

On Mar. 1, 1967, Mr. Fletcher Thompson, of Georgia, stated that he intended to offer an amendment stating that Mr. Powell was not entitled to a seat in the House since he had abandoned inhabitancy in New York prior to election.⁽⁶⁾

When the House excluded Mr. Powell, however, the resolution of exclusion admitted Mr. Powell's satisfaction of the inhabitancy qualification but excluded him on other grounds.⁽⁷⁾

§ 11. Conviction of Crime; Past Conduct

Although the Senate or the House may expel a seated Mem-

ton was submitted in the case of James Beck (see 6 Cannon's Precedents §174), wherein the House found to be an inhabitant of Pennsylvania a Member who occupied an apartment in Pennsylvania one or more times each week, and exercised his civic rights there, although owning summer homes and residences in other states.

6. 113 CONG. REC. 4993, 90th Cong. 1st Sess.
7. H. JOUR. 313, 314, 90th Cong. 1st Sess., Mar. 1, 1967. For Speaker John W. McCormack's responses to parliamentary inquiries related to the meaning of the adopted resolution and preamble in regards to the inhabitancy qualification, see 113 CONG. REC. 5038, 90th Cong. 1st Sess., Mar. 1, 1967.

ber for disorderly conduct committed during his term,⁽⁸⁾ Congress has no general authority to exclude a Member-elect solely for criminal or immoral conduct committed prior to the convening of the Congress to which elected.⁽⁹⁾ Although the Senate and the House have affirmed their power

8. U.S. Const. art. I, §5, clause 2. See, in general, Ch. 12, *infra*.
9. For a discussion of the limits on Congress to add qualifications to those specified in the Constitution, see §9, *supra*. See also *House Rules and Manual* §§10-12 (comment to U.S. Const. art. I, §2, clause 2, setting qualifications for Members) (1973).

For the views of constitutional commentators, see Federalist No. 60 (Hamilton), Modern Library (1937); Story, *Commentaries on the Constitution of the United States*, §§616-624, Da Capo Press (N.Y. repub. 1970); Schwartz, *A Commentary on the Constitution of the United States*, p. 97, McMillan Co. (N.Y. 1963); Dempsey, *Control by Congress Over the Seating and Disciplining of Members*, Ph.D. dissertation, University of Michigan (1956) (on file with Library of Congress); Note, *The Right of Congress to Exclude Its Members*, 33 Va. L. Rev. 322 (1947); Note, *The Power of the House of Congress to Judge the Qualifications of Its Members*, 81 Harv. L. Rev. 673 (1968); Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 Journal Public Law 103 (1968).

to exclude for improper conduct on many occasions before 1936, and on several occasions since 1936,⁽¹⁰⁾ the Supreme Court decided in 1969 that the House or the Senate was limited to determining whether a Member-elect had satisfied the standing qualifications of age, citizenship, and residency.⁽¹¹⁾

- 10.** 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); § 11.1, *infra* (1967, abuse of power while past Member and committee chairman).

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 deny seats to Senators-elect for prior improper conduct, see §§ 11.2, 11.3, *infra*. 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).

- 11.** *Powell v McCormack*, 395 U.S. 486 (1969).

The Supreme Court case arose from the exclusion of a Member-elect (Adam Clayton Powell) in the 90th Congress for improper conduct as a Member of past Congresses.⁽¹²⁾ The abuses charged against the Member-elect never became the subject of criminal conviction. The House decided not only that it could exclude for abuse of power while a past Congressman and past committee chairman, but also that it could exclude by a simple majority vote. In denying such congressional power, the Supreme Court stated that the qualifications of the Constitution were exclusive and that the Congress could not deny to constituents their choice of a Representative, even if the majority of the House found his past conduct so criminal or so immoral as to render him unsuited for membership.

On two occasions since 1936, proceedings in the Senate have sought to deny seats to Senators-elect for immoral or criminal activity committed prior to the convening of Congress.⁽¹³⁾ Both attempts were unsuccessful.

- 12.** See § 9.3, *supra*, for a complete synopsis of the House proceedings leading to the vote on exclusion, and see § 9.4, *supra*, for a complete synopsis of the litigation by the excluded Member against House Members and officers.

- 13.** See §§ 11.2, 11.3, *infra*.

Congress may have the power to exclude a Member-elect for improper conduct when such conduct relates to campaign activities.⁽¹⁴⁾ Congress is the sole judge of the elections of its Members,⁽¹⁵⁾ and regulation of elections is a subject of various federal statutes. If the House found that a Member had conducted such a corrupt or fraudulent campaign as to render the election invalid, the House could deny a seat to such Member-elect, not for disqualifications but for failure to be duly elected.⁽¹⁶⁾

Generally, any state constitution⁽¹⁷⁾ or any statute⁽¹⁸⁾ which

14. See Ch. 12, *infra*.
15. U.S. Const. art. I, §5, clause 1.
16. See Ch. 8, *infra*, for elections and election campaigns and Ch. 9, *infra*, for election contests.
17. See §11.4, *infra*, for an occasion where the House declined to exclude a Member-elect whose citizenship had been challenged, since he had been convicted of a felony and his state's constitution stripped of citizenship persons convicted of felonies.
18. The Supreme Court held in *Burton v U.S.*, 202 U.S. 344 (1906) that although a statute barred a Congressman convicted of accepting a bribe from holding office, a judgment of conviction did not automatically expel him or compel Congress to expel him.

A state cannot by statute prevent a candidate from seeking office by virtue of his having been convicted of a felony. Application of Ferguson,

disqualifies a congressional candidate for criminal conviction is invalid and does not operate to disqualify the candidate for a congressional seat.

Cross References

- Conduct, punishment, censure, and expulsion, see Ch. 12, *infra*.
 Charges against Member as raising personal privilege, see Ch. 11, *infra*.
 Improper campaign practices, see Ch. 8, *infra*.
 Impeachment and improper conduct, see Ch. 14, *infra*.
 Resignations after conviction of crime, see Ch. 37, *infra*.
 Challenging the right to be sworn, based on improper conduct, see Ch. 2, *supra*.
 Demotions in seniority for improper conduct, see §2, *supra*.

Collateral Reference

- Sense of the House, Member's actions, convictions of certain crimes, H. REPT. No. 92-1039, 92d Cong. 1st Sess. (1972).

Exclusion for Improper Conduct

§ 11.1 The House excluded in the 90th Congress a Member-elect for avoidance of state court process and abuse of his congressional position while a Member of past Congresses.⁽¹⁹⁾

294 N.Y.S. 2d 174, 57 Misc. 2d 1041 (1968).

19. For a complete synopsis of the proceedings leading to Mr. Powell's ex-

On Mar. 1, 1967, the House excluded Member-elect Adam C. Powell, of New York, through passage of House Resolution No. 278 by a majority vote. The preamble of the resolution read in part as follows:

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

clusion, and of the litigation filed by him against the House, see §§9.3, 9.4, *supra*.

lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member. . . .⁽²⁰⁾

Exclusion of Senator for Improper Conduct

§ 11.2 A Senator-elect whom Members of the Senate sought to exclude from the 80th Congress, for corrupt campaign practices and past abuse of congressional office, died while his qualifications for a seat were still undetermined.

On Jan. 4, 1947, at the convening of the 80th Congress, the right to be sworn of Mr. Theodore Bilbo, of Mississippi, was laid on the table and not taken up again due to his intervening death.⁽¹⁾

The right to be sworn of Mr. Bilbo had been challenged through Senate Resolution No. 1, whose preamble read as follows:

Whereas the Special Committee To Investigate Senatorial Campaign Expenditures, 1946, has conducted an in-

20. 113 CONG. REC. 4997, 90th Cong. 1st Sess. (original resolution introduced by the special committee on the right of Mr. Powell to his seat). The House retained the preamble and adopted an amendment, text *id.* at p. 5020, which excluded Mr. Powell from the House.

1. 93 CONG. REC. 109, 80th Cong. 1st Sess.

vestigation into the senatorial election in Mississippi in 1946, which investigation indicates that Theodore G. Bilbo may be guilty of violating the Constitution of the United States, the statutes of the United States, and his oath of office as a Senator of the United States in that he is alleged to have conspired to prevent citizens of the United States from exercising their constitutional rights to participate in the said election; and that he is alleged to have committed violations of Public Law 252, Seventy-sixth Congress, commonly known as the Hatch Act; and

Whereas the Special Committee To Investigate the National Defense Program has completed an inquiry into certain transactions between Theodore G. Bilbo and various war contractors and has found officially that the said Bilbo, "in return for the aid he had given certain war contractors and others before Federal departments, solicited and received political contributions, accepted personal compensation, gifts, and services, and solicited and accepted substantial amounts of money for a personal charity administered solely by him" . . . and . . . "that by these transactions Senator Bilbo misused his high office and violated certain Federal statutes"; and

Whereas the evidence adduced before the said committees indicates that the credentials for a seat in the Senate presented by the said Theodore G. Bilbo are tainted with fraud and corruption; and that the seating of the said Bilbo would be contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuation of free Government and the preservation of our constitutional liberties. . . .⁽²⁾

2. 93 CONG. REC. 7, 8, 80th Cong. 1st Sess., Jan. 3, 1947.

§ 11.3 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, despite charges from the citizens of his state recommending he be denied a congressional seat because of campaign fraud and past conduct involving moral turpitude.⁽³⁾

The petition against Senator Langer charged: control of election machinery; casting of illegal election ballots; destruction of legal election ballots; fraudulent campaign advertising; conspiracy to avoid federal law; perjury; bribery; fraud; promises of political favors.⁽⁴⁾

After determining that a two-thirds vote was necessary for expulsion,⁽⁵⁾ the Senate failed to expel Senator Langer.⁽⁶⁾

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

4. 88 CONG. REC. 2077-80, 77th Cong. 2d Sess., Mar. 9, 1942.

5. 88 CONG. REC. 3064, 77th Cong. 2d Sess., Mar. 27, 1942.

6. *Id.* at p. 3065.

Criminal Conviction

§ 11.4 Where the right to a seat of a Representative-elect was challenged on the ground that he had forfeited his rights as a citizen by reason of a felony conviction, the House declined to exclude him.⁽⁷⁾

On Mar. 10, 1933,⁽⁸⁾ the right of Francis H. Shoemaker, of Minnesota, to be sworn in was challenged on the ground that he had been convicted of a felony, and that under the Minnesota state constitution any felony conviction resulted in the loss of citizenship, unless restored by the state legislature.⁽⁹⁾

Since, however, Mr. Shoemaker had been convicted of a federal offense (mailing libelous and inde-

cent matter on wrappers or envelopes) and not a state felony, and the conviction involved no moral turpitude, the House adopted a resolution authorizing Mr. Shoemaker to be sworn but referring the question of his final right to a seat to an elections committee.⁽¹⁰⁾

No further action was taken and Mr. Shoemaker served a full term as a Member of the House.

§ 11.5 The House adopted a resolution expressing the sense of the House that Members convicted of certain felonies should refrain from participating in committee business and from voting in the House until the presumption of innocence was reinstated or until the Member was re-elected to the House.

On Nov. 14, 1973,⁽¹¹⁾ the House adopted House Resolution 700, providing for the consideration of a resolution expressing the sense of the House with respect to actions which should be taken by Members upon being convicted of certain crimes. Mr. Charles M. Price, of Illinois, of the reporting committee (Standards of Official Conduct) asked unanimous consent that the resolution provided

7. On several occasions, since 1921, Members of the House have been convicted of crimes without House disciplinary action being taken. See the remarks of Mr. John Conyers, Jr. (Mich.) 113 CONG. REC. 5007, 90th Cong. 1st Sess., Mar. 1, 1967.

On one occasion, a charge that a Member had been convicted of playing poker prior to his becoming a Member was held not to involve his representative capacity. See 78 CONG. REC. 2464, 73d Cong. 2d Sess., Feb. 13, 1934.

8. 77 CONG. REC. 131-39, 73d Cong. 1st Sess.

9. *Id.* at p. 134.

10. *Id.* at pp. 137-39.

11. 119 CONG. REC. 36943, 36944, 93d Cong. 1st Sess.

for, House Resolution 128, be considered in the House as in the Committee of the Whole. The request was granted, and the House adopted the following resolution:

H. RES. 128

Resolved, That it is the sense of the House of Representatives that any Member of, Delegate to, or Resident Commissioner in, the House of Representatives who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is then a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House, unless or until judicial or executive proceedings result in reinstatement of the presumption of his innocence or until he is reelected to the House after the date of such conviction. This resolution shall not affect any other authority of the House with respect to the behavior and conduct of its Members.⁽¹²⁾

§ 12. Loyalty

Loyalty to the United States or to its government is not listed as one of the standing qualifications for membership in Congress.⁽¹³⁾

12. For a similar resolution reported in a preceding Congress but not considered in the House, see H. Res. 933, 92d Cong.
13. The congressional precedents on loyalty all arose prior to 1936 (see 1

The Supreme Court decided in 1969 that Congress could not add to the constitutional qualifications for Members, and could only adjudge the absence or lack of the standing qualifications of age, citizenship, and residency.⁽¹⁴⁾ The Powell case did not specifically discuss, however, the constitutional provisions which are related to loyalty and which could be construed as qualifications for membership.

First, the Constitution requires that every Member swear to an oath to support the Constitution.⁽¹⁵⁾ If a Member-elect were afflicted with insanity he could probably not take a meaningful oath, a question which has arisen in the Senate but not in the House.⁽¹⁶⁾

Hinds' Precedents §§ 449, 451, 457, 459, 620). The last House debate on exclusion for disloyalty occurred in 1919 through 1921 (see 6 Cannon's Precedents §§ 56-58).

14. *Powell v McCormack*, 395 U.S. 486 (1969).

A state cannot require of a congressional candidate declarations of loyalty, or affidavits averring lack of intent to seek forcible overthrow of the government. *Shubb v Simpson*, 76 A.2d 332 (Md. 1950).

15. U.S. Const. art. VI, § 3. The form of the oath which is taken appears at 5 USC § 3331. For detailed information on the evolution of the oath of office, see Ch. 2, *supra*.
16. See 1 Hinds' Precedents § 221, where the Senate allowed a Senator-elect to