

**Petition to the Clerk of the House
And the Secretary of the Senate
For Votes on Motions to
Exclude Members-elect and Senators-elect
Who Are Disqualified Under
Section 3 of the 14th Amendment,
To Exclude Electoral Votes for Candidates Disqualified Thereby,
And to Invoke the 12th Amendment as Necessary**

December 26, 2024
(December 30th 5 p.m. revision, with additional cosigners)

To: The Clerk of the House and the Secretary of the Senate
By email (Cheryl.Johnson@mail.house.gov and Sonceria.Berry@Secretary.Senate.gov
and other means.*

Cc: The Parliamentarians and officers of the House and the Senate
By email (Jason.Smith@mail.House.gov and
Elizabeth.MacDonough@Parliamentarian.senate.gov) and other means, and
The Honorable Muriel Bowser, Mayor of Washington, D.C., and interested parties.

From: John M. Fitzgerald¹, Michael Aisenberg², Georgia Shaw, Christine Real de Azua,
Mary Anne Royal³, Andrew "A.J." Levine, Andrew Levis, Stephen Lincoln Spitz,
Patrick Shaw, Lionel Real de Azua, Susan (Becky) Bartovics, Deborah Ingram, Stephen
Caruso, Constance Caruso, Harvey Wasserman, John Davenport⁴, *et al.*⁵

Re: Denying seating as Members of Congress on January 3rd, and the assumption of any
Federal executive office, to individuals disqualified by their participation in or aid to the
insurrection of January 6, 2021.

Date: December 26, 2024

¹ Author of memos accepted as amicus briefs in the proceeding of the Secretary of State of Maine barring Donald Trump from the primary ballot of Maine until stayed after the Supreme Court decision in *Trump v. Anderson*.

² Members of the Supreme Court Bar and co-authors of a memorandum for the Secretary of State of Maine in preparation for judicial review. Addresses of cosigners in ME (1st and 2nd), FL, MD (8th), NY (20th) CA(2nd), VA(8th), OH, etc. to be provided upon request from authorized persons.

³ Petitioner to the Secretary of State of Maine and party to the proceeding that led to a decision to exclude Donald Trump from the primary ballot of Maine.

⁴ Professor and author, co-signed the petition on December 28, 2024.

⁵ The Maine Secretary of State's decision was upheld by the Maine State Supreme Judicial Court confirming her decision that Donald Trump is disqualified by Section 3 and thus should not appear on the primary ballot of Maine. The list of cosigners as noted in future versions of this memo may include additional persons, all of whom, as in the first, happen to be U.S. citizens and voters.

**Delivered Initially by Email to the Secretary of the Senate, among others, and by the U.S. Postal Service, Registered Mail, Return Receipt Requested, to the Clerk of the House and the Secretary of the Senate and the 3:30 p.m. version by email to addressees other than the Clerk of the House who does not accept petitions by email.*

We hereby request that, as the first order of business, you place before the Speaker, Speaker Pro Tempore or Chair of the Committee of the Whole and the Senate Majority Leader the factual and legal basis for Votes on Motions to Exclude Members-elect of each body who are disqualified under Section 3 of the 14th Amendment, to Exclude Electoral Votes for candidates disqualified by Section 3 of the 14th amendment and, in a timely manner, steps needed to invoke the 12th Amendment as necessary.

We, the authors and signers of this memorandum, invoking our 1st Amendment right to petition our Government for redress of grievances and our right to petition the Congress as set forth in and confirmed by examples in *Deschler's Precedents*, do hereby place before the House and Senate, through your good offices, the facts and law that compel the House and Senate, and the joint session thereof convened to certify the presidential election to take up and vote upon four motions:

- 1) To exclude Members – elect of the House and the Senate, who have participated in or lent aid and comfort to an insurrection or to enemies of the Constitution who acted in furtherance of an attempt to block the counting of electoral votes for Joseph Biden as President;
- 2) To ensure that votes cast in 2024 for Donald J. Trump, as a candidate for President are not counted given that he has been adjudicated by the House and a majority of the Senate, and by the officials and courts of two states to be disqualified from the office of President by Section 3 of the 14th amendment;
- 3) To determine whether electoral votes for Vice Presidential candidate J.D. Vance should not be counted and that he is disqualified from the Vice Presidency based on his actions in support of the insurrection and its participants, including, but not limited to, two bills he has sponsored to:
 - a) Declare there was no insurrection on January 6, 2021 and
 - b) End any prosecution of Donald J. Trump for his part in that; and
- 4) To invoke the 12th amendment in a timely manner, confirming by its terms that Ms. Harris and Mr. Walz are President and Vice President-elect and will take office on January 20th, 2025.

I. Congress has the power to bar insurrectionists from being seated in its own Houses and should apply that power immediately upon convening in Washington on January 3rd 2025.

- (a) Congress has the power to enforce Section 3 with regard to its own Members without enacting new legislation.**

The power of determining who qualifies to serve in each House of Congress lies with each House, as specified by Article 1, Section 5, paragraph 1 of the Constitution. It states that each House shall determine who qualifies to serve in that House.⁶

The determination to exclude Members-elect, Senators-elect, and probably Senators whose terms might otherwise carry over into the new Congress, can be made by the Congress with a simple majority of a quorum voting to exclude the person, as opposed to the Constitutionally required 2/3rds vote to expel a Member after a Member has been seated in Congress.

The controlling Supreme Court case on the power of a House of Congress to exclude a member-elect from that body is *Powell v. McCormack*, 395 U.S. 486 (1969). Its primary holding was that an individual who meets the constitutional requirements for being a member of the House of Representatives may not be denied a seat there upon being properly qualified under the limited terms of the Constitution and duly elected in an election that otherwise complies with the law.

Section 3, however, bars from any state or Federal office any person who has taken an oath to uphold the Constitution and then participated in an insurrection to block or subvert the implementation of the Constitution or given aid and comfort to the enemies of the Constitution. The present facts fit that holding and it is therefore the responsibility of Congress to exclude Members-elect who are constitutionally disqualified by the terms of the 14th amendment.

(b) Congress can enforce Section 3 with regard to its own Members immediately upon coming to Washington in January 2025.

The 20th Amendment confirms that the new Congress convenes on the 3rd of January giving Congress several days in which to form itself and pass new legislation before the current Presidential term ends:

Amendment XX Section 1.

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin. (Emphasis added.)

Deschler's Precedents (of Congressional procedure) explains how Members-elect may be excluded from the House:

The House is constituted the sole judge of the qualifications and dis-qualifications of its Members.

⁶ "Exclusions are not mentioned in the Constitution, so there is no two-thirds requirement, meaning that a Congressperson-elect can be excluded by a majority vote." -- Kevin Wagner is a noted constitutional scholar and political science professor at Florida Atlantic University. <https://www.palmbeachpost.com/story/opinion/columns/2023/01/05/the-civics-project-how-does-a-member-of-congress-get-removed/69779343007/>

Alleged failure to meet qualifications is raised, usually by another Member-elect, before the House rises en masse to take the oath of office. If a challenge is made, the Speaker requests the challenged Member-elect to stand aside. The Member-elect whose qualifications are in doubt may then be authorized to take the oath of office pursuant to a resolution so providing, which resolution may either declare him entitled to the seat, or refer the question of his final right to committee. The House may also refuse to permit him to take the oath, and may refer the question of his qualifications and his right to take the oath to committee.

The temporary deprivation to a state of its equal representation in Congress when a Member-elect is refused immediate or final right to a seat is a necessary consequence of Congress' exercise of its constitutional power to judge the qualifications, returns, and elections of its Members. *Barry v ex rel. Cunningham*, 279 U.S. 615 (1929).⁷

So, each House is not only empowered to make a final determination as to whether or not each prospective Member meets the basic qualifications or is disqualified but each House is also afforded plenty of time to do that, and to do more, by the 20th Amendment.

(c) Each House can use the recorded votes in both Houses on January 6, 2021 to prevent the electoral votes from Arizona and Pennsylvania from giving Biden enough to be sworn in, and thus to set the stage to either invoke the 12th amendment or to replace duly elected electors with false slates.

Recorded votes are indelible and undeniable evidence. As recorded in the official roll calls for those votes in the Congressional Record, Vol. 167, No. 4, and reported in the media⁸, 8 Senators and 139⁹ House Members voted to prevent the counting of electoral votes certified as valid by the Governors of Arizona and Pennsylvania in order to prevent Joe Biden from having a majority of electoral votes and thus to win the Presidency. Their strategy seems to have been to trigger an investigation of sorts and to either have the House decide the election with one vote per delegation or to replace duly elected electors with false slates of electors who had pledged to vote for Trump in spite of their states having voted for Biden.¹⁰ Any of those who seek seats in January 2025 should be excluded by a simple majority of the votes of the unchallenged Members seated before the Members-elect who are tainted by violating either section of the 14th Amendment.

II. The Standard of Evidence has been met

⁷ Deschler's includes footnotes including to pages from the 1933 Congressional Record. Not all are accessible on line but CRS could find them easily.

⁸ See, e.g., footnote 5.

⁹ With a few House Members changing their initial votes, e.g., at Pages H94 and H112, the tally may be 137 or so but the new Congress can certify which Members to exclude on this basis.

¹⁰ "How members of Congress voted on counting the electoral college vote", <https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker/>.

It is important to note that Section 3 does not require a finding of intent based on evidence that proves that beyond a reasonable doubt, unlike the crime of insurrection or any crime. It holds sworn office holders to a higher standard. It demands that they control their actions and public statements so as to avoid aiding or lending comfort to an insurrection or participating in the planning of one or promising to pardon those who plan or participate in an effort to block the operation of the government as set out in the Constitution. They are not elected or appointed to plead ignorance. Therefore, the unfounded assertions made by those who offered the resolutions to reject the electors certified by Pennsylvania and Arizona should not be sufficient to protect those 130 plus House Members or 8 Senators who voted to replace them from being barred from the new Congress.

Several more state Republican Parties had prepared alternative slates of Electors with the knowledge of some that these actions were not legal: To the extent that those involved had previously sworn an oath to support the Constitution, those persons are disqualified from holding public office or being seated in either House of Congress.¹¹

Additional evidence is found in other records and factual determinations made not only by the previous Congresses and the Department of Justice, and the Special Prosecutor, but also by the Governors, Secretaries of State of Maine and Colorado and their respective state Supreme Courts¹², or the U.S. Attorney General and states' Attorneys General or other officials who have made such determinations.¹³

(a) Citizen petitions can initiate Congressional review of the qualifications of a member-elect:

Challenges to the qualifications of Members-elect have been brought to the Clerk of the House by citizens as well as by Members-elect so that they were among the first orders of business before the general swearing in of those Members-elect not so challenged. Majority or Minority Members of the current Committees of jurisdiction of each House can review and recommend any necessary changes in the procedures for this well in advance of the convening of Congress on January 3rd 2025.

Deschler's Precedents sets out a process citizens have used to prompt the exclusion of one or more members-elect by virtue of disqualification by petitioning Congress:

§ 9.2 A challenge to the qualifications of a Representative-elect may be instituted by the filing of a memorial or petition by a citizen.

¹¹ Washington Post August 7, 2023, 'Fake' elector plot raised concerns over legal peril, indictment shows A contingency plan, a crime or a 'donkey show'? Doubts across seven states and within the Trump campaign. <https://apple.news/A6q5lyHCUAWAhXUpn9xgPg>

¹² https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2023/23SA300.pdf

¹³ The Supreme Court's opinion in Trump v. Anderson of March 4, 2024 noted in footnote 3 on page 9, that the Governor of Georgia in 1868 had refused to commission John Christy, ... because-- in the Governor's view— Section 3 made Christy ineligible to serve." Thereafter, "a committee of the House reviewed Christy's qualifications itself and recommended that he not be seated". "See 1 A. Hinds, Precedents of the House of Representatives §459 pp. 470-472 (1907).

On Mar. 11, 1933, Speaker Henry T. Rainey, of Illinois, laid before the House a letter from the Clerk transmitting a memorial and accompanying letters challenging the citizenship qualifications of Henry Ellenbogen, Representative-elect from Pennsylvania.

Mr. Ellenbogen did not take the oath until Jan. 3, 1934, and was not declared entitled to his seat until the adoption of a resolution to that effect on June 15, 1934.

14. 77 CONG. REC. 239, 73d Cong. 1st Sess.

15. 78 CONG. REC. 12193, 73d Cong. 2d Sess. See § 10.1, *infra*,

(b) Members of Congress cannot deny that Congress has determined a Section 3 disqualification event has happened and must vote to exclude from its ranks in both Houses those who are disqualified by attempting to officially aid that effort.

Members of the current Congress can cite with regard to the relevant questions of fact and law, the records and determinations of those Secretaries of State that have compiled records and findings and the records that Committees of Congress have compiled.

These should include the two predicates of Section 3 evident in the record of the events of January 6, 2021:

- a) the existence of an insurrection against the operation of the Constitution, and
- b) coordinated efforts to block the Constitutional transfer of power that were aided by others not directly within the insurrection.

Thus members-elect of the 119th Congress can address challenges to the seating of Members-elect using the combined records of qualified officials, such as Federal and state prosecutors, and previous Congressional committees¹⁴ and determinations of the Committee and each House as to whether a Representative-elect or Senator-elect is disqualified under the 14th amendment's Section 3, before proceeding to any other business.

III -- Beyond vetting its own Members, Congress has the power to prevent insurrectionists from holding Federal and state office, including the Presidency and the Vice-Presidency, and must prepare to do so through legislation or otherwise.

While the US Supreme Court in *Trump v. Anderson* ruled affirmatively and unanimously on the question before them - "Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?", five of the Court's justices, including the deciding fifth who would normally have recused himself, reached beyond that question and opined that the authority to enforce Section 3 against Federal office holders rests solely with Congress. The Supreme Court also noted that "the Fourteenth Amendment grants new powers to Congress to enforce the provisions of the Amendment against states."¹⁵ Thus, those were powers held only by the States before the 14th went into force. So, at this point Congress is well justified

¹⁴ Including but not limited to the 2022 Report of the January 6th Special Committee
<https://www.webharvest.gov/congress117th/20221231143403/january6report.house.gov/>

¹⁵ *Trump v. Anderson*, pp. 7-8.

in so doing even if Congress agrees with the four Justices who wrote that the Court had addressed issues on which the case did not turn.

We quote at length a recent article¹⁶ citing constitutional scholars on this matter:

The case made its way to the Colorado Supreme Court, which sided with the plaintiffs and [blocked Trump from the ballot](#). A majority of justices agreed with the lower court that “the events at the U.S. Capitol on January 6, 2021, constituted an ‘insurrection’” and that “President Trump ‘engaged in’ that insurrection through his personal actions.”

The U.S. Supreme Court [overturned](#) the Colorado ruling, but that outcome was based on the high court’s reasoning that states do not have authority to enforce Section 3 against federal candidates for office. If the justices thought Trump was innocent of engaging in insurrection, they could have said so, but they didn’t. Left in place was the Colorado Supreme Court’s judgment that Trump engaged in insurrection in violation of Section 3.

What remains is the question of enforcement.

In the U.S. Supreme Court’s “per curiam,” or unsigned, ruling in the case, *Trump v. Anderson*, a majority of the justices had much to say about how “responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States.”

But, according to two of the nation’s preeminent Section 3 scholars, a close reading of the opinion shows that it could allow for a range of possible enforcement mechanisms.

“All it said was that the Fourteenth Amendment confers enforcement power on Congress, that this power could appropriately be used to specify how Section 3 is applied, and that such power was important as a practical matter,” write professors William Baude and Michael Stokes Paulsen in [an upcoming paper](#), a draft of which was published online in October. “Nowhere does the per curiam say that congressional legislation ... is required or is a condition of Section Three’s status as law.”¹⁷

Baude and Paulsen, who have long argued that Trump is disqualified from the presidency and can’t lawfully serve in the office, are widely regarded as experts’ experts on Section 3. They add this about Jan. 6, 2025: “The decision in *Trump v. Anderson* also does not limit whatever powers the two houses of Congress might properly possess when meeting in joint session pursuant to the procedures established by the Twelfth Amendment to decline to count votes cast by Electors for a presidential candidate who is constitutionally disqualified by Section Three.”

16

<https://coloradonewslines.com/2024/12/12/jan-6-colorado-insurrection-ruling/> “Jan. 6 is back, this time with a Colorado insurrection ruling in the mix” by Quentin Young, Dec. 12, 2024

17 “Thus, each house of Congress can, and in duty should, employ

Section Three to refuse to seat newly elected members, or to expel existing members, who it determines are constitutionally disqualified by Section Three, pursuant to each house’s Article I, section 5 authority with respect to its own membership.¹⁴⁰” -- See Baude & Paulsen, (Sweeping Section Three under the Rug:

A Comment on *Trump v. Anderson*, William Baude* & Michael Stokes Paulsen**

138 Harvard Law Review (forthcoming 2025) *supra* note 15, at 636–38, 743; accord *Trump v. Anderson*, 601 U.S. at 114.”

The Yale constitutional law scholar and historian Akhil Amar, ... filed a “friend of the court” [brief](#) in the case, [explaining the history of section 3 and its coverage of plots and conspiracies as well as larger insurrections].

Similar views are shared by other well-known legal scholars, such as Laurence Tribe, who in a social media post last month after Trump was elected [wrote](#) that “as an adjudicated oath-breaking insurrectionist, Mr. Trump is constitutionally disqualified under Sec. 3 of 14th Am.”

A rejection of electoral votes in several weeks would be entirely different than the rejection of electoral votes for President Joe Biden by some Republicans in January 2021. In that case, the basis for rejection was the lie that Trump had won the election, while the basis for rejection next month is the truth that Trump is ineligible to hold the office of the presidency.

Members of Congress from Colorado can read findings, which corroborate what they saw with their own eyes during the insurrection, in opinions produced after lengthy witness testimony and exhaustive briefings by courts in their own state.

These matters of law and fact remain factors as they perform their role in certifying the election.

The Congress now holds and must now exercise the power that the current Supreme Court majority can be read to believe are the primary tools available to enforce Section 3 at the Federal level.¹⁸

- a) **Invoking the 12th Amendment vis a vis the President** -- Having excluded Donald Trump from the office of the President, the House must now select the President from the top three recipients of legally cast electoral votes by one vote per state. It would appear that Ms. Harris is the only other recipient of electoral votes for President and is therefore to be sworn in as President. If a motion for this action is required then we petition that it be so moved and acted upon by acclamation or otherwise as there is no alternative.
- b) **Invoking the 12th Amendment vis a vis the Vice President** – If the Senate has on January 3rd, 2025 decided that J.D. Vance is disqualified to be seated as a Senator due to his sponsoring bills and other actions giving aid and comfort to the enemies of the Constitution, then he is also ineligible to be President. If they have not so decided then they must address the question based on all of his actions and statements up to and including January 6th 2025, the date on which electoral votes are counted. The 12th amendment gives to the Senate the choice of Vice President from the top two recipients of electoral votes for that office. Therefore, Governor Walz, as the only other such recipient becomes the Vice President. If a motion for this action is required

¹⁸ Under the Electoral Vote Count Act, the second permissible objection is that “the vote of one or more electors has not been regularly given.” By its terms, this objection applies only to the *electoral votes cast* by lawfully appointed electors. The term “regularly given” is [properly understood](#) to encompass only a narrow set of legal infirmities with an elector’s vote, such as an elector voting for an **ineligible candidate** or voting on the wrong day, or an elector voting as the result of bribery or other improper influence. (<https://protectdemocracy.org/work/understanding-the-electoral-count-reform-act-of-2022/>)

then we petition that it be so moved and acted upon by acclamation or otherwise as there is no alternative.

IV. For the Protection and Security of the Congress, the President and the Capitol

We suggest that you ask the Mayor of Washington D.C. and the President to coordinate the deployment of members of the National Guard and such other protective services as may be warranted from January 2d through the 20th of January. We further suggest that you ask the Sergeant at Arms and the Capitol Police to sequester those Members-elect or returning Senators who are to be the subject of potential exclusion away from the floor or the Capitol entirely in order to protect all concerned.

Thank you in advance for presenting this petition in a timely manner to the appropriate Members-elect and Senators.