C. QUALIFICATIONS AND DISQUALIFICATIONS

§ 9. In General; House as Judge of Qualifications

The Constitution requires three standing qualifications of Members,[12] mandates that they swear to an oath to uphold the Constitution,[13] and prohibits them from holding incompatible offices.[14] The House is constituted the sole judge of the qualifications and disqualifications of its Members.[15]

Alleged failure to meet qualifications is raised, usually by another Member-elect, before the House rises *en masse* to take the oath of office.[16] 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.[17] 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.[18]

If the House finds that a Member-elect has not met the quali-

12. Art. I, § 2, clause 2.

13. Art. VI, clause 3.

14. Art. I, § 6, clause 2.

15. Art. I, § 5, clause 1. See *Sevilla* v *Elizalde,* 112 F2d 29, 38 (D.C. Cir. 1940) (determination of qualifications solely for legislature); *Application of James,* 241 F Supp 858, 860 (D.N.Y. 1965) (no jurisdiction in federal courts to pass on qualifications and legality of Representative); *Keogh* v *Horner,* 8 F Supp 933, 935 (D.Ill. 1934) (supreme power of Congress over qualifications and legality of elections). Compare *Powell* v *McCormack,* 395 U.S. 486 (1969) for limitations on the power of the House to exclude a Member for qualifications not specified in the Constitution (see Ch. 12, infra).

16. See § 9.1, infra.

17. Under the House rules, the Committee on House Administration, which assumed the functions of the former Committee on the Election of President, Vice President, and Representatives in Congress, has jurisdiction over the qualifications of Members. *House Rules and Manual* §§ 693, 694 (1973).

18. For an instance where the taking of oath was deferred for Members-elect whose qualifications were challenged, see § 9.2, infra.

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).

fications for membership, or has failed to remove disqualifications, a new election must be held. An opposing candidate with the next highest number of votes cannot claim the right to the seat.[19]

Congress and the courts have uniformly rejected the idea that the individual states could require qualifications for Representatives above and beyond those enumerated in the Constitution.[20] The

19. See 6 Cannon's Precedents §§ 58, 59; 1 Hinds' Precedents §§ 323, 326, 450, 463, 469.

20. For the congressional determination that states lack power over the qualifications of Representatives, see 1 Hinds' Precedents §§ 414–416, 632.

See also, for lack of state power to add or determine qualifications, *Richardson* v *Hare,* 381 Mich. 304, 160 N.W. 2d 883 (1968) and *Danielson* v *Fitzsimons,* 232 Minn. 149, 44 N.W. 2d 484 (1950).

Where a state court denied a candidate's eligibility for a congressional seat, and a federal court had affirmed the eligibility of another candidate identically situated, Supreme Court Justice Black, sitting in Chambers, granted interim relief. See *Florida ex rel. Davis* v *Adams,* 238 So. 2d 415 (Flat 1970), stay granted, 400 U.S. 1203 (1970) and *Stack* v *Adams,* 315 F Supp 1295 (N.D. Fla. 1970).

State attempts to require a candidate to be a resident of the district where he sought a congressional seat have been invalidated. *Exon* v *Tiemann,* 279 F Supp 609 (Neb. 1968); *State ex rel. Chavez* v *Evans,* 79 N.M. 578, 446 P.2d 445 (1968); *Hellman* v *Collier,* 217 Md. 93, 141 A.2d 908 (1958).

Where a candidate's affidavit stated he met all qualifications, whether or not he was a "sojourner" was for Congress and not for the courts to decide. *Chavez* v *Evans,* 79 N.M. 578, 446 P.2d 445 (1968).

Similarly, states cannot render ineligible for congressional seats incumbents of state elective offices, *State ex rel. Pickrell,* 92 Ariz. 243, 375 P.2d 728 (1962), or state governors, *State ex rel. Johnson* v *Crane,* 197 P.2d 864 (Wyo. 1948), or state judges, *Ekwell* v *Stadelman,* 146 Or. 439, 30 P.2d 1037 (1934), *Stockland* v *McFarland,* 56 Ariz. 138, 106 P.2d 328 (1940).

States cannot add qualifications requiring affirmations of loyalty, such as requiring affidavits showing lack of intent to overthrow the government, *Shub* v *Simpson,* 76 A.2d 332 (Md. 1950), appeal dism'd, 340 U.S. 881 (1950); nor can they bar a candidate for openly espousing international communism and leading the American Communist Party. *In re O'Connor,* 17 N.Y.S.2d 758, 173 Misc. 419 (1940).

The states have attempted to regulate primaries in such a manner as to set qualifications for election to a federal office. However, a state cannot independently render a losing candidate in a primary ineligible for election. See *State ex rel. Sundfor* v *Thorson,* 72 N.D. 246, 6 N.W. 2d 89 (1942).

In general, any special or unusual conditions mandated by a state act

states have regulatory powers over federal elections, but they may not determine the qualifications for election to the office.[1] Likewise, the qualifications and disqualifications of Delegates and Resident Commissioners are specified and judged under the sole jurisdiction of Congress itself.[2]

One important issue relating to the qualifications and disqualifications of Members remains unresolved in part, although clarified by the Supreme Court in 1969. That question concerns the power of the House to exclude Members-elect for other than failure to meet the express constitutional qualifications, and the right of the House to add requirements in the nature of qualifications.[3] In the case of *Powell* v *McCormack*,[4] the Supreme Court held that the qualifications of age, citizenship, and state inhabitancy were exclusive and that the House could not exclude a Member-elect for allegedly improper conduct while a Member of past Congresses.[5]

The court based its decision on the historical developments in the

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to regulate federal elections are invalid, insofar as they directly or indirectly add to qualifications. *State* v *Russell*, 10 Ohio S. & C.P. Dec. 225 (1900).

1. Where state statutes have purported only to regulate elections, and not to set qualifications, they have been permitted. Thus, an Illinois statute requiring petitions signed by a certain number of voters, from a certain number of counties, did not violate the exclusiveness of constitutional qualifications. *MacDougall* v *Green*, 335 U.S. 281 (1948).

A state may require a five percent filing fee of a candidate without adding to qualifications. *Fowler* v *Adams*, 315 F Supp 592 (Flat 1970), stay granted, 400 U.S. 1205 (J. Black in Chambers) (1970), appeal dism'd, 400 U.S. 986 (1970); but see *Dillon* v *Fiorina*, 340 F Supp 729 (N.M. 1972), where a six percent filing fee for a Senatorial candidate was ruled unconstitutional.

A state has the power to require each candidate to appoint a campaign treasurer. *State* v *McGucken*, 244 Md. 70. 222 A.2d 693 (1966).

2. See § 3, supra, for the qualifications of Delegates and Resident Commissioners and for the method of determining those qualifications.

3. For lengthy historical debate on the power of Congress to add qualifications, see 1 Hinds' Precedents §§ 414, 415, 443, 449, 451, 457, 458, 469, 478, 481, 484. For more recent debate on the subject, relating to the attempt to exclude Member-elect Adam Clayton Powell from Congress, see §§ 9.3, 9.4, infra.

For debate in the Senate on the power of Congress to add qualifications, see §§ 9.5, 9.6, infra. See also Hupman, Senate Election, Expulsion and Censure Cases from 1789 to 1972, S. Doc. No. 92–7, 92d Cong. 1st Sess. (1972).

4. 395 U.S. 486 (1969).

5. See 395 U.S. 486, 489–493.

original Constitutional Convention and the intent of the framers of the Constitution to prescribe exclusive qualifications and to limit the House to judging the presence or absence of those standing requirements.[6] The decision apparently precludes the practice of the House or Senate, followed on numerous occasions during the 19th and 20th centuries, of excluding Members-elect for prior criminal, immoral, or disloyal conduct.[7] The court upheld in *Powell* the interest of state voters in being represented by the person of their choice, regardless of congressional dislike for the Member's-elect moral, political, or religious activities.[8]

The *Powell* case did not discuss, however, other constitutional provisions which may give rise to disqualifications, such as the requirement to swear to an oath and the requirement of loyalty after once

6. 395 U.S. 486, 518–547. The court drew upon the practice of the English and colonial parliaments, the debates of the Constitutional Convention, the debates of the ratifying conventions, and Hamilton and Madison's comments in the Federalist Papers (see, in particular, Federalist No. 60).

7. For exclusions by the House, see 1 Hinds' Precedents § 449 (1868, Civil War disloyalty); § 451 (1862, Civil War disloyalty); § 459 (1868, Civil War disloyalty); § 620 (1869, Civil War disloyalty); § 464 (1870, "infamous character", selling appointments to West Point); § 473 (1882, practice of polygamy by Delegate-elect); §§ 474–480 (1900, practice and conviction of polygamy); 6 Cannon's Precedents §§ 56–59 (1919, acts of disloyalty constituting criminal conduct).

The Senate has excluded one Senator-elect for disloyalty (see 1 Hinds' Precedents § 457 [1867]), but seated a Senator-elect accused of polygamy (see 1 Hinds' Precedents § 483 [1907]). For the two attempts in the Senate since 1936 to exclude Senators-elect for failure to meet other than the constitutional qualifications, see § 9.5, infra (failure to muster two-thirds majority) and § 9.6, infra (Senator-elect died while case pending).

In another instance, a Senator whose character qualifications were challenged by petition was held entitled to his seat without discussion in the Senate (see 81 CONG. REC. 5633, 75th Cong. 1st Sess., June 14, 1937).

8. 395 U.S. 486, 547–548. As noted in the United States Constitution Annotated, Library of Congress, S. DOC. No. 92–82, 92d Cong. 2d Sess. (1972), the reasoning of the court in Powell may be analogized to other cases holding that voters have the right to cast a ballot for the person of their choice and the right to have their ballot counted at undiluted strength. See *Ex parte Yarborough,* 110 U.S. 651 (1884); *United States* v *Classic,* 313 U.S. 299 (1941); *Wesberry* v *Sanders,* 376 U.S. 1 (1964); *Williams* v *Rhodes,* 393 U.S. 23 (1969).

having taken an oath.[9] The constitutional prohibition against holding incompatible offices may disqualify a Member or Member-elect,[10] and a person impeached by Congress may be disqualified from again holding an office of honor, trust, or profit under the United States.[11]

Cross References

Challenging the right to be sworn, see Ch. 2, supra.

Punishment, censure, or expulsion, see Ch. 12, infra.

House as judge of elections, see Ch. 9, infra.

Procedure in challenging qualifications before rules adoption, see Chs. 1 and 2, supra.

Collateral References

Curtis, Power of the House of Representatives to Judge the Qualifications of Its Members, 45 Tex. L. Rev. 1199 and 1205 (1967).

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Challenging Procedure

§ 9.1 Challenges by one Member-elect to the qualifications of another are usually presented prior to the swearing in of Members-elect en

9. These issues are analyzed in § 12, infra. Unwillingness or lack of mental capacity to take the oath could conceivably act as disqualifications.

10. See § 13 (incompatible offices) and § 14 (military service), infra.

11. U.S. Const. art. I, § 3, clause 7.

masse, whereupon the Speaker requests the challenged Member-elect to stand aside.

On Jan. 10, 1967, Member-elect Lionel Van Deerlin, of California, stated a challenge to the right of Member-elect Adam C. Powell, of New York, to be sworn, based on charges allegedly disqualifying him to be a Member of the House. The Speaker requested Mr. Powell to stand aside while the oath was administered to the other Members-elect:[12]

THE SPEAKER:[13] According to the precedent, the Chair will swear in all Members of the House at this time.

If the Members will rise, the Chair will now administer the oath of office.

OBJECTION TO ADMINISTRATION OF OATH

MR. VAN DEERLIN: Mr. Speaker.

THE SPEAKER: For what purpose does the gentleman from California rise?

MR. VAN DEERLIN: Mr. Speaker, upon my responsibility as a Member-elect of the 90th Congress, I object to the oath being administered at this time to the gentleman from New York [Mr. Powell]. I base this upon facts and statements which I consider reliable. I intend at the proper time to offer a resolution providing that the question of eligibility of Mr. Powell to a seat in this House be referred to a special committee——

THE SPEAKER: Does the gentleman demand that the gentleman from New York step aside?

MR. VAN DEERLIN: Yes, Mr. Speaker.

THE SPEAKER: The gentleman has performed his duties and has taken the action he desires to take under the rule. The gentleman from New York [Mr. Powell] will be requested to be seated during the further proceedings.

Challenge to Qualifications by Citizen

§ 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.

On Mar. 11, 1933,[14] 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.[15]

12. 113 CONG. REC. 14, 90th Cong. 1st Sess. For the Senate practice, see §§ 9.5, 9.6, infra.

13. John W. McCormack (Mass.).

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

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

Power of House to Determine Qualifications

§ 9.3 The House decided in the 90th Congress that it could exclude, by a majority vote, a duly qualified and certified Member-elect for improper conduct while a former Member of the House.[16]

On Jan. 10, 1967, the convening day of the 90th Congress, a challenge was made to the right to be sworn of Mr. Adam C. Powell, of New York, whose credentials had been submitted to the House, and whose qualifications of age, citizenship, and inhabitancy had been satisfied. He stepped aside as the oath was administered to the other Members-elect *en masse.*[17] The challenge to Mr. Powell's right to a seat was based on his alleged misconduct in a prior Congress as a Member of the House and Chairman of a committee, and on his avoidance of state court processes.

House Resolution No. 1 was then offered, which would have permitted Mr. Powell to take the oath but referred the question of his final right to a seat to a special committee. The House rejected the previous question on House Resolution No. 1 and adopted a substitute amendment referring both Mr. Powell's right to be sworn and his final right to

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discussion of Mr. Ellenbogen's qualifications for a seat.

For instances of petitions submitted to the Senate by private citizens, challenging the qualifications of Senators-elect, see 81 CONG. REC. 5633, 75th Cong. 1st Sess., June 14, 1937; 88 CONG. REC. 2077, 2078, 77th Cong. 2d Sess., Mar. 9, 1942; and 93 CONG. REC. 91–93, 80th Cong. 1st Sess., Jan. 4, 1947.

16. The action of the House in excluding the Member-elect was ruled unconstitutional by the Supreme Court in *Powell* v *McCormack,* 395 U.S. 486 (1969).

For the contrary views of two Members of Congress on the power of the House to exclude Mr. Powell, see Curtis, Power of the House of Representatives to Judge the Qualifications of Its Members, 45 Tex. L. Rev. 1199 (1967) and Eckhardt, The Adam Clayton Powell Case, 45 Tex. L. Rev. 1205 (1967).

For a prior instance (1919) where a Member-elect with unquestioned credentials was denied a seat for other than failure to meet the requirements of age, citizenship, or inhabitancy, see 6 Cannon's Precedents §§ 56–58.

17. 113 CONG. REC. 14, 90th Cong. 1st Sess.

Although some Members challenged the fulfillment by Mr. Powell of the inhabitancy qualification, that ground for exclusion was not considered by the House or the special committee established to investigate his right to a seat. See 113 CONG. REC. 4772, 90th Cong. 1st Sess., Feb. 28, 1967, and the resolution offered on Mar. 1, 1967, 113 CONG. REC. 4993, 90th Cong. 1st Sess.

be seated to a special committee:[18]

MR. GERALD R. FORD [of Michigan]: Mr. Speaker, I offer a substitute for House Resolution 1.

The Clerk read as follows:

Amendment offered by Mr. Gerald R. Ford as a substitute for House Resolution 1: Strike out all after the resolving clause and insert the following:

"*Resolved*, That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House.

"For the purpose of carrying out this resolution the committee, or any subcommittee thereof authorized by the committee to hold hearings, is authorized to sit and act during the present Congress at such times and places within the United States, including any Commonwealth or possession thereof, or elsewhere, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee nor any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpoenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

"Until such question and right have been decided, the said Adam Clayton Powell shall be entitled to all the pay, allowances, and emoluments authorized for Members of the House.

"The committee shall report to the House within five weeks after the members of the committee are appointed the results of its investigation and study, together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House."

On Mar. 1, 1967, the special committee on the right of Mr. Powell to his seat offered House Resolution No. 278, which declared Mr. Powell entitled to his seat on the ground that he met all constitutional qualifications for membership, but which imposed various penalties for congressional misconduct:[19]

MR. [EMANUEL] CELLER [of New York]: Mr. Speaker, pursuant to House Resolution 1, I call up for immediate consideration the following privileged resolution, House Resolution 278, which is at the Clerk's desk.

The Clerk read the resolution, as follows:

18. 113 CONG. REC. 14–26, 90th Cong. 1st Sess.

19. 113 CONG. REC. 4997, 90th Cong. 1st Sess.

Whereas,

The Select Committee appointed pursuant to H. Res. 1 (90th Congress) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C. or the State of New York as required by law. . . .

Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member; Now, therefore, be it

Resolved,

1. That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-elect from the Eighteenth District of the State of New York.

2. That upon taking the oath as a Member of the 90th Congress the said Adam Clayton Powell be brought to the bar of the House in the custody of the Sergeant-at-Arms of the House and be there publicly censured by the Speaker in the name of the House.

3. That Adam Clayton Powell, as punishment, pay to the Clerk of the House to be disposed of by him according to law, Forty Thousand Dollars ($40,000.00). The Sergeant-at-Arms of the House is directed to deduct One Thousand Dollars ($1,000.00) per month from the salary otherwise due the said Adam Clayton Powell and pay the same to said Clerk, said deductions to continue while any salary is due the said Adam Clayton Powell as a Member of the House of Representatives until said Forty Thousand Dollars ($40,000.00) is fully paid. Said sums received by the Clerk shall offset to the extent thereof any liability of the said Adam Clayton Powell to the United States of America with respect to the matters referred to in the above paragraphs Third and Fourth of the preamble to this Resolution.

4. That the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. That if the said Adam Clayton Powell does not present himself to take the oath of office on or before March 13, 1967, the seat of the Eighteenth District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.

After debate,[20] the House refused to order the previous question on the original resolution and agreed to an amendment in the nature of a substitute, stating the abuses Mr. Powell had committed, and excluding him from membership in the House:[1]

MR. [THOMAS B.] CURTS [of Missouri]: Mr. Speaker, I offer an amendment as a substitute for the resolution offered by the Committee.

The Clerk read as follows:

Amendment offered by Mr. Curtis as a substitute for House Resolution 278:

Resolved, That said Adam Clayton Powell, Member-elect from the 18th District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.

While the amendment was pending, Speaker John W. McCormack, of Massachusetts, stated in response to a parliamentary inquiry that adoption of the resolution would require a majority vote:

MR. CELLER: Mr. Speaker, a parliamentary inquiry.

MR. CURTIS: Mr. Speaker, I yield to the gentleman for the purpose of making a parliamentary inquiry.

THE SPEAKER: The gentleman will state his parliamentary inquiry.

MR. CELLER: Anticipating that the Member-elect from the 18th District of New York satisfies the Constitution, and a question is raised in this resolution, would the resolution offered by the gentleman from Missouri require a two-thirds vote, in the sense that it might amount to an expulsion?

THE SPEAKER: In response to the parliamentary inquiry, on the amendment of the gentleman from Missouri [Mr. Curtis], action by a majority vote would be in accordance with the rules.

Speaker McCormack also overruled a point of order against the resolution based on the theory that the resolution was beyond the power of the House to adopt:

MR. [PHILLIP] BURTON of California: Mr. Speaker I raise a point of order.

THE SPEAKER: The gentleman will state his point of order.

MR. BURTON of California: In view of the fact that this resolution, among other things, states that the Member from New York is ineligible to serve in the other body, and therefore clearly beyond our power to so vote; and in addition to that fact it anticipates election results in the 18th District of New York, a matter upon which we cannot judge at this time, I raise the point of order that the resolution is an improper one for the House to consider, and that it clearly exceeds our authority.

THE SPEAKER: The Chair will observe to the gentleman that if the

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20. 113 CONG. REC. 4997–5039, 90th Cong. 1st Sess., Mar. 1, 1967. For a brief prepared by the Library of Congress buttressing the authority of Congress to exclude Members-elect for misconduct, see *id.* at pp. 5008–10.

1. *Id.* at p. 5038. The text of the substitute resolution appears *id.* at p. 5020.

point of order would be in order it would have been at a previous stage in the proceedings, and the gentleman's point of order comes too late.

MR. BURTON of California: May I make a parliamentary inquiry, Mr. Speaker?

THE SPEAKER: The gentleman will state the parliamentary inquiry.

MR. BURTON of California: Am I not correct in my statement that under the resolution on which we are about to vote, the only clear meaning of it would preclude the gentleman from New York from serving in the other body.

THE SPEAKER: The Chair would state that that is not a parliamentary inquiry. The Chair cannot pass upon that question.

Following the adoption of the resolution as amended, the House agreed to the preamble to the resolution.

§ 9.4 A qualified Member-elect who had been duly elected to the 90th Congress and who had been excluded by the House for improper conduct while a former Member instituted a suit to enjoin the Speaker, other Members, and House officers from enforcing the resolution of exclusion.

On Mar. 9, 1967, Speaker John W. McCormack, of Massachusetts, announced to the House that a suit had been instituted against him, and against officers and other Members of the House, in order to enjoin the enforcement of a resolution excluding Mr. Adam C. Powell, of New York, from House membership.(2) Mr. Powell's complaint sought a writ of mandamus directing the Speaker to administer him the oath of office as a Member of the 90th Congress.(3) As to the age, citizenship, and inhabitancy requirements of the Constitution, the complaint stated:

> . . . These are the sole and only qualifications prescribed by the Constitution for members of the House of Representatives, and they cannot be altered, modified, expanded or changed by the Congress of the United States. The House found that plaintiff Adam Clayton Powell, Jr. possesses the requisite qualifications for membership in the House (House Resolution No. 278 . . .) but nonetheless voted to exclude him.(4)

2. 113 CONG. REC. 6035, 90th Cong. 1st Sess.
3. Subpenas to the Speaker and others, the complaint in the suit, and application (with memorandum) for the convening of a three-judge federal court were inserted in the Record *id.* at pp. 6036–40.
4. 113 CONG. REC. 6037, 90th Cong. 1st Sess.

   Further briefs, memoranda, and the opinion of the United States District Court Judge dismissing the complaint are reprinted at 113 CONG. REC. 8729–62, 90th Cong. 1st Sess., Apr. 10, 1967.

On Jan. 3, 1969, the convening day of the 91st Congress, the House agreed to a resolution authorizing Speaker John W. McCormack, of Massachusetts, to administer the oath to Mr. Powell, but imposing various penalties against him.[5]

Parliamentarian's Note: The suit filed by Mr. Powell in the United States District Court for the District of Columbia eventually reached the United States Supreme Court, which held that the House could exclude a Member-elect only for failure to satisfy one of the qualifications mandated in the Constitution. The suit was still pending when Mr. Powell was sworn in at the commencement of the 91st Congress.[6]

Senate Determinations as to Qualifications

§ 9.5 In the 77th Congress, the Senate failed to expel, by the required two-thirds vote, a Senator whose qualifications had been challenged by reason of election fraud and of conduct involving moral turpitude.

On Jan. 3, 1941, at the convening of the 77th Congress, Senator William Langer, of North Dakota, took the oath of office without prejudice, despite letters, protests, and affidavits from citizens of North Dakota recommending that he be denied a congressional seat because of campaign fraud and conduct involving moral turpitude.[7]

The final right of Senator Langer to his seat was not acted upon until Mar. 9, 1942, when the Committee on Privileges and Elections offered Senate Resolution No. 220:

> *Resolved*, That the case of William Langer does not fall within the constitutional provisions for expulsion or any punishment by two-thirds vote, because Senator Langer is neither charged with nor proven to have committed disorderly behavior during his membership in the Senate.
>
> *Resolved*, That William Langer is not entitled to be a Senator of the United

5. 115 CONG. REC. 33, 34, 91st Cong. 1st Sess. (see H. Res. 2). For further discussion, see Ch. 12, infra.

6. *Powell* v *McCormack*, 395 U.S. 486 (1969). The Court dismissed the complaint as to the House Members named, since they were immune from inquiry under the Speech and Debate Clause of the Constitution. However, the presence of House officers as defendants gave the Court jurisdiction to enter a declaratory judgment against the House action. See Ch. 12, infra.

7. 87 CONG. REC. 3, 4, 77th Cong. 1st Sess.

The petition challenging Senator Langer's qualifications appears in the Record at 88 CONG. REC. 2077, 77th Cong. 2d Sess., Mar. 9, 1942.

States from the State of North Dakota.[8]

Extensive debate, on the charges against Senator Langer, on the procedure to be followed by the Senate in determining his right to a seat, and on the authority of the Senate to deny him a seat for other than failure to meet express constitutional qualifications, consumed Mar. 9 through Mar. 27, 1942.[9]

On Mar. 27, the Senate agreed to a resolution requiring a two-thirds vote for expulsion of Senator Langer.[10] On the same day, the Senate failed to pass by a two-thirds vote the resolution to expel Senator Langer.[11]

8. 88 CONG. REC. 2077, 77th Cong. 2d Sess.

9. *Id.* at pp. 2077–105, 2165–79, 2239–62, 2328–44, 2382–406, 2472–94, 2630–52, 2699–720, 2759–67, 2768–79, 2791–806, 2842–63, 2914–23, 2959–78, 3038–65. For debate on the constitutional issues and parliamentary precedents, see *id.* at pp. 2390–406. The minority report of the Committee on Privileges and Elections, contending that the Senate could only exclude for failure to meet express constitutional qualifications, is set out *id.* at pp. 2630–34.

10. *Id.* at p. 3064.

The Senate had decided in 1907 that a two-thirds vote was required to expel a Senator who had already taken the oath. 1 Hinds' Precedents §§ 481–484.

11. 88 CONG. REC. 3065, 77th Cong. 2d Sess.

§ 9.6 A Senator-elect whom members of the Senate sought to exclude from the 80th Congress, for allegedly corrupt campaign practices, died while his qualifications for a seat were still undetermined.

On Jan. 3, 1947, at the convening of the first session of the 80th Congress, the right to be sworn of Theodore Bilbo, Senator-elect from Mississippi, was challenged. The challenge was made through Senate Resolution No. 1, which alleged Mr. Bilbo had engaged in corrupt and fraudulent campaign practices and had conspired to prevent the exercise of voting rights of certain citizens.[12] Extensive debate occurred on Jan. 3 and 4 in relation to the right of Mr. Bilbo to be sworn and in relation to the charges and petitions against him.[13] During the debate, the question was discussed as to whether Mr. Bilbo could be excluded from the Senate for his allegedly improper conduct, without violating the principle of the exclusivity of the constitutional qualifications.[14]

12. 93 CONG. REC. 7, 80th Cong. 1st Sess.

13. *Id.* at pp. 7–33, Jan. 3, and at pp. 71–109, Jan. 4. The petition submitted to the Senate by concerned private citizens which challenged Mr. Bilbo's entitlement to a seat appears in the Record *id.* at pp. 91–93.

14. *Id.* at pp. 14–19.

The question of Mr. Bilbo's right to a seat, and his right to take the oath, were laid on the table pending his recovery from a medical operation.[15] Mr. Bilbo died on Aug. 21, 1947, without further action being taken by the Senate on his right to a seat.[16]

Qualifications of Senate Appointee

§ 9.7 The validity of an appointment to the Senate may be challenged on the ground that the appointee does not meet the qualifications required by state law.[17]

On Aug. 5, 1964,[18] Senator Everett M. Dirksen, of Illinois, challenged the validity of the appointment of Pierre Salinger, appointed to fill a vacancy in the Senate caused by the death of Senator Clair Engle, of California. Senator Dirksen's challenge was based on the fact that the California code required that an appointee by the governor must be an elector, and that an elector must be a resident for one year before the day of election. It was claimed that Mr. Salinger was not a resident of California for a period of one year prior to appointment.

The Senate, after lengthy debate, agreed to a motion that the oath be administered to Mr. Salinger, and that his credentials be referred to the Committee on Rules and Administration.

§ 10. Age, Citizenship, and Inhabitancy

The Constitution requires that a Representative be at least 25 years old, have a period of citizenship of at least seven years, and be an inhabitant of his state at the time of election.[19] Those three qualifications are unalterable by either the state legislature

15. *Id.* at p. 109.
16. See the announcement of Nov. 17, 1947, 93 CONG. REC. 10569, 80th Cong. 1st Sess.
17. Under U.S. Const. amend. 17, a state legislature may empower the state executive to make temporary appointments to the Senate in the event of a vacancy, with the legislature setting qualifications for appointees. However, in the case of a House vacancy, an election must be held, with candidates possessing the constitutional qualifications. See U.S. Const. art. I, § 2, clause 4.
18. 110 CONG. REC. 18107–20, 88th Cong. 2d Sess.
19. Art. I, § 2, clause 2. These requirements are the express "standing" qualifications for a Representative, although there are other prerequisites in the nature of qualifications and disqualifications (see § 9, supra).