

Overall, it seems that the case was a quasi-criminal one. Trump was accused by petitioners of committing a federal crime (engaging in insurrection), and the court

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[95] WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 375-377 (3d ed. I927); OLIVER WENDELL HOLMES, THE COMMON LAW 85-87 (1881); Francis Bowes Sayre, *Mens Rea,* 45(6) HARV. L. REV. 974, 990 (1932).
[96] Henry T. Terry, *Malicious Torts*, 20 L. Q. REV. 10, 12 (1904); Mark A. Geistfeld, Conceptualizing *Intentional Torts,* 10(2) J. TORT L. 159, 160 (2017).
[97] Nick Sage, *Reconciling Contract Law's Objective and Subjective Standards,* 85(6) MOD. L. REV. 1422, 1423 (2023).
[98] Holdsworth, *supra* note 95.
[99] *Id.*
[100] Anderson, *supra* note 36, 153-54.
[101] *Id.* at 181.
[102] *Id.* at 197.
[103] *Id.* at 180.
[104] *Id.* at 25.

employed criminal law definitions and rules to arrive at the decision that Trump indeed engaged in an insurrection.[105] This conclusion by itself is not a criticism of the decision. Civil cases often involve quasi-criminal procedures,[106] and indeed, election petitions sometimes take the form of a quasi-criminal proceeding.[107] This conclusion, however, does mean that in *Trump v. Anderson*, Trump should have been afforded some criminal law protections. It remains to be decided what kind of criminal law doctrines and privileges should apply to the current case.

## V. CONFRONTATION IN QUASI-CRIMINAL CASES

The Confrontation Clause, enshrined in the Sixth Amendment of the Constitution,[108] safeguards a defendant's right to confront and cross-examine witnesses against them in criminal prosecutions. Traditionally, the Supreme Court's *Ohio v. Roberts* jurisprudence dictated that the Confrontation Clause can be satisfied even when hearsay evidence is introduced without the opportunity to confront the evidence's source, so long as the evidence exhibits indicia of reliability.[109] This framework of the Court was heavily criticized for blurring the line between the

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[105] *Id.* at 109.
[106] *See* **Part III**, *supra.*
[107] Addington v. Texas 441 U.S. 418, 424 (1979); Michael Odugbemi, *The Need to Reconsider Standard of Proof of Criminal Allegations in Election Petitions,* THE CABLE (Feb. 14, 2022), https://www.thecable.ng/the-need-to-reconsider-standard-of-proof-of-criminal-allegations-in-election-petition; John Hatchard, *Election Petitions and the Standard of Proof*, 27 DENNING L.J. 291, 293 (2015); F. O. Osadolor, *Burden and Standard of Proof in Election Petitions without Criminal Allegations,* 12(3) J. POLITICS & L. 156, 159 (2019); Hoolo 'Nyane, A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho, 17(2) J. AFRICAN ELECTIONS 1, 8-9 (2018); Aaron Erlich, Nicholas Kerrb, and Saewon Park, *Weaponizing Election Petitions,* ANNUAL MPSA MEETINGS, CHICAGO 34 (2019); Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 435 (2011); Alexandra Just, *Trumping Unmeritorious Election Contests: The Need for Uniform Election Contest Laws in the Wake of 2020 Election Litigation*, 62 U. LOUISVILLE L. REV. 167, 199 (2023).
[108] U.S. CONST. amend. VI.
[109] Ohio v. Roberts, 448 U.S. 56, 66 (1980); see Noam Kozlov, *It Was the Death of Bruton, It Was the Birth of Bruton – Why Confrontation Dismantled the Bruton Rule, and How Due Process Can Save It,* 55 ST. MARY'S L. J. (Forthcoming 2024).

Confrontation Clause and state and federal hearsay rules. In *Crawford v. Washington*, the Court overturned its previous *Roberts* jurisprudence, deciding that "the [Confrontation] Clause's goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[110] The *Crawford* Court decided that its previous indicia-of-reliability jurisprudence did not offer adequate protection to defendants as dictated by the Confrontation Clause.[111] Instead, the Court decided that any testimonial evidence must be subject to cross-examination.[112] Hence, if the defendant was unable to confront testimonial evidence through cross-examination, then the Confrontation Clause precluded the admission of the evidence, regardless of its trustworthiness or the existence of a state of federal hearsay exception. The Court did not define the term "testimonial," and much disagreement exists to this day regarding the scope of the definition. In this article, it will be assumed that testimonial evidence means any evidence intended "to establish or prove past events potentially relevant to later criminal prosecution."[113]

Accordingly, the witness testimony in the Congressional report would fall firmly within the definition of testimonial evidence: the testimony was given in a fact-finding procedure to establish past facts and events.[114] Thus, had the report been presented as evidence in a criminal trial, *Crawford* would have dictated that the Confrontation Clause precludes the introduction of the report as evidence,[115] and the

[110] Crawford v. Washington 541 U. S. 36, 61 (2004).
[111] *Id.* at 60.
[112] *Id.* at 61.
[113] *Id.*; Davis v. Washington 547 U.S. 813, 822 (2006); Andrew Dylan, *Working Through the Confrontation Clause After Davis v. Washington,* 76(3) FORDHAM L. REV. 1095, 1920 (2009); Kozlov, *supra* note 109, at 3.
[114] Dylan, *supra* note 113, at 1915.
[115] *Id.*

report would have been swiftly thrown out of evidence.[116] The Confrontation Clause, however, presumably applies only to criminal cases. After all, the Confrontation clause explicitly reads that "[i]n all criminal prosecutions, the accused shall enjoy…."[117] Hence, even if the report is inadmissible in a criminal trial, it may be admissible, subject to state and federal evidence rules, in a civil case. Had Trump's case been a regular civil procedure, this would have been the appropriate conclusion. However, Trump's case is not a typical civil procedure. As explained above, Trump's case falls within the category of quasi-criminal procedures, where, despite nominally being part of the civil law rules and procedures, criminal law doctrines and protections may sometimes be introduced.

Indeed, the Confrontation Clause, and specifically the *Crawford* jurisprudence, has been recognized by courts as one of these criminal law doctrines that should sometimes apply to quasi-criminal procedures.[118] These unique characteristics of quasi-criminal cases often persuade judges to introduce some of the protections and privileges typically offered to criminal defendants and apply them even concerning the respondent-defendant in a quasi-criminal case. This is also true in the case of Confrontation and *Crawford* jurisprudence, where courts have recognized that using unconfronted hearsay testimony might jeopardize respondent-defendant's due process rights.[119]

Similarly, even in some civil law cases that are not quasi-criminal, courts recognized that although the Confrontation Clause does not apply to the case, the rationale of *Crawford*— namely, that trustworthiness needs to be assessed through

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[116] *Id.*
[117] U.S. CONST. amend. VI.
[118] Daniel Huff, *Confronting Crawford*, 85 NEB. L. REV. 417, 449 (2006); David Alan Sklansky, *Confrontation and Fairness*, 45 TEX. TECH L. REV. 103, 110 (2012); Goldberg v. Kelly, 397 U.S. 254, 270 (1970); Greene v. McElroy, 360 U.S. 474, 496-97 (1959); Willner v. Comm. on Character & Fitness, 373 U.S. 96, 103 (1963).
[119] *See* Huff, *supra* note 118, at 448.

cross-examination— can be extended to civil law cases through the due process right.[120]

Overall, it can be asserted that quasi-criminal cases sometimes prompt courts to introduce doctrines and privileges usually applicable only to criminal law. One of these doctrines is that of confrontation through cross-examination, as set forth by the Court in *Crawford.*[121], Applying the *Crawford* framework to the report would render the report firmly inadmissible.[122] In addition, we have also seen that the Trump case falls within the definition of quasi-criminal procedures, and it is therefore warranted to apply some criminal-law doctrines to the procedure. Hence, it is only left to assess whether the *Crawford* framework should be applied to the Trump case. That is, should the court require testimonial evidence to be subjected to cross-examination as a condition for its admissibility?

## VI. CONFRONTATION AND THE TRUMP CASE

It would not be an exaggeration to say that the *Trump v. Anderson* ruling is one of the most critical court decisions in recent years. Whether the Supreme Court will overturn the decision remains to be seen, but the impact of the ruling is already observable. Republican lawmakers argued that in response to the decision, other states should disqualify President Biden from appearing on the ballot.[123] Others argued that the Colorado decision requires a complete restructuring of election law to prevent

[120] Fuerstman, *supra* note 14 *and* Kinnally, *supra* note 76.
[121] *Id.*
[122] *See* note 115.
[123] Ray Lewis, *GOP State Lawmakers Work to Remove Biden from Ballot: 'We Must Fight Back',* ABC NEWS (Dec. 22, 2023), https://abc3340.com/news/nation-world/gop-state-lawmakers-work-to-remove-biden-from-ballot-we-must-fight-back-pennsylvania-state-rep-aaron-bernstine-r-lawrence-georgia-state-rep-charlice-byrd-r-woodstock-and-arizona-state-rep-cory-mcgarr-r-pima-co-donald-trump-2024.

such a decision from occurring again.[124] Above all, the ability of one of the frontrunners for the Presidency to even stand for elections has been starkly undermined mere weeks before the primary elections.[125] As explained above, this national turmoil ultimately stems from an unprecedented decision by the Colorado court: the factual ruling that President Trump engaged in insurrection on January 6th. But is it possible that this crucial factual ruling was decided without hearing a single direct eyewitness? Is it possible that the court issued its remarkable, groundbreaking ruling without hearing firsthand about what happened on January 6th? Unfortunately, this is precisely the case.[126]

In a five-day trial, a Denver district court heard secondhand, hearsay testimony from members of the congressional committee.[127] The court then based its conclusions on the testimonial statements found in the congressional report.[128] In its decision to uphold the district court's ruling, the Supreme Court of Colorado stated that the congressional report was compiled by a team of "highly skilled lawyers".[129] The ability and skill of the lawyers are undisputed. The integrity of the congressional bipartisan committee is also evident. What is disputed, however, is the authority of a state supreme court to decide that a former President has committed one of the most serious offenses in federal law, and disqualifying said President from ever seeking public office again, depriving tens of millions of Americans of their right to elect their preferred leader, all without hearing a *single* firsthand witness that could testify to Trump's actual conduct on the day of the election. And this is not for lack of availability of possible witnesses. The January 6th insurrection took place only two

[124] *Id.*
[125] Tom Geoghegan, *Can Donald Trump Still Run for President after Colorado Ruling?,* BBC (Dec. 20, 0223), https://www.bbc.com/news/world-us-canada-67770912.
[126] Anderson, *supra* note 36, at 197.
[127] Anderson District Ruling, *supra* note 36.
[128] *Id.* at 17.
[129] Anderson, *supra* note 36, at 53.

years ago, and some of the witnesses who appeared in front of the committee have since become vocal opponents of Trump and express their disapproval of his actions in any forum that would listen (and rightly so, considering they are probably correct to claim that Trump attempted to orchestrate a coup).[130] Yet the court did not see it fit to invite even one of them to testify about what they had seen and heard on January 6th. The court did not explain to the plaintiffs that firsthand testimony is in order in such a damaging case.

It thus seems that the Trump case, as a quasi-criminal proceeding, is precisely a case where certain criminal law doctrines should be adopted. Specifically, the detrimental effect of the case, combined with its deliberation on the allegation that Trump committed a crime, both point to the conclusion that the court should have adopted the *Crawford* framework for the treatment of testimonial evidence and required the production of firsthand eye-witness testimony in person, subjecting the testimony to cross-examination. Failing to do so violated Trump's due process rights. Indeed, deciding on one of the most critical questions in the nation's history in a five-day trial, without calling on a single firsthand witness, indicates that the judicial procedure in the Trump case violated due process. Accordingly, the court's decision should be overturned irrespective of the complex and detrimental constitutional questions it raises.

[130] See, e.g., Ryan J. Reilly, Vaughn Hillyard, and Daniel Barnes, *Trump Grand Jury Hears Testimony from Aide Who Was with Him on Jan. 6,* NBC NEWS (July 20, 2023), https://www.nbcnews.com/politics/justice-department/trump-grand-jury-hear-testimony-aide-was-jan-6-rcna94998; Tracy Smith, *Trump White House Staffer Cassidy Hutchinson on the Price of Speaking Out,* CBS NEWS (Sept. 23, 2023), https://www.cbsnews.com/news/trump-white-house-staffer-cassidy-hutchinson-on-the-price-of-speaking-out/.

## VII. CONCLUSION

It is in the most contentious cases that our judicial system is tested the most. Trump may have engaged in insurrection. Indeed, he probably did attempt to disrupt the peaceful and democratic transfer of power. It is precisely for this reason that a proceeding set to determine Trump's eligibility to seek office again needs to follow all the procedural requirements established by law. There was no justifiable reason to refrain from holding a procedurally sound hearing. The court could have called on witnesses, directly heard them, and allowed the sides to cross-examine them. This, the Supreme Court dictates, should be the preferred way to determine facts in our judicial system. Furthermore, in the case of criminal proceedings, as well as some quasi-criminal cases, this is not only a preferred method, it is the only method.

This article argued that aside from the complex constitutional issues raised by the recent Colorado ruling that disqualified Trump from appearing on the Colorado ballot, the court's ruling cannot stand due to its unsound procedural mechanisms, jeopardizing Trump's due process rights. *Trump v. Anderson* demonstrates that in some detrimental legal cases, we are so eager to reach the vital constitutional and fundamental issues that we sometimes forego the procedural rules and requirements that govern the case. The basic building blocks of a functioning legal system do not start with its ability to decide abstract constitutional dilemmas correctly. They begin with the ability of the judicial system to hold a judicial hearing that adheres to the basic principles of fairness and due process. Thus, before assessing the constitutional interpretation of Section 3 of the Fourteenth Amendment, we need to make sure that our courts decide detrimental factual questions based on witness testimony and not ex-parte affidavits.