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## **Congress Should Create a Uniform Standard for Invoking Disqualification Clause of 14<sup>th</sup> Amendment to Bar Insurrectionists from Public Office**

New York, September 29, 2022 –The New York City Bar Association is urging Congress to enact enforcement legislation for Section 3 of the Fourteenth Amendment to the United States Constitution, also known as the Disqualification Clause, to ensure that any officeholder who violates an oath to uphold the Constitution by engaging in an insurrection be barred from again seeking public office.

In a [report](#) released today, the City Bar proposes a framework for federal enforcement legislation and urges the House January 6 Select Committee to include such a recommendation for Section 3 enforcement legislation in its forthcoming report, noting that “public officials who participated in the attack on the Capitol and in efforts to disrupt the count of the Electoral College vote have declared their candidacy for election to federal or state office.”

Although the framers of Section 3 intended for it to apply in circumstances of “insurrection or rebellion” beyond the actions of former Confederates during the Civil War, “the subsequent judicial interpretation of Section 3 offers no certainty as to whether it is enforceable without additional legislation and as to whom,” the City Bar writes. After recounting the origin and scant historical application of Section 3, and surveying recent Section 3 challenges in various states and on the federal level (which present a wide variety of legal arguments, venues and outcomes), the City Bar analyzes two proposals introduced by legislators for enforcement of the section, and offers recommendations and a framework for a proposal of its own.

As to venue, the City Bar recommends that disqualification determination for all federal and state officers be made in federal courts: “Placing the Attorney General in charge of initiating the judicial proceedings before a District Court in which all related cases in the Circuit would be consolidated, and adding the requirement of an expedited appellate review by the Court of Appeals (and regular certiorari procedures) would prevent unnecessary delays impacting election schedules, while discouraging frivolous Section 3 challenges.”

The City Bar further recommends that proceedings be civil in nature, which would not foreclose criminal prosecution for the same conduct, but would not require it. Because the process would

be civil, rather than criminal, “the potential penalty of disqualification would not interfere with the Justice Department’s role in establishing guilt beyond a reasonable doubt in any criminal prosecutions relating to the same conduct,” the City Bar writes. “Thus, the imposition of disqualification from office would neither constitute a double jeopardy bar to criminal prosecution for the same conduct nor constitute an impermissible bill of attainder, because it would constitute a civil forfeiture rather than a punishment.”

While advocating that the proceedings be civil in nature, the City Bar recommends a higher standard of proof than is typical in civil cases, “that being proof at least by clear and convincing evidence. Where the complaining witness is a competing candidate or is affiliated with one, it might be advisable to require proof beyond a reasonable doubt. Additionally, we strongly recommend incorporation of some further due process considerations, such as affording pretrial discovery, mandating the disclosure prior to trial by the government of exculpatory evidence, as required by *Brady v. Maryland* in criminal cases, and extending the constitutional privilege against self-incrimination to these proceedings.”

“In sum,” the City Bar writes, “because a federal civil enforcement statute, whether or not legally necessary to continued application of Section 3, would eliminate ambiguity and confusion surrounding Section 3, would preclude jurisdictional conflicts as to a candidate for office in multiple jurisdictions, and would assure a reasoned, evidence-based, due process approach to candidate disqualification, the New York City Bar Association urges Congress, pursuant to its powers under section 5 of the Fourteenth Amendment, to pass legislation enforcing the terms of Section 3 at its earliest opportunity. We also urge the House of Representatives’ Select Committee to Investigate the January 6 Attack on the Capitol to include in its forthcoming report a recommendation that Congress take such action.”

The report can be read here: <https://bit.ly/3reiqA6>

#### **About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. [www.nycbar.org](http://www.nycbar.org)*