

The Honorable Chuck Schumer
322 Hart Senate Office Building
Washington, D.C. 20510

February 18, 2021

Dear Majority Leader Schumer,

We write to you as a cross-partisan coalition of legal and advocacy organizations to urge you to recognize that President Trump is disqualified from future office under Section Three of the Fourteenth Amendment. Initially enacted in the wake of the Civil War and intended to apply to future cases, Section Three disqualifies from public office any individual who has taken an oath to uphold the U.S. Constitution and then engages in insurrection or rebellion against the United States, or has given aid or comfort to those who have.¹

Impeachment, conviction, and disqualification might be considered the primary method for holding the former President to account, and prohibiting his return to public office. But it is not the *only* tool that the Constitution provides to address grave threats of this nature to the Republic. Section Three is another. Drafters of this provision were concerned that former Confederate leaders would use state and federal positions to corrode and subvert the fragile constitutional order at a time when the nation was just emerging from the Civil War.

The text, however, is written broadly to stand the test of time. While the tool lay largely dormant for over a century, so too did insurrectionist threats. Text and history now compel this Congress to exhaust its constitutional options for addressing the events leading up to and on January 6th. Not doing so will increase the likelihood that such dangerous behavior not only continues, but escalates.

Invoking Section Three could take different forms. In the immediate wake of the impeachment trial, Congress could either:

- Pass legislation that (a) includes findings and expresses its view that Section Three applies to former President Trump and (b) establishes a formal enforcement mechanism for federal courts to determine whether Section Three applies to former President Trump (i.e., judicial review) and any other office-holder who engaged in the January 6th insurrection; or
- Pass a resolution with factual findings and expressing its view that Section Three applies to former President Trump. Though a resolution would not have the force of law, it would cast a cloud over any future candidacy by Trump and provide grounds for further actions challenging a future candidacy.

¹ U.S. Const. amend. XIV, § 3. For a thorough history of Section Three, see Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment* (Dec. 29, 2020, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3748639.

Other actors could bring a court action to disqualify a future Trump candidacy under Section Three without a resolution from Congress. And, a court would ultimately determine whether Section Three applies. However, a congressional statement would provide powerful—and potentially critical—support for any such efforts. Further, it would eliminate any ambiguity as to whether Section Three is self-executing, which Trump as a candidate would certainly exploit.

We believe that such legislation or a resolution could garner the necessary bipartisan support. 38 Republican Senators who voted to acquit the former president did so explicitly on procedural grounds, impugning the constitutionality of the trial. While this claim was widely disputed by legal scholars,² those grounds for acquittal would be irrelevant here. In fact, Senators on both sides of the aisle (including 13 Republicans who voted to acquit) roundly condemned the *behavior itself* for which the former president was on trial—behavior that, as a legal matter, is well within the scope of Section Three. This includes Senator McConnell who, while casting his vote on procedural grounds, forcefully condemned the former President as “practically and morally responsible for provoking the events of [January 6].”

Further, congressional action to reanimate Section Three and apply it to President Trump would be on sound constitutional footing. As laid out in more detail in the attached legal memorandum, it is precisely events like those on and around January 6th for which Section 3 was intended. At its passage, members of Congress explicitly and repeatedly endorsed congressional declarations rendering specific people ineligible for office. Additionally, and as also explained in the attached, it is the overwhelming consensus of legal scholars that neither the First Amendment nor the Bill of Attainder Clause insulate public officials, including the president, from the reach of Section Three.

Americans across the political spectrum agree that a peaceful transfer of power is among our most sacred institutional practices, and indeed, forms the basis of our democracy. President Trump succeeded in violently disrupting it. Furthermore, in all likelihood, this unfortunately will *not* be an isolated event. Indeed, the armed storming of the Michigan statehouse last May was a harbinger of January 6th, as the latter surely forewarns us of future political violence. The former president may or may not instigate further insurrection or rebellion; but others, emboldened in the absence of consequence, surely will.

Section Three is meant to ensure that any future presidents or would-be office-holders are dissuaded from the notion that the U.S. will permit violent insurrections to contest the will of the people. Congress should expeditiously turn to a constitutional tool designed explicitly for this juncture.

Respectfully,

Citizens for Responsibility and Ethics in Washington (CREW)
Common Cause
Constitutional Accountability Center
DemCast
Democracy 21

² Natasha Bertrand, “Legal scholars, including at Federalist Society, say Trump can be convicted,” Politico (Jan. 21, 2021), <https://www.politico.com/news/2021/01/21/legal-scholars-federalist-society-trump-convict-461089>

Digital Democracy Project
Equal Justice Society
Free Speech For People
Government Accountability Project
Mainers for Accountable Leadership
MoveOn Civic Action
Project on Government Oversight
Protect Democracy
Public Citizen
Stand Up America