

Statement to
The U.S. House Select Committee to Investigate the January 6th Attack on the United States
Capitol

Statement on the January 6, 2021 Attacks and the Threat to American Democracy

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Dear Chairman Thompson and Vice-Chair Cheney:

We write at the request of the Committee to provide you background context about the effect of political violence on democracy. In this letter, we draw on five years of joint research on the dynamics of democratic backsliding around the world, with a special focus on constitutional law. (We offer a list of our relevant scholarly work at the end of this statement). In particular, we offer a perspective here informed by a global account of how democracies have come under threat. We identify the legal pathways through which backsliding can occur, and we explain the relevance of the January 6 insurrection in light of those findings. Finally, we share some new research on the role that disqualifying anti-democratic politicians has played in limiting the retreat of democracy both in the United States, and more generally around the world.

I. The Democratic Foundation of the Constitution

Start with some basics: The United States Constitution creates a democracy. The Declaration of Independence, of course, tells us that “Governments are instituted among Men” and derive their “just powers from the consent of the governed,” and lists among King George’s offenses his meddling in the working of colonial legislative bodies. At the very opening of the Constitution, Article I mentions the word “elections” three times. In particular, the House is composed of “Members chosen every second Year by the People of the several states.” Article I, section 4, directs the various state legislatures to decide on the “Times, Places, and Manner of holding Elections.” Under the Seventeenth Amendment, ratified in April 1913, Senators of each State are “elected by the people thereof.”

Simply put, democracy is one of our founding values: It is carved into the bones of our nation. An organization, person, or party that denies the basic democratic core of the Constitution places itself at odds with our traditions, values, and identity as a nation. Yet it is an open question whether and how American democracy, and those loyal to it, can defend themselves. Unlike those of other countries, the United States Constitution does not contain so-called “militant democracy” provisions, which allow for speech and association restrictions directed at undemocratic actors (e.g., bans of certain texts such as *Mein Kampf*, or party bans). These ‘militant democratic’ measures have had mixed success around the world. They are often abused by being turned against minority parties or communities. Even if they were effective, they would flagrantly conflict with the First Amendment. Without the availability of such militant democracy tools, the United States must rely on different methods to defend American democracy when it comes under attack.

II. The Present Threat to Democracy

Democracies are under threat around the world. In the past decade, an increasing number of seemingly stable, wealthy democracies have retreated from robust democratic regimes toward autocracy. These states are literally all over the map. They range from Eastern Europe (Hungary and Poland) to the Mediterranean (Turkey) to Latin America (El Salvador and Venezuela). Once-anticipated democratic gains in Russia and China have failed to materialize. Meanwhile, a hoped-for “fourth wave” of democracy in the wake of the Arab Spring has dissipated into either bitter civil war or authoritarianism. Democratic backsliding today is hence far less rare than political scientists used to believe.

In 2018, we identified 37 instances in 25 different countries in the postwar period in which democratic quality declined significantly, even though a fully authoritarian regime didn’t emerge. That is, roughly one out of eight countries in the world have recently experienced a measurable decay in the quality of their democratic institutions — without fully collapsing into dictatorship.

These findings, and others like them, call into question a basic assumption in the study of democracy and its consolidation. Scholars used to argue that democracy, once attained in a fairly wealthy state, would become a permanent fixture and would not be easily dislodged. This can no longer be taken for granted. As the research organization Freedom House explained in their most recent global report, this is no longer the case:

Over the past decade, ... amid the erosion of the liberal democratic order and the rise of authoritarian powers, the idea of democracy as an aspirational end point

has started to lose currency in many capitals. Existing institutions' failure to address pressing societal concerns, increasing polarization, and growing inequality have fueled uncertainty and anger, and major democracies' mismanagement of the COVID-19 pandemic has provided additional fodder to those interested in exploiting disillusionment with the traditional champions of democratic governance.¹

This description of democracy's plight certainly captures global trends—but it is also accurate as a description of the United States.

III. The Threat to American Democracy

How is the United States vulnerable to democratic backsliding or failure? The Constitution's commitment to democracy is not 'self-executing': It must be put into operation over and over again each election cycle. The practice of democracy under our Constitution can be thwarted in practice by malign actors. We explain here how that can happen, and what role violence of the sort seen on January 6 might play.

To begin with, we do not think that violence alone is likely to be enough to end American democracy—even when it takes the acute and deadly form we saw on January 6, 2021. Historically, violent coups have been an important threat to democracy. The end of the Weimar Republic in 1933 is one example where violence and illegality played important roles. Since the 1950s, however, coups have become increasingly infrequent around the world. Still, they happen sometimes. In May 2014, for example, the Thai military suspended that country's constitution and ended democratic rule. A year earlier, the Egyptian military ousted then-president Mohamed Morsi in favor of General Abdel Fattah el-Sisi. This has been followed by coups against elected leaders in a half-dozen African countries in the last few years. By contrast, an attempted coup against Turkish President Recep Tayyip Erdogan in 2016 failed, although it did paradoxically precipitate an acceleration of that country's rush toward autocratic consolidation.

Coups usually take place in contexts quite different from the American situation. Full-on democratic collapse tends to occur in recently established, and relatively impoverished, democracies in which civilian control of the military is tenuous. In the United States, we do not think that a coup is the most important source of concern, as civilian control of the military is firmly established.

Rather, the more substantial and salient threat to American democracy today is linked to the vulnerability of key *institutional and legal* elements of the democratic process. Institutions

¹ <https://freedomhouse.org/report/nations-transit/2021/antidemocratic-turn>.

can become distorted or hijacked to anti-democratic ends. This means would-be autocrats need not end democracy in a frontal, sudden manner; indeed in a context like the United States such an approach *simply isn't necessary*. Would-be autocrats have a cheaper option to hand, one that is far less likely to prompt opposition and popular resistance: democratic institutions and traditions can be captured and distorted from within.

This observation cuts against widely held expectations: many expect that democracy will end by way of a “crisis,” or a sudden turning point. This may be because we are quick to assume that the narrative of political life will track the arc of fictional accounts of political upheaval. Fiction is dominated by dramatic moments of clarification and revelations, victories and defeats. But real life is not like that. There need not be sharp points of change. Rather, democracy relies on a range of important virtues: transparency, legality, impartiality, and constraint. These are promoted by a range of different laws, norms, institutions, and individuals. All of these rarely vanish all at once. But their slow evaporation can easily be missed. What seems like an inflexion point may well instead be the moment at which a long accumulation of slow, incremental changes suddenly snap into focus. What seems like a turning point may just be that instant of clarity in which we can see the damage already done.

To understand this new form of democratic backsliding, we must be clear about the essential components of a democracy. What exactly do we mean by democracy? First, there must be elections, which must be both free and fair. Note well that elections by themselves are not enough. Both Russia and China, after all, have elections that formally reflect the choice of the people, but allow only limited choices. Elections must also be fairly administered to be meaningful and to enable voters to exercise a measure of meaningful choice. Otherwise, they are just charades.

Second, democracy needs robust rights of voting, speech and association so those with alternative views can challenge government on its policies, hold it accountable, and propose alternatives. Finally, democracy can't work if a ruling faction has the courts and bureaucracy firmly in its pocket. This is true both at the level of states and at the level of the nation. Parts of the United States, for much of the early twentieth century, didn't have a democracy because Jim Crow ruled and Blacks were excluded from political as well as economic life. The rule of law—not just the rule of the politically powerful and influential—is essential, especially when it comes to the neutral administration of the criminal law and election administration. When prosecutors or election managers pursue partisan agendas, they place democracy directly in peril.

Take away but one of these attributes, and the meaningful possibility of democratic competition recedes from view. Other countries have experienced various forms of democratic backsliding without violence. In those contexts, we see one or more of these three basic foundations of democracy subverted *through legal and institutional means*. A hallmark of other examples of democratic backsliding is that many of the power grabs are legal in and of themselves. It is quite telling that many of the new breed of populist autocrats are lawyers by training. This includes Lech Kaczyński (Poland), Viktor Orbán (Hungary), and even Vladimir Putin (Russia). They, and their advisors, are keenly aware of how to exploit loopholes and ambiguities in the laws that set forth and enable democratic rule. This is why they don't resort to violent coups.

In many of these contexts, the cumulative effect of many small but malign changes to those laws is to dismantle from within the practical possibility of democratic competition, leaving only its façade. It is a death by a thousand cuts, rather than the clean slice of the coup maker. This is what makes the slow road from democracy so alluring to seekers of power, and so dangerous for the rest of us. Because it can be masked with a veneer of legality, it can be cloaked with plausible deniability. It is always possible to justify each incremental step. Looking closely at those experiences, we can better understand the specific legal mechanisms and institutional changes used against democracy. Doing so, we obtain some insight on the ways in which our original commitment to democracy—as evidenced in the Declaration of Independence, Article I of the Constitution, and the Seventeenth Amendment—may be vulnerable to anti-democratic tactics.

Other countries' experience shows that would-be autocrats first aim to control the public narrative, often by directly attacking or intimidating the press. One way of doing this is with libel suits. Vladimir Putin, for example, recriminalized libel after it had been decriminalized in 2011 under Dimitry Medvedev. Spurious tax prosecutions, and strict media regulation can accomplish the same end of stifling press freedom. Another way of doing so is by taking advantage of powerful friends in the media. A mogul who controls powerful media, such as Italy's Silvio Berlusconi, has an extra advantage of being able to crowd out other voices from the national stage. Contrary to hopes expressed in the early days of the internet's development, new forms of social media may have made it easier rather than more difficult to corrupt the national debate with misinformation and radicalizing propaganda.

Further, the recent experience of Italy and other nations shows that even a free media can be weaponized against democracy. This is what has happened with the false and dangerous

“Big Lie” narrative pushed by former President Trump, which has spread through social media, radio and TV networks, and even podcasts. The lie is the refusal to acknowledge Joe Biden as the winner of the 2020 election and the call to “decertify” the presidential election because of (non-existent) fraud. False claims about the election are now so commonly shared by political leaders that a lawyer for Oath Keepers militia founder and leader Stewart Rhodes, charged with seditious conspiracy for his role in the January 6 insurrection, argued that Rhodes’ views on the legitimacy of the election should not be held against him: “There’s plenty of public leaders that are still saying that on a regular basis.”² This dynamic is one on which no one can be held responsible or accountable.

Related to attacks on the media are other efforts to control the public sphere, including universities and civil society organizations. In countries like Turkey and Russia, academics have been effectively purged, and laws have constrained civil society organizations’ freedom of operation and funding. These attacks, too, go to institutions which are responsible for conducting independent inquiries into truth. Instead, would-be autocrats seek to control the narrative, and are threatened by independent institutions capable of producing and confirming knowledge beyond political controls. It is worth noting that the United States has also seen attacks, at the state level, on academic freedom in universities.

A second element of democratic backsliding, which we also see in many other cases around the world, is the systematic effect to dismantle the checks and balances created by a plurality of national institutions. In ordinary times, an independent judiciary and institutional checks such as legislative oversight, through committees and by legislative staff, can prove significant barriers to democratic backsliding. Often, when the state bureaucracy insists on rule-of-law norms, it is bullied into submission. Weakening civil-service tenure protections is a way to accomplish this. When government workers hired on the basis of merit are elbowed out, and replaced by loyal partisans, this not only removes one potential source of opposition to the executive branch; it enables a would-be autocrat to direct formidable prosecutorial and investigative apparatuses against political foes. Equally, autocratic rule thrives in the absence of legislative oversight of the sort that this Select Committee is striving to provide the nation.

In times of democratic stress, institutions tasked with maintaining the rule of law, or that provide a foothold for opposition politicians, are often targeted first because they present a threat to would-be autocrats. This, obviously, is what happened on January 6: A legislative chamber controlled by the then-party in opposition was attacked. This chamber was a vulnerable point in

² <https://www.justsecurity.org/80324/the-big-lie-is-a-reality/>.

the process of national election administration—and as such became a target for violence. More specifically, the violence may well have been aimed at pushing legislators into abandoning their role as neutral arbiters, and into a nakedly partisan role. In this way, it was a mechanism designed to subvert the institutional independence which is necessary for our democracy to run from the outside.

Finally, it is important to stress that political competition can be choked off, even if elections proceed in some form as a way of enabling leaders to claim a mantle of legitimacy. *The mere fact that elections are happening is no guarantee of democracy—just look at Russia or China.* There are many ways of eliminating political competition without doing away with the act of voting. Modifying presidential term limits is a common move, but so too are changes to the ground rules of elections in order to permanently lock in temporary majorities.

The violence that occurred on January 6 has direct links to several of these processes. Let us recap to show this:

First, it is through social media and radio/TV outlets closely aligned with the former president that the “Big Lie” has spread. Especially where people are not exposed to competing points of view because of media concentration, they are likely to accept such falsehoods at face value. This may lead to an acceptance of, or at least a willingness to tolerate and not condemn, political violence.

Second, violence of the kind that happened on January 6 can be an instrument of democracy’s decline because it weakens or disables the independent institutions needed to manage the electoral process and to supervise other parts of the democratic process. Violence matters because it undermines the sound operation of rule-of-law and checking institutions. It is an effort to undermine the independent judgment that is needed for democracy to work.

Third, such violence—and the lies that underpin it—makes it more difficult to grasp and resolve institutional weaknesses in the democratic process. Here, the most important of those is the ambiguities and uncertainties created by the badly drafted Electoral Count Act.

III. Disqualification

So what can be done? Obviously, this Committee is considering a range of measures, and we do not address all of the possible and appropriate responses to this grave threat to democracy here. We instead highlight just one especially important question: Having worked against democracy, should a politician or elected official be allowed to continue to participate in democratic life? Or should they be disqualified from future office holding? We are at a moment

when a constitutional mechanism to sanction democracy’s individual antagonists seems urgently needed—and yet fraught with democratic and constitutional difficulty.

Almost all democratic constitutions, including our own, contain instruments of *democratic disqualification*. These allow for specific individuals or groups to be cast out of political life, either temporarily or permanently. These mechanisms are distinct from criminal prosecution or conviction. Indeed, disqualification can and often is implemented through non-judicial mechanisms, and criminal sanction need not lead to political disqualification.

While the idea of ‘disqualification,’ might seem a militant democracy measure that is alien to the American tradition, in fact our constitutional law creates several, overlaps pathways for the exclusion of bad-faith political actors. Under the U.S. Constitution, there are three mechanisms of political exclusion targeting the federal executive, and in particular the presidency: impeachment, with its sequel of a separate decision on disqualification; the anti-insurrection provision of the Fourteenth Amendment; and the two-term limit for presidents. (We don’t address here federal legislators, who are governed by a separate set of procedures).

The best-known vehicle for disqualification today is impeachment. The main effect of impeachment is removal from office. The Constitution also states that conviction on an impeachment charge may have the additional consequence of “disqualification to hold or enjoy any office of honor, trust, or profit under the United States.” Experience with the Trump presidency and its aftermath, however, suggests that this avenue may be all but dead as an effective disqualification tool.

Second, Section 3 of the Fourteen Amendment is a “lustration” provision barring officials who had served with the Confederacy and made war on the United States. Despite recent efforts to use it through the federal courts, it remains little used. Judicial opinions from the 19th century suggests that it requires legislation for implementation, and there is ongoing litigation in the Fourth Circuit about whether and how late nineteenth-century legislation applies now.

Third, the Twenty-Second Amendment to the United States Constitution states that “[n]o person shall be elected to the office of the President more than twice.” This means that any president who has served for two full terms is thereafter subject to a permanent ban on again holding the presidency. But like Section 3 of the Fourteenth Amendment, the Twenty-Second Amendment does not set out a process for its enforcement. At least until now, it has been self-enforcing: Chief executives who served two terms, such as Presidents Reagan, Clinton and Obama, have not tried to find workarounds to term limits. This means we simply don’t know what would happen if a two-term president simply refused to leave office and ran again with

broad public support. Would it make a difference if that person had won in the Electoral College? Could a federal court enjoin them from taking the oath of office? We just don't know.

These uncertainties create opportunities for reform and positive change. We highlight a number of possible avenues here, and would be more than happy to work with the committee or legislators to flesh any of these out.

First, Section 3 of the 14th amendment could be revitalized by enacting a carefully-crafted statute that created a predictable, apolitical means for its operation. This could expand on and offer precision to the substantive standard. It could lean on federal courts rather than political actors for enforcement.

Section 3 is written in general terms: It is not limited by its words to the Civil War context. Congress passed a statute to implement it after the Civil War, and remains empowered to do now via its authority to “enforce” the terms of the Reconstruction amendments. Such a statute could usefully clarify both the substantive standard for application and the procedure for disqualification. It might also address other issues, such as the length of any disqualification. As it is, Section 3's threshold of “insurrection or rebellion” invites careless application. It is probably too narrow to deal with the vast majority of modern threats to democracy. The variety of quite legal used means to entrench officials in office do not easily fit within the terms “insurrection or rebellion.”

One could, instead, imagine a statutory framework fleshing out the meaning of “insurrection and rebellion”, elaborating in more detail a substantive threshold calibrated to the need to preserve democracy as a going concern. Such a standard should be written broadly to catch future threats, rather than being confined to a particular historical incident. Attempts to subvert the electoral process should be at the core of such a “modernized” statutory definition. The standard would thus aim at specific, individualized acts of violence aimed against American democracy.

Further, the statute should address the process through which disqualification would proceed, as the post-Civil War legislation did. Under the 1870 Enforcement Act, disqualification for most officials was initiated by federal prosecutors. They brought suits brought against allegedly ineligible state officials, with the federal courts acting as arbiters. A statute laying out a similar procedure may have some useful today.

Second, the near-death status of impeachment means that the Twenty-Second Amendment's presidential term limit is a very important protection for the U.S. democracy. Placing a lifetime two-term limit on presidents, as our Constitution does, is a crude way to protect

democracy. Popular and effective presidents are arbitrarily forced to leave office, despite popular opinion. But the clear, rule-like quality of the term limit can also be a major advantage for the simple reason that it is easier to apply in practice. It avoids ambiguity and is clear cut: In this way, it is very different from the standards for disqualification found in the Constitution's impeachment provisions and in Section 3 of the Fourteenth Amendment.

Yet our presidential term limit regime may be more vulnerable to evasion than is commonly appreciated. Unlike many democracies around the world, the United States has never experienced a serious evasion attempt around term limits or the Twenty-second Amendment. But past may not be prologue. It would be dangerous to assume that no such attempt will happen in the future. The current regime is riddled with ambiguity about enforcement. Should an evasion attempt be made, whether brazenly or with subtlety, it is unclear which institution would be responsible for stopping it. There is hence a powerful case for Congress to enact a framework statute setting forth a judicial mechanism for enforcing the two-term limit on chief executives contained in the Twenty-Second Amendment. Ideally, enforcement would precede a presidential election, and perhaps focus on the presence on the ballot of a candidate who is barred by law and the Constitution. At present, courts might steer clear of such a dispute, by invoking the 'political question' doctrine. A new law could ensure that they would step in. Such a statute would have to identify appropriate plaintiffs (for example, the attorney general of a state), and elaborate a clear norm detailing the Twenty-Second Amendment's application to different scenarios. It would also have to specify a remedy. For example, a district court could be authorized to issue an injunction against including an illegitimate candidate on state ballots. In effect, this is the mirror image of orders now issued mandating a candidate's inclusion. It is also similar to orders the Supreme Court has issued recently, mandating that certain votes not be counted in an ongoing election.

Third, if constitutional amendment were on the table, one could re-imagine a disqualification regime from the ground up. A new mechanism could be keyed towards the protection of democracy by providing that those who attack democratic institutions cannot run for office. Enforcement by a super-majoritarian Congress is unlikely to work well in the current highly polarized context. This means a new mechanism would need to rely on other institutions, such as judicial or administrative agencies—as happens overseas.

It would also be a good idea to broaden the grounds for disqualification beyond "insurrection or rebellion." This language was designed to deal with the particular problems posed by the Civil War. There is, of course, a risk of excessive use. But this could be controlled

with a clearer substantive threshold for political expulsion, and more detailed ex ante guidance as to the actions sufficient to warrant disqualification. The revised constitutional language should focus on the kinds of actions that pose a threat to democratic stability, and not broader but less relevant issues of the character or morality of public officials.

Finally, in designing a new pathway for disqualification, the U.S. would be better served with temporary exclusions of the sort found elsewhere, rather than the more permanent bars contained in the current text of the federal constitution. Disqualifications of five or eight years may help to preserve democracy against immediate threats, while also increasing both incentives for actors to deploy disqualification as a sanction as well as compliance with democratic norms. Temporary bans also allow for the length of disqualification to be calibrated to the degree of the offense and nature of the threat posed to the democratic order. And they give banned individuals a chance to come in from the cold if they are truly popular.

V. Conclusion

Recent experience around the world demonstrates that even consolidated democracies are at greater risk of backsliding than first appears today. The United States is not immune from this. Many of the tactics used to undermine democracy in other nations are available, can be observed at work, here.

This does not mean we are helpless: There are many things that can be done to strengthen and defend our foundational constitutional commitment. We have focused here on just one—the rules for disqualifying anti-democratic politicians—but of course there is a great deal more to be done. This Committee’s important work is just a first step.

Appendix: Relevant Academic Work

We list below our most relevant academic work on these issues (and are happy to supply the committee with any further material that it deems relevant:

- *How to Save a Constitutional Democracy* (University of Chicago Press, 2018)
- *Democracy's Other Boundary Problem: The Law of Disqualification*, 110 *California Law Review* - (forthcoming 2023) (with David Landau).
- *The Comparative Constitutional Law of Presidential Impeachment*, 88 *University of Chicago Law Review* 81 (2021) (with David Landau).
- *Democracy without Democrats*, 6 *Constitutional Studies* 165 (2020).
- *How to Lose a Constitutional Democracy*, 65 *UCLA Law Review* 78 (2018)
- *Democracy's Near Misses*, 29 *Journal of Democracy* 16 (2018).
- *The Comparative Constitutional of Democratic Backsliding: A Report on the State of the Field*, -- *Droit Public Comparé* - (forthcoming 2022).