GUEST ESSAY

The Supreme Court Should Get Out of the Insurrection Business

Feb. 7, 2024

By Akhil Reed Amar
Mr. Amar, a law professor at Yale, wrote an amicus brief for the Section 3, 14th Amendment Supreme Court case Trump v. Anderson.

The Supreme Court will hear arguments on Thursday about whether Colorado may keep Donald Trump off the presidential ballot because of the storming of the Capitol on Jan. 6, 2021. The justices should seek a ruling that is originalist, modest and respectful of America's democratic federalism.

In particular, they should focus on two phrases: "the first insurrection of the 1860s" and "the fifty-state solution."

The first phrase explains *why* Mr. Trump's conduct squarely falls under Section 3 of the 14th Amendment, which bars from any "office, civil or military, under the United States" any important public servant who, after swearing an oath to the Constitution, engages in an "insurrection" or gives insurrectionists "aid or comfort."

The second phrase highlights the Constitution's well-established structure for presidential elections, blending democracy with federalism. A 50-state solution allows each state to use its own distinct procedures and protocols for applying Section 3.

Mr. Trump's lawyers legitimately ask what counts as a disqualifying insurrection. Section 3, they note, was clearly aimed at oath-breakers who had backed insurrections akin to the Civil War. In that calamitous insurrection, more than half a million people died. The Jan. 6 Capitol riot, they argue, pales in comparison.

But Section 3's authors actually had not one but two recent insurrections in mind. Before the bloody insurrection that began when cannons roared at Fort Sumter in April 1861, there was the first insurrection of the 1860s, led by cabinet members of outgoing President James Buchanan, including John B. Floyd, the war secretary, and Philip Francis Thomas, the treasury secretary, among many others. A shadowy network of affiliates and co-conspirators aimed in several and nefarious ways — including mayhem, military subversion and even murder, if need be — to prevent the lawful counting of President-elect Abraham Lincoln's electoral votes and to thwart his lawful inauguration in early March 1861.

From one angle, the first insurrection was even worse than the giant insurrection that followed. It aimed not merely to shrink the union, but to undo a legitimate presidential election for all Americans.

On Feb. 13, 1861 — the closest equivalent of Jan. 6, 2021 — Congress met to certify Lincoln's victory. Malicious anti-Lincoln men congregated near the Capitol. But thanks to Gen. Winfield Scott's steely defense, the Capitol held.

In some ways, the insurrection of 2021 was worse than the first insurrection of 1861. The Capitol did not fall in 1861, but it was breached in 2021.

Section 3 squarely covers oath-breaking insurrectionist presidents seeking to regain presidential power. When Americans debated Section 3 in the mid-1860s, it was widely understood that Section 3 aimed to prevent Confederate leaders like Jefferson Davis from becoming president. No prominent participant is known to have ever said that this provision somehow exempted oath-breaking presidents. Similarly, no one claimed that Section 3 somehow overlooked other leading oath-breakers seeking the presidency. Even Mr. Trump's own lawyers appear to concede this last point in their recent filings.

But the question remains: Who is to decide, and using what legal procedures, whether Mr. Trump himself must answer for Jan. 6?

The Constitution provides the answer. It structures a 50-state solution in which different states may properly use different procedures and protocols, and different standards of proof, to apply Section 3. Some states, like Colorado, may carefully police ballot access even in primary elections. Others will focus more on the general ballot. Still others may wait until vote tabulation begins. Yet another cluster of states may defer to Congress as the last actor when Electoral College ballots are unsealed. In past elections, Congress has at times refused to count improper electoral votes.

Under the 50-state solution, facts as found by a state trial court in Colorado permit that state to act. But other states using different procedures are free to act differently, or not at all. What happens in Denver stays in Denver, unless other states choose to follow suit. In 1860, Lincoln was not on the ballot in every state; ditto for Ralph Nader in 2000. Welcome to the Electoral College.

But what about democracy? The first-insurrection concept reminds us that those who attack elections cannot justly complain when they are disfavored in later elections. Turnabout is fair play. And the 50-state-solution notion reminds us that Americans have never picked presidents in a single undifferentiated national contest. Eight years ago, constitutional federalism made Mr. Trump president even though Hillary Clinton won millions more votes nationally. This time around, constitutional federalism may well disfavor Mr. Trump.

An originalist first-insurrection-plus-50-state approach could appeal to the court and its individual justices for several overlapping reasons.

Start with Chief Justice John Roberts. An institutionalist by both role and temperament, he most likely aspires to achieve judicial unanimity or near-unanimity in this high-profile case. This goal will be easier to reach if the justices all steer by the same north star. The obvious focal point in this case — a case squarely about constitutional oaths — is the oath itself, which each justice takes before exercising power. It is an oath to uphold the Constitution — and thus to take Section 3 seriously, come what may.

The chief justice also believes in judicial modesty. A 50-state solution creates one of the smallest splashes possible. Each state has some leeway as a laboratory of democracy, in keeping with the teaching of Justice Louis Brandeis, one of the chief justice's heroes.

Justice Amy Coney Barrett, another believer in judicial modesty, often votes alongside the chief justice, as does Justice Brett Kavanaugh. Were these two Trump-nominated associate justices to rule against Mr. Trump himself, they would offer America and the world a dazzling lesson in judicial independence and constitutional fidelity, reversing the damage done decades ago by the partisan lineup in Bush v. Gore.

Justice Elena Kagan might well be moved by the story of the first insurrection. She herself once worked in the executive branch under President Barack Obama. When his party lost the presidency in 2016, she watched him admirably channel Gen. Winfield Scott, ensuring a peaceful transfer of power to President Trump.

Justice Sonia Sotomayor has her own strong reasons for upholding the actions of the Colorado judges. As a former trial

judge, she understands viscerally the importance of allowing trial judges to make well-supported findings of fact, as did the trial judge in this case, after allowing Mr. Trump's attorneys ample opportunity to be heard and present evidence. Proper deference to triers of fact is one of the many virtues of the 50-state solution.

The court's newest member, Justice Ketanji Brown Jackson, has already shown flashes of brilliance in practicing her distinctive brand of liberal originalism. A strong believer in constitutional text and enactment history, she is likely to pay close attention to the story of the first insurrection.

The remaining three justices are more conservative originalists who also care deeply about the history underlying key constitutional texts. Twenty years ago, most Americans ignored the important fact that the authors of the 14th Amendment's first section believed in gun rights, especially for Southern Black citizens. Thanks especially to Justices Samuel Alito and Clarence Thomas, the court in recent years has heeded serious historians and read Section 1 honestly and broadly. These justices should now do the same thing for Section 3.

And Justice Neil Gorsuch (who was born in Denver) need only say again what he said as an appellate judge in 2012 in a presidential-election case arising out of Colorado. "A state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." That was the right answer in 2012, and it remains the right answer today.

The Constitution is best read to safeguard intricate federalism over pure nationalism — and the Supreme Court's ruling should reflect that principle.

Akhil Reed Amar, a law professor at Yale, is the author of "The Words That Made Us: America's Constitutional Conversation, 1760-1840" and a host of the podcast "Amarica's Constitution."