PRECEDENTS OF THE HOUSE OF REPRESENTATIVES RELATING TO EXCLUSION, EXPULSION AND CENSURE

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The following is a report on significant precedents of the House of Representatives relating to exclusion of Members or Members-elect, and to expulsion or censure of Members. It does not contain references to contested elections cases except where the primary issue might have been that of qualifications, nor to disability pursuant to Article I, Section 6, clause 2, relating to appointment of a Member, during the time for which he was elected, to a federal civil office, which shall have been created, or the emoluments whereof shall have been increased during such time. Nor do the precedents reported herein relate to demotion in standing on a committee membership.

Applicable provisions of the Constitution are:

> Article I, Section 2, clause 2:
> No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Article I, Section 5, clause 1:
> Each House shall be the judge of the elections, returns, and qualifications of its own Members. . . .

Article I, Section 5, clause 2:

> Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member.

On occasion, Article VI, clause 3, has been invoked:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution. . . .

In addition, on occasion, Amendment XIV, section 3, has been involved:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a Member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

House precedents reflect at least five categories of disqualification or punishment imposed upon Members or Members-elect (and, on occasion, Delegates, or Delegates-elect). These are exclusion, expulsion, censure, demand for an apology, and restraint by a Member from participation in House proceedings while under indictment or while appealing a conviction for a criminal offense.

Exclusion has been premised upon Article I, Section 5, clause 1, and has been exercised in situations where Members-elect

have not been sworn in (see, for example, the cases of Brigham Roberts, of Utah, 56th Congress, 1900, Hinds' Precedents of the House of Representatives, Vol. I, §§474-480; Victor Berger, of Wisconsin, 66th Congress, 1919, Cannon's, Precedents of the House of Representatives, Vol. VI, §§56-58; Smith v. Brown, 40th Congress, 1867, I Hinds', supra, §§449-450; B.F. Whittemore, of South Carolina, 41st Congress, 1870, I Hinds', supra, §464); or, where they have been sworn in (see, John Bailey, of Massachusetts, 18th Congress, 1824, I Hinds', supra, §434).

Such situations involved disqualification on the grounds set forth in Article I, Section 2, clause 2 (i.e., John Bailey, of Massachusetts, was excluded on grounds of ineligibility due to absence of inhabitancy at the time of election); or on other grounds (i.e., disloyalty, Mr. John Young Brown, Mr. Berger; commission of crime (bribery) for which a Member had resigned, and then been re-elected during the same Congress and was then excluded, Mr. Whittemore; or for disloyalty whereby the Member-elect had been excluded and when re-elected during the same Congress had again been excluded, Mr. Berger; or, disloyalty where the Member-elect had for years been "living in open, flagrant, and notorious defiance of the statutes of Utah, and in open, flagrant, and notorious defiance of the statutes of Congress", and where he had "persistently held himself above the law", Mr. Roberts).

The House has also not excluded where allegations of ineligibility under Article I, Section 2, clause 2, have been made, or where allegations on other grounds have been made (see the following material infra).

Expulsion and censure have been applied pursuant to Article I, Section 5, clause 2. Expulsion, thus far, has only been imposed by the House on grounds of disloyalty (see, for example, John W. Reid, of Missouri, 37th Congress, 1861, II Hinds', supra, §1261, and Henry C. Burnett, of Kentucky, id.). Expulsion resolutions have been submitted on other occasions but have not been adopted by the necessary vote of the House (see the following material, infra).

Censure has been inflicted for various reasons, as set forth in the following material, both pursuant to House Rule XIV, §4 (calling a Member to order during debate), and otherwise. On other occasions resolutions of censure have been submitted but not adopted.

On occasion, the House has required Members to appologize to the House for breaching its privileges (see, II Hinds', supra, §§ 1250, 1257, 1258, 1650, 1657, 1648; V Hinds', supra, §7006).

These have occurred in situations where Members have been called to order during debate, or have inserted offensive material in the Congressional Record (i.e., II Hinds', §§1250, 1258; V Hinds',

§7006; II Hinds', §1257), or, situations involving physical assaults by one Member upon another during debate (see, II Hinds', supra, §§1650, 1657, 1648).

In several cases, an "unwritten rule" of the House has been observed, that Members under indictment or appealing convictions have taken "no part whatever in any of the business of the House or its committees" (see, Cannon's, Vol. VI, §§238 and 403 [committee report], and Cannon's, Vol. VIII, §2205).

This report will not deal in detail with the category of apologies.

Significant Cases Where The House Has Considered Questions of Qualification - Age, Citizenship, Inhabitancy

A - Significant cases where the House has permanently excluded on grounds of age, citizenship, or inhabitancy.

JOHN BAILEY, MASSACHUSETTS; 18TH CONGRESS, 1ST SESSION, 1824; I HINDS' § 434; PARTY UNKNOWN; THE HOUSE HAD 141 DEMOCRATS, 72 FEDERALISTS

This case involved a question of inhabitancy raised by voters in Mr. Bailey's district. He had worked in the Department of State in Washington, D.C., for several years until he resigned on October 21, 1823. He had been elected to Congress on September 8, 1823.

After an examination of the evidence, the Committee on Elections reported a resolution that Mr. Bailey was not entitled to his seat in the 18th Congress. He had been sworn in on December 1, 1823, when the Congress convened (Annals of Congress, 18th Congress, 1st Session, pp. 739-796).

The Committee report and the debate from March 18 to 26, 1824, discussed the meaning of the term "inhabitancy" in detail.

On the 26th, the House, by a vote of 125 to 55, adopted the Committee resolution and Mr. Bailey was excluded.

B. Significant cases where the House has not excluded because of allegations of lack of age, citizenship, or inhabitancy.

I. Age

JOHN YOUNG BROWN, KENTUCKY; 36TH CONGRESS, 1ST SESSION, DECEMBER, 1859; I HINDS' § 418; DEMOCRAT; THE HOUSE HAD 113 REPUBLICANS, 101 DEMOCRATS, 23 OTHERS

Mr. Brown appeared at the convening of Congress on December 5, 1859, as a Member-elect from Kentucky. He was not sworn in until December 3, 1860, at the commencement of the second session because he was under the constitutional age when the first session began, although the State authorities of Kentucky had issued a certificate to him.

B. Significant cases where the House has not excluded because of allegations of lack of age, citizenship, or inhabitancy.

II. Citizenship

WILLIAM SMITH, SOUTH CAROLINA; FIRST CONGRESS, FIRST SESSION 1789; I HINDS; SEC. 420; FEDERALIST; THE HOUSE HAD 53 FEDERALISTS, 12 DEMOCRATS

The House convened on April 1, 1789, and on April 13, Mr. William Smith, of South Carolina appeared and took his seat. A footnote in Hinds, vol. I, p. 391 refers to the assumption that Mr. Smith apparently took the oath when he appeared.

On April 15, Representative David Ramsey, of South Carolina, presented a petition to the House setting forth that Representative Smith was ineligible because he had not been a citizen of the United States for 7 years. The petition was referred to the Elections Committee of seven members, five of whom were Federalists and the affiliation of the other two members is unknown.

On April 18, the Committee reported a list of members whose credentials were sufficient to entitle them to take seats in the House and the House agreed to the report. Mr. Smith's name was on this report.

On the same day the Committee reported respecting Mr. Smith that a committee take such proofs and counter proofs concerning Mr. Smith (Mr. Smith was given the right to be present before the Committee, to cross examine, and offer counter proofs), and report to the House which should take such decision as would be appropriate.

The House on April 29, instructed the Committee to proceed accordingly.

On May 16, Mr. Smith is recorded on a vote indicating that he had been sworn in.

On May 12, the Committee reported and the report was considered on May 21 and 22. Mr. Smith had been born in South Carolina and had been sent to England to study in 1774, at age 12. Because of the war he was unable to return to the United States until 1783.

He had been elected to the South Carolina legislature and other positions but it was shown that he had been uniformly assumed to have been a citizen of South Carolina while abroad, a prerequisite for holding some of the positions.

On May 22, 1789, the House adopted a resolution that Representative Smith had been seven years a citizen of the United States at the time of his election.

It does not appear that any question was raised in the debate as to the right of the House to decide by majority vote on the title of a member to his seat should he be found disqualified.

The principle of the case is that the House decided that a member-elect was entitled to a seat on his prima facie right, although knowing that his qualifications were under examination.

LOWRY v. WHITE, INDIANA; 50TH CONGRESS, 1ST SESSION, 1888;
I HINDS' § 424; REPUBLICAN; THE HOUSE HAD
170 DEMOCRATS, 151 REPUBLICANS, 4 OTHERS

The Member had been sworn in, and allegations were made concerning his citizenship qualifications. The majority of the Elections Committee, after an examination, reported a resolution that Mr. White was not entitled to his seat because of citizenship disqualification.

The minority of the Committee reported a resolution that Mr. White was entitled to his seat.

After debate on February 2, 4, and 6, 1888, the House substituted the resolution of the minority for that of the majority by a vote of 186 to 105.

ANTHONY MICHALEK, ILLINOIS; 59TH CONGRESS, 1ST SESSION, DECEMBER, 1905; I HINDS' § 426; REPUBLICAN; THE HOUSE HAD 250 REPUBLICANS, 136 DEMOCRATS

Mr. Michalek was sworn in on opening day and on the following day a protest from voters of his district was submitted alleging that he did not possess the citizenship requirements as set forth in the Constitution. After an examination, the Elections Committee reported that Mr. Michalek did possess the qualifications of age, citizenship and inhabitancy, and the report was adopted by the House.

In this case, the House considered a protest as to the qualifications of a Member after he had taken the oath without objection.

PHILIP B. KEY, MARYLAND; 10TH CONGRESS, 1ST SESSION, 1807; I HINDS' § 432; FEDERALIST; THE HOUSE HAD 110 DEMOCRATS, 31 FEDERALISTS

This case involved a similar result but involved the question of inhabitancy.

LAWSON v. OWEN, FLORIDA; 71ST CONGRESS, 2ND SESSION, 1930; VI CANNON'S § 184; DEMOCRAT; THE HOUSE HAD 267 REPUBLICANS, 163 DEMOCRATS, 1 OTHER

Mrs. Owen had been sworn in at the convening of the Congress. The issue in the case was that of her citizenship. She had been born in the United States but had married a British subject in 1910. She resided in England until 1919, and then returned with her husband permanently to the United States where she made application for naturalization and was restored to citizenship on April 27, 1925. She was elected to the House in November, 1928.

The Elections Committee, No. 1, majority concluded that the voters in the district had expressed a preference for Mrs. Owen, and she could not legally be precluded from taking a seat in the House except by action of the House.

The Committee majority also concluded that the constitutional requirement of seven years of citizenship was cumulative and not limited to the seven years next preceding an election.

She was retained in her seat by the House.

B. Significant cases where the House has not excluded because of allegations of lack of age, citizenship, or inhabitancy.

III. Inhabitancy.

WILLIAM McCREERY, MARYLAND; 10TH CONGRESS, 1ST SESSION, 1807; I HINDS' § 414; PARTY UNKNOWN

Mr. McCreery had been sworn in without question, and a memorial was presented contesting his election in that he had not been eligible under an existing Maryland law requiring a Member to be an inhabitant of his district at the time of his election, and to have resided therein 12 calendar months immediately before.

The Committee on Elections, in its report, concluded that the law was inapplicable and that Mr. McCreery, who had a majority of votes in the district, was entitled to the seat.

An exhaustive debate in the House occurred from November 12-19, 1807 (Annals, 10th Congress, pp. 870-950) and concerned, primarily, the power of the States, individually, to add additional qualifications for membership in the House. One argument in opposition to the committee report was that, because the House was constituted the judge of the qualifications of its Members, it did not follow that it could constitute or enact qualifications. However, it was argued, the States could under the reserved powers. The functions of judging and enacting, it was argued, were distinct.

A resolution that, "William McCreery is duly elected according to the laws of Maryland and is entitled to his seat in this House," was "negatived by a large vote."

Then a resolution was offered declaring that neither Congress nor the State legislatures could add to or take away from the qualifications prescribed by the Constitution, that the law of Maryland was void, and that William McCreery was entitled to his seat. The resolution did not come to a vote, as the committee of the whole rose after it was offered, and on the next day, November 19, the House discharged the committee of the whole from the subject and recommitted it to the Committee on Elections.

It reported out a resolution, on December 7, 1807, "That William McCreery, having the greatest number of votes, and being duly qualified agreeably to the Constitution of the United States, is entitled to his seat in the House."

On December 23, this was amended to "That William McCreery is entitled to his seat in the House." On being reported to the House, this amendment was agreed to, 70 to 37.

Mr. John Randolph of Virginia moved an amendment by inserting after the word "McCreery", the following: "By having the qualifications prescribed by the laws of Maryland." This was defeated, on December 24, 8 to 92.

The version, "That William McCreery is entitled to his seat in the House," was agreed to, 89 to 18.

JAMES M. BECK, PENNSYLVANIA; 70TH CONGRESS, 1ST SESSION, DECEMBER, 1927; VI CANNON'S § 174; REPUBLICAN; THE HOUSE HAD 237 REPUBLICANS, 195 DEMOCRATS, 3 OTHERS

Mr. Beck was sworn in and the Committee on Elections, No. 2, was empowered to examine into allegations respecting his "inhabitancy". The Member had been elected in November, 1926. He had rented an apartment in the State of Pennsylvania on June 1, 1926, and occupied it "one or more times each week," although owning at the time a summer home in another State and owning and maintaining a residence in the District of Columbia.

The Committee construed Mr. Beck to be an inhabitant of Pennsylvania within the meaning of the Constitution, and he was held to be entitled to his seat by vote of the House.

Significant Cases Relating To Qualifications Other Than Age, Citizenship, Or Inhabitancy

A. Cases where oath was administered and question was referred to a committee for examination and report: (note: the Upton case is included herein although it concerned a question of inhabitancy; the election was invalidated on other grounds)

I. State laws presumably disqualifying candidates from running (see also, case of William McCreery, of Maryland, supra)

TURNEY v. MARSHALL, FOUKE v. TRUMBULL, ILLINOIS;
34TH CONGRESS, 1ST SESSION, 1856; I HINDS' § 415;
MR. MARSHALL WAS A DEMOCRAT, MR. TRUMBULL, A REPUBLICAN;
THE HOUSE HAD 108 REPUBLICANS, 83 DEMOCRATS, 43 OTHERS

The case became moot as respects Mr. Trumbull, since he had been elected to the Senate before taking his seat in the House. Nevertheless, the Committee on Elections reported on both cases which were similar in that each contestee had been an Illinois judge and the question presented involved the operative effect of Illinois law preventing them from running for other office.

The report of the Elections Committee (H. Rept. 194) disposed of the argument that States could impose qualifications to the House of Representatives in addition to those set forth in the U.S. Constitution.

It also asserted ". . . that the said Trumbull and Marshall were each eligible to the office of Representative in Congress at the time of said election, it being conceded that on that day they possessed all the qualifications for that office required under the Constitution of the United States. . . ."

A resolution holding Mr. Marshall was entitled to his seat was adopted. In this case, the House considered the qualifications of a Member who had already been seated on his prima facie showing.

A. Cases where oath was administered and question was referred to a committee for examination and report: (Note: The Upton case is included herein although it concerned a question of inhabitancy; the election was invalidated on other grounds).

II. Disloyalty

CHARLES H. UPTON, VIRGINIA; 37TH CONGRESS, 1ST SESSION,
JULY 4, 1861; I HINDS' § 156; REPUBLICAN
THE HOUSE HAD 106 REPUBLICANS, 42 DEMOCRATS, 28 OTHERS

An allegation was raised as to Mr. Upton's qualifications of inhabitancy, it being charged that he was a citizen of Ohio and had voted there in the last election. A resolution that his credentials, along with others, be referred to the Committee on Elections and that the oath not be administered until the Committee had reported and the House had acted on the same was laid on the table.

Mr. Upton then took the oath, but was later unseated by majority vote when the election was deemed invalid, although his qualification of inhabitancy was accepted.

For similar cases where Members-elect, being challenged for alleged disqualifications, have been sworn in at once, and the question of their qualifications, in some instances, has been referred to committee for examination, see:

Patrick Hamill, Maryland; 41st Congress, 1st Session, March, 1869; I Hinds' § 157; Democrat; the House had 170 Republicans, 73 Democrats; the allegation was of disloyalty.

Boyd Winchester and John M. Rice, both of Kentucky; 41st Congress, 1st Session, March, 1869; I Hinds' § 158; both were Democrats; the House had 170 Republicans, 73 Democrats; the allegations against both men were of disloyalty.

S. R. Peters, Kansas; 48th Congress, 1st Session, December, 1889; I Hinds' § 159; Republican; the House had 200 Democrats, 119 Republicans, 6 others; the allegation was that Mr. Peters, being a state judge in Kansas, was disqualified by state law from holding any other office under the State or the United States. After the oath was administered, Mr. Peter's qualifications were examined and he was declared entitled to the seat.

WILLIAM B. STOKES, TENNESSEE; JAMES MULLINS, TENNESSEE;
FORTIETH CONGRESS, FIRST SESSION, NOVEMBER 21, 1867;
BOTH WERE REPUBLICANS; THE HOUSE HAD
143 REPUBLICANS, 49 DEMOCRATS,
1 OTHER; I HINDS;
§444

When Members-elect from Tennessee appeared to be sworn in, Representative James Brooks, of New York, challenged Mr. Stokes, alleging he had been disloyal during the Civil War and presented in suuport thereof a letter alleged to have been written by Mr. Stokes in 1861, announcing his intention to resist the Federal Government.

On the same day, a challenge was made against Mr. Mullins on the grounds of disloyalty, in support of which a letter written by an army officer, but not verified by oath, was read charging Mr. Mullins with disloyal utterances in 1861.

In the debate that followed, (Globe, pp. 768-778) it was argued that the charges had not been made on the responsibility of a Member, or supported by affidavit as in earlier Kentucky cases (40th Congress, Globe, 1st Sess., pp. 501, I Hinds, §448); that the gentlemen were known to have acted loyally during the war, and that the evidence shown against them was not sufficient to preclude their taking the test oath with the approval of their own consciences.

Resolutions to refer the credentials and deny the oath to them were voted down by the House and they were sworn in.

WHITTLESEY v. McKENZIE, VIRGINIA; 41ST CONGRESS, 2ND SESSION, 1870; I HINDS' § 462; REPUBLICAN; THE HOUSE HAD 170 REPUBLICANS, 73 DEMOCRATS

At the opening of the second session of the Forty-first Congress, the credentials of the Members-elect from Virginia were referred to the Committee on Elections and the persons were not sworn in. Shortly thereafter a resolution was adopted providing for the swearing in of Mr. McKenzie, although the question of loyalty was present. The resolution also provided that the swearing in be without prejudice to a contested election case against Mr. McKenzie.

After committee examination and report, the House voted to adopt a resolution declaring Mr. McKenzie entitled to his seat, deciding that the evidence did not show his disqualification on disloyalty grounds.

In this case the House voted to administer the oath to a Member-elect on his correct prima facie showing, although a question as to his qualifications was pending before the Elections Committee.

A. Cases where oath was administered and question was referred to a committee for examination and report: (Note: The Upton case is included herein although it concerned a question of inhabitancy; the election was invalidated on other grounds).

III. Crime, or alleged commission of a crime

PHILEMON T. HERBERT, CALIFORNIA; 34TH CONGRESS, 1ST SESSION;
MAY 15, 1856; II HINDS' § 1277; DEMOCRAT;
THE HOUSE HAD 108 REPUBLICANS, 83 DEMOCRATS, 43 OTHERS

The Member was charged with the crime of manslaughter. A resolution was introduced to refer the case to the Committee on the Judiciary for examination and report.

A question of order was raised that a question of privilege was not involved in the preamble (which set forth the facts and referred to the constitutional clause that each House shall be the judge of the qualifications of its own members, and may punish its members for disorderly behavior, etc.) nor in the resolution.

The Speaker (Nathaniel Banks of Massachusetts) submitted the question to the House whether it would entertain the resolution as a question of privilege.

By a vote of 79 to 70, the question was laid on the table.

On February 24, 1857, on petition of citizens of California, the matter was considered, but the House determined not to investigate the subject (Globe, 34th Congress, 2nd Sess., p. 843).

EXCLUSION OR EXPULSION: GEORGE Q. CANNON, 43D CONG., 2D SESS., 1874; HINDS' §§ 468, 469, 470; REPUBLICAN; 43D CONGRESS HAD 203 REPUBLICANS, 88 DEMOCRATS

Losing candidate at the election contested Cannon's right to take his seat on the basis that he was guilty of polygamy. Cannon was seated and given the oath and thereafter the elections committee studied the contest and reported back with a resolution stating that Cannon was elected and returned as a Delegate from Utah but did not declare him entitled to his seat.

In regard to its jurisdiction, the committee said:

> What are the qualifications here mentioned and referred to the Committee on Elections? Clearly, the constitutional qualifications, to wit, that the claimant shall have attained the age of 25 years, been seven years a citizen of the United States, and shall be an inhabitant of the State in which he shall be chosen.
>
> The practice of the House has been so uniform, and seems so entirely in harmony with the letter of the Constitution, that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified mentioned in the notice of contest and hereinbefore alluded to. H. Rept. No. 484, 43d Cong.

It does not appear why the recommendations stopped short of calling Cannon entitled to his seat.

Mr. Harrison of Tennessee proposed a substitute finding Cannon so entitled. Said he:

> If the Constitution of the United States had vested anywhere the power to prescribe qualifications of Representatives in Congress additional to or different from those prescribed by the Constitution itself, it is obvious that this power would have been conferred either upon Congress, or upon the House alone, or upon the States.
>
> In the history of our Government it has never been claimed that the House of Representatives, acting alone, possessed the power to add to or change the qualifications of its Members....

The precedents of the House are in accordance with this construction of the Constitution. There has been no precedent since the organization of the Government which would justify, any more than would the Constitution itself justify, the House acting as the judges of the election, returns, and qualifications of Mr. Cannon, in a decision to deprive him of his seat on the ground that he has violated the law prohibiting polygamy in the Territories of the United States.

. . .

The line of demarkation between these two great powers of the House, the power to judge of the election, returns, and qualifications of its Members by a mere majority vote, and the power to expel its Members by a two-thirds vote, is clear and well defined. That line is not to be obliterated. . . .

The framers of the Constitution of the United States, in prescribing or fixing the qualifications of Members of Congress, must be presumed to have been dealing with the question with reference to an obvious necessity for uniformity in the matter of the qualifications of Members, and with a jealous desire to prevent, by the action of either House of Congress, the establishment of other or different qualifications of Members.

It was appropriate and proper--in fact, necessary--that the power should be given to each House to judge of the elections, returns, and qualifications of its Members; that is, to judge of the constitutional qualifications of its Members.

The exercise of this power requires only a majority vote.

But the House possesses another power, to decide who shall and who shall not hold seats in that body. It is altogether distinct, in origin and character, from that to which I have just referred. It is the power of expulsion, which requires a two-thirds vote for its exercise. . . .

This power of expulsion conferred by the Constitution on each House of Congress was necessary to enable each House to secure an efficient exercise of its power and honor and dignity as a branch of the National legislature.

> It was too dangerous a power to confer on either House without restriction, and hence it was expressly proviced in the Constitution that there must be a concurrence of two-thirds of the Members to expel.

The House voted 109 to 76 to adopt Harrison's substitute stating Cannon to be entitled to his seat. Following this vote the House voted 137 to 51 to instruct the Committee on Elections to investigate the charges of polygamy and report back.

The Committee majority reported that Cannon had violated the statute against ploygamy and should be excluded. A minority dissented, with only Mr. Harrison stating his views that the House ought not expel or exclude anyone on account of alleged crimes or immoral practices unconnected with their duties or obligations as a Member or as a delegate. H. Rept. No. 106, 43d Cong., 2d sess.

When the Committee resolution was called up, an appropriation bill was also due consideration and the House voted not to consider the resolution.

J. H. ACKLEN, LOUISIANA; 45TH CONGRESS, 3RD SESSION,
JANUARY, 1879; I HINDS' § 466; DEMOCRAT;
THE HOUSE HAD 156 DEMOCRATS, 137 REPUBLICANS

Mr. Acklen, after a personal explanation regarding a charge by affidavit that he had seduced a woman in April, 1877, submitted a resolution authorizing the appointment of an investigation committee to investigate the truth or falsity of the charges. The woman was deceased when Mr. Acklen submitted the resolution, but the alleged act had occurred during the 45th Congress.

Mr. Acklen had been sworn in at the convening of the Congress.

A Member raised a point of order that a mere charge of a crime, on which no conviction had been obtained, did not justify the House in taking jurisdiction on the question of qualifications.

After the Speaker, Samuel J. Randall of Pennsylvania, had given his opinion that a question of personal privilege was not involved since the charges did not directly affect the representative character of a Member, and that consequently an inquiry by the House was not called for, the House, on a question of whether a question of privilege was involved, voted no.

FRANCIS H. SHOEMAKER, MINNESOTA; 73RD CONGRESS, 1ST SESSION, MARCH 9-10, 1933; DEMOCRAT; THE HOUSE HAD 313 DEMOCRATS, 117 REPUBLICANS, 5 OTHERS; 77 CONGRESSIONAL RECORD, PP. 73-74, 131-139

Member-elect Francis H. Shoemaker of Minnesota was asked to stand aside during the administration of the oath on convening day. A resolution was offered (H. Res. 6) that whereas it had been charged that Mr. Shoemaker was ineligible to a seat in the House, the question of his prima facie as well as his final right to a seat be referred to the Committee on Elections, No. 1, and that until such time as the Committee reported and the House acted, Mr. Shoemaker not be permitted to occupy a seat in the House.

Because of urgent legislative business, consideration of the question was put off until the following day, March 10.

It was asserted that Mr. Shoemaker had been indicted and convicted in 1930 under then section 212 of the federal criminal code relating to the mailing of libelous and indecent matter on wrappers or envelopes. He had been sentenced to a year and a day but had been paroled prior to the completion of the sentence.

Involved also was a question of Minnesota law prohibiting anyone convicted of "any felony", unless restored to civil rights, from exercising the right to vote, and hence a question of "citizenship" was alleged to be presented. Mr. Shoemaker had received proper credentials from the Governor of Minnesota.

On March 10, a substitute resolution was offered directing the Speaker to administer the oath and referring the question of the final right of Mr. Shoemaker to a seat to the Committee on Elections to examine and report thereon for House action.

The debate concerned a question of procedure and centered on the question of whether, under the precedents, the House would adopt the original resolution or the substitute. As stated by Representative Bulwinkle of North Carolina (p. 135): "The case that is before the bar of the House today is not one to refuse to seat a man in the House of Representatives, but it is not to administer the oath to him until a day certain, until a trial can be had, until he can present witnesses and an opportunity is had to go into the truth or falsity of the charges made against him."

Statements concerning the qualifications set forth in Article I, Section 2, clause 2, and the power of the House to judge of the qualifications of Members-elect under Article I, Section 5, clause 1,

were made during the debate, but in reference to the adoption of the original resolution or the substitute (see statement by Mr. Lemke, p. 132, respecting the citizenship requirement).

The following are excerpts from the debate:

Mr. Carter of California stated, for instance (p. 134): "I wish to say in response to the question propounded by the gentleman from Georgia, who asked whether or not the people of Minnesota were aware of the facts at the time of election, that I refer him to the case of B. H. Roberts, who had all the constitutional qualifications, who was elected from the State of Utah, and who, according to the committee which was appointed to investigate his case, had been found guilty of a crime in that State, and that it was well known to the electorate of that State at the time this man was elected.

"Here is the situation: Do you desire to maintain the integrity of the House, or are you going to admit every person that has those three necessary constitutional qualifications that were referred to a few moments ago for admission to this House? . . . The precedents of this House have taken that, being the judge of the returns and qualifications of Members, we have the right to say whether a man shall come here and take his seat, even though he has those constitutional qualifications."

Mr. Bulwinkle of North Carolina (p. 135): "What have been the precedents of the House in similar cases?, for the precedents must guide us here today. Remember, that the resolution introduced by the gentleman from California (Mr. Carter, the initial resolution) does nothing more or less than to have a hearing and put this off to a day certain in the future when all can be heard and the matter decided upon.

"There was a South Carolina case, Mr. Speaker, some years ago, in the Forty-first Congress, the case of B. F. Whittemore. Mr. Whittemore had been a Member of this House. He sold his West Point appointment. Then the House moved to expel him, but before the matter was considered, he resigned. He then went back home and was reelected to the Congress, never having been tried, mind you, for bribery; and the only thing that was against him was the charge of bribery and his resignation from the House of Representatives. But he came back to the House, and the House then set the hearing of the matter for a day certain, first referring the case to a committee, the resolution being in the same terms as the resolution of the gentleman from California."

Mr. O'Connor of New York (p. 136): "Will the gentleman tell us what harm is done if we administer the oath and the committee then hears the case? If the man is ineligible he will not be continued in Congress. He has his certificate of election here, and what harm would be done by proceeding in this way?

"Mr. Bulwinkle: He should stand aside. And I am calling on you to follow precedents just as the House followed the precedent in the Whittemore case and just as the House followed precedents in the Berger case.

"Mr. McKeown of Oklahoma: Mr. Speaker and gentlemen of the House, the gentleman from California (Mr. Carter) is entirely within his rights when he rises in his place and asks that the candidate from Minnesota be not allowed to take the oath." After some other remarks, he then continued: "The Constitution says that there are three qualifications for a Member of this House. Neither the State Legislature of Minnesota nor the Congress of the United States can change these qualifications. They are written into the Constitution by the great fathers of the Republic and they cannot be changed by law (underlining supplied; referring to section 212 of the U.S. criminal code, supra).

"The gentleman refers to the Roberts case, from Utah. Yes; they stood Roberts aside, and they also tried to expel Mr. Smoot from the United States Senate, one of the illustrious Senators in after years.

"I want to say if there is a man in this House who feels himself so perfect that he never violated any law or any statute, let him object and be the first man to throw this man out. . . . I want to direct your attention to another precedent. You cannot try a man and throw him out of this House on a matter of mere whim. The Constitution says you are to consider three things. You can consider his election, you can consider the returns and his qualifications, but you cannot try him for something that happened before he was elected to this House.

"Mr. Blanton, of Texas: . . . The gentleman from Minnesota comes here with a prima facie case of disqualification against him. He comes with an uncontraverted record of having served a sentence in the penitentiary, based upon his own plea of guilty, which carries with it the forfeiture of the right of citizenship. Surely, under such circumstances, the House of Representatives of the People of the United States is not asking too much when it requests that before

he take the oath of office his case be referred to the proper Elections Committee for proper investigation and report. We are not doing the gentleman any injustice in doing that. We can see to it that it behooves the House of Representatives to act with deliberation in such a case as this.

"When the gentleman from Wisconsin, Mr. Berger, came here, not with a final conviction against him, but with a conviction that was then on appeal before the highest courts, the House of Representatives asked him to stand aside, and he did stand aside, until that matter was investigated; and, later on, when that sentence was set aside, he was allowed to take his seat here in this House and did serve here for quite a length of time.

"I think in all fairness and in all justice to the gentleman from Minnesota, this matter should be properly investigated. In all fairness to the standing of this House, which owes something to the people whom we represent, the case should go to a committee and be fairly investigated. If he is guilty of no moral turpitude, let that fact be developed, and then will be time enough for him to take the oath."

Mr. Luce of Massachusetts (p. 139): "Mr. Speaker, the precise point upon which this House is to vote has almost wholly been lost from sight. This man is, anyhow, to have a trial, a fair trial. The question now is only whether he shall be sworn in at once or after consideration of the case by a committee and acceptance of its report if it finds he is duly qualified to sit in the House.

"The point involved concerns the rules and precedents of the House. Again and again Speakers and leaders of the House have had occasion to say that the precedents of the House are part of the rules of the House. It is of vital importance that at the opening of this session the House shall commit itself to loyalty to its rules and its precedents. . . . On the very first day I sat in this House, in May of 1919, came up the case of Victor Berger, of Wisconsin. He was charged with being disqualified. The House had him step aside and did not permit him to take the oath. The precedent then brought to attention was that of the Roberts case, where the same procedure had been followed. The House should stand by the precedent. . . . We should follow that particular precedent not alone because it was a precedent but also because it insures justice.

"You have just seen here an example of how legislative justice by a mass works and what happens anywhere in the world

whenever a body of this size attempts to pass upon the merits of any judicial question. You have seen the debate center not upon the question before the House but on the question of guilt or innocence. You have seen Member after Member argue that this man ought to be admitted and Member after Member argue that he ought not to be admitted. A judicial question ought to be decided by judicial processes, by those processes that the House has established as the orderly, safe, prudent, just, right way to handle these matters. So I ask you to stand by the precedents of the House."

On the vote on the substitute resolution (that the oath be administered and the case of final right to a seat be referred to the Elections Committee) it was adopted, 230 to 75.

The initial resolution, as amended, was agreed to, and by unanimous consent, the preamble of the original resolution was stricken ("Whereas, it is charged that Francis H. Shoemaker, a Representative elect to the Seventy-third Congress from the State of Minnesota, is ineligible to a seat in the House of Representatives, and") (p. 139).

The case was one of procedure. It does not seem to have been further considered. The Committee on Elections made no report thereon.

B. Cases where oath was not administered and question was referred to a committee for examination and report; member-elect was eventually sworn in.

I. Disloyalty; pre-Fourteenth Amendment:

KENTUCKY MEMBERS; 40TH CONGRESS, 1ST SESSION, JULY, 1867;
I HINDS' § 448; 7 MEMBERS-ELECT, ALL DEMOCRATS;
THE HOUSE HAD 143 REPUBLICANS, 49 DEMOCRATS

Allegations were made against all seven Members-elect on the grounds of disloyalty (this was before the adoption of the 14th Amendment). Credentials in due form were presented by each.

The House adopted a resolution (67 to 50) referring the credentials of the Members-elect to the Committee on Elections without their being sworn in.

The Committee reported on July 8, 1867, that no person who had been disloyal (i.e., engaged in armed hostility against the Government, or given aid and comfort to its enemies) should be permitted to be sworn in as a Member of the House (H. Rept. 6).

The House then agreed to a resolution authorizing the Committee to inquire whether any of the Members-elect were disqualified.

On December 3, 1867, the Committee reported (2nd Session, 40th Congress, H. Rept. 2).

The report stated in part:

> It is apparent that there must be power in this House to prevent this (seating of disloyal persons), the House being the judge of the qualifications of its Members, of which fidelity to the Constitution is one, and that this end can only be certainly accomplished by the investigation of any specific and apparently well-grounded charge of personal disloyalty made against a person claiming a seat as a Member of this House, before such person is permitted to take the seat. The House concurred in this view of the committee by adopting the resolution under which the committee is now acting. The principle upon which this preliminary investigation was ordered was adopted by Congress when the oath of office to be taken by Members of this House was prescribed by law, and the preliminary investigation of specific and apparently well-founded charges against a person claiming a seat in this House is only an additional mode of attaining the same result sought to be secured by requiring the oath to be taken by all persons who become Members of this House . . . (Act of 1862). . . . But while the committee entertained no doubt that it is the right and duty of this House to turn back

> from its very threshold everyone seeking to enter who has been engaged in armed hostility to the Government, or has given aid and comfort to its enemies during the late rebellion, yet we believe that in our Government the right of representation is so sacred that no man who has been duly elected by the legal voters of his district should be refused his seat upon the ground of his personal disloyalty, unless it is proved that he has been guilty of such open acts of disloyalty that he cannot honestly and truly take the oath prescribed by the Act of July 2, 1862. . . ."

The Committee found that four of the delegation, James B. Beck, Thomas L. Jones, A. P. Grover, and J. Proctor Knott, met the qualifications stated, and submitted a resolution that they be sworn in.

It was adopted by the House and the four persons were sworn in.

The House excluded, without swearing him in, John Young Brown of the delegation for disloyalty, I Hinds' §449; it likewise excluded John D. Young of the delegation, I Hinds' § 451, although during the consideration the Elections Committee minority issued a report supporting the view that the three qualifications set forth in the Constitution were the only ones, and that the 1862 oath statute created an invalid additional one.

In the case of the last member of the Kentucky delegation, L. S. Trimble, it not being proved by clear and satisfactory testimony that he had given aid and comfort to the rebellion, the House declined to exclude him but voted that he be sworn in (I Hinds' § 452). (The allegations involved contraband trade with the enemies of the Government and were found to be too vague and uncertain.)

B. Cases where oath was not administered and question was referred to a committee for examination and report; member-elect was evenutally sworn in.

II. Disloyalty; post-Fourteenth Amendment

R.R. BUTLER, TENNESSEE; FORTIETH CONGRESS, FIRST SESSION
NOVEMBER 21, 1867; REPUBLICAN; THE HOUSE HAD
143 REPUBLICANS, 49 DEMOCRATS,
1 OTHER; I HINDS;
§455

Mr. Butler was asked to step aside before the oath was administered, on the grounds that he had been disloyal to the Government, and there was presented in support of the charge the journal of the Tennessee legislature at the time of the secession acts.

After debate, the House adopted a resolution that Mr. Butler not be sworn in pending an investigation and that his credentials be referred to the Committee on Elections.

(Note: on June 19, 1868, an act was passed by Congress removing the disabilities for office as imposed by section 3 of the 14th Amendment [I Hinds; 455], and he was sworn in.)

BOYDEN v. SHOBER, NORTH CAROLINA; 41ST CONGRESS, 1ST SESSION, 1869; I HINDS' § 456; DEMOCRAT; THE HOUSE HAD 170 REPUBLICANS, 73 DEMOCRATS

Mr. Shober was on the list of Members-elect to the 41st Congress, but was not sworn in nor did he participate in proceedings because of allegations of disloyalty. In 1870, Mr. Shober's disability was relieved by legislation.

B. Cases where oath was not administered and question was referred to a committee for examination and report; member-elect was eventually sworn in.

III. Alleged Immoral Act

JOHN C. CONNER, TEXAS; 41ST CONGRESS, 1ST SESSION,
MARCH 31, 1870; I HINDS' § 465; DEMOCRAT;
THE HOUSE HAD 170 REPUBLICANS, 73 DEMOCRATS.
THIS WAS ESSENTIALLY A CONTESTED ELECTION CASE
(GRAFTON v. CONNOR) BUT THE QUESTION OF QUALIFICATIONS AROSE.

Upon approval of the act admitting Texas to representation in Congress, after the Civil War, a letter from the headquarters of the military district in Texas announcing the result of an election for the House, held Nov. 30, Dec. 1, 2, 3, 1869, was received as the credentials of the Members-elect. It was referred to the Committee on Elections before the Members-elect were sworn in. One was Mr. John C. Conner.

On March 31, 1870, the Committee submitted a resolution that the oath of office be administered to the four Texas Members-elect, but that the right to contest be preserved (i.e., Members-elect be admitted prima facially on credentials).

Rep. Shanks of Indiana proposed an amendment that Mr. Conner not be sworn in and that the contested election case of Grafton v. Conner be referred to the Committee on Elections with instructions to examine and report both as to prima facie and final right.

Representatives Shanks and Butler presented affidavits that Mr. Conner, while an officer of the Army, on January 5, 1868, had "cruelly whipped" and otherwise punished certain Negro soldiers of his command, and that later, on October 23, 1869, in a public speech, he had boasted of the deed and had also stated that he had escaped conviction by a military court by bribing the soldiers with circus tickets so that they would not testify against him.

It was urged that because of bad character he should not be admitted to the oath, although the Committee on Elections had found his credentials regular and sufficient.

During the debate on the resolution, Representative James A. Garfield of Ohio asked:

> Allow me to ask . . . if anything in the Constitution of the United States and the laws thereof . . . forbids that a "moral monster" shall be elected to Congress?

Representative Ebon C. Ingersoll of Illinois replied:

> I believe the people may elect a moral monster to Congress if they see fit, but I believe that Congress has a right to exclude that moral monster from a seat if they see fit.

Representative Henry L. Dawes of Massachusetts, in speaking for the Committee on Elections in the preceding Congress, said (Globe, p. 2325):

> . . . The Committee on Elections of the last Congress had occasion to consider how far it was within their province to consider questions at the threshold, in limine, before a member applying for his seat was sworn in. It arose first on charges brought against members touching their loyalty. The conclusion to which the committee came after very careful examination of this question, and in which they were sustained by the House over and over again, was this: that as to any question which touched the constitutional qualification of a gentleman claiming a seat it was proper that question should be raised at the threshold before he was sworn in. And it was decided by the last House, when any member, upon his responsibility as a member, made any charge against any claimant to a seat that touched his constitutional qualifications, the House, before swearing him in, would refer the question to the proper committee to report on it. Beyond that the Committee of Elections came to the conclusion, and the House sustained them, it was not proper to go. That question of itself was a very delicate one, and of course might be carried to such an extent as to involve great abuse to the rights of persons claiming seats here. But never did that committee ask the House to go one inch beyond the question of the constitutional qualification of a member, and never did this House decide that we had the right to go one inch beyond that question

(Note - However, the case of Smith v. Brown, Kentucky, in the 40th Congress, where the House, in effect, held that there might be established by law qualifications (i.e., disloyalty) other than those required by the Constitution.)

> As to the question whether a gentleman claiming a seat has heretofore behaved in a manner unbecoming a member, I think this is the first time it was ever raised

> on the floor of the House. I know in reference to one gentleman coming from the State of New York--I will not call his name because I desire to make no reflection--there came pouring into the Committee of Elections statements about his conduct, and copies of indictments and other papers of a like character, and that committee directed the chairman to return those papers to the gentleman who had sent them, and to tell them that was a question between the member and his constituents; that if they chose to be represented by this gentleman it was not for the Committee of Elections nor for the House to pass on that question. But, to say upon an ex parte affidavit, taken I do not know when or where, or how prompted, that a man coming here upon a proper certificate shall be stopped at the threshold, and kept out until the question is settled whether his conduct previous to the election has been such as could be commended by us, is going to a very dangerous extent, and I do not think that the House should go to that extent.

The amendment offered by Representative Shanks was voted down without division. The Committee resolution proposing to seat Mr. Conner, among others, was agreed to, and he was sworn in along with the other members of the Texas delegation. (On July 15, 1870, the House, adopting a report from the Committee on Elections, agreed to a resolution declaring Mr. Grafton, the contestant, not entitled to the seat.

C. Cases where oath was not administered and case was referred to a committee for examination and report; member-elect eventually was not sworn in.

I. Crime

EXCLUSION: B. F. WHITTEMORE, 41ST CONG., 2D SESS., 1870;
I HINDS' §464; REPUBLICAN; THE HOUSE HAD
170 REPUBLICANS; 73 DEMOCRATS

Member resigned from House while under investigation for allegedly selling appointments at the Military Academy. He was censured and resigned to escape expulsion. Upon his reelection at the same session, the House refused to seat him, 130 to 76 in favor of resolution of exclusion.

Author of resolution addressed the House as summarized by Hinds:

> Mr. Logan...said he did not presume that the Constitution contemplated expulsion for any mere political reasons, or for anything except a violation of the rules of the House or an infraction of some existing law. He assumed that where the House had the right to expel for violation of its rules or of some existing law it had the same power to exclude a person from its body.... It was right to exclude a man from the House for crime. I Hinds, p. 487.

There was a recommendation that the resolution be referred to committee for study but this apparently was not acted upon.

EXPULSION AND CENSURE: B. F. WHITTEMORE
II HINDS, § 1273

While resolution for expulsion was pending business, the following transpired:

(1) Whittemore was allowed to speak to defend himself, but after obtaining recognition for that purpose yielded to another Member to defend him.

(2) The following day the Speaker received notification that Whittemore had resigned from the House, while Whittemore was addressing the House. The Speaker caused him to suspend his remarks as he was no longer a Member.

(3) After some discussion of what to do with the resolution in view of the resignation, it was laid on the table.

(4) The House then adopted a committee resolution condemning Whittemore as "unworthy of a seat" in the House and of "conduct unworthy of a representative of the people." The resolution carried 137 to 0, 34 not voting.

EXPULSION OR EXCLUSION: CANNON AND CAMPBELL, 47TH CONG., 1ST SESS., 1882; I HINDS' §473

Campbell presented himself with the Governor's certificate of election although Cannon had received 18,568 votes to Campbell's 1,357. The contest was referred to the Committee on Elections.

The Committee report, H. Rept. No. 559, 47th Cong., 1st sess., disposed of various arguments about the Governor's certificate, the report of votes cast, the proof of Cannon's naturalization. Then the report and the views of various individual Members took up the question of whether Cannon could be excluded on the basis of his polygamy. Attached hereto is the text of these views as set out in Hinds.

A Delegate-elect being excluded for disqualification, the House declined to seat the candidate having the next highest number of votes.

An argument that questions affecting qualifications should be instituted in the House alone and not by proceedings under the law of contest.

In 1882, in a sustained case, the major opinion of the Elections Committee inclined to the view that the constitutional qualifications for a Member did not apply to a Delegate.

An elaborate discussion of the status in the House of a Delegate from a Territory.

The question as to whether or not a law of Congress creating Delegates is binding on the House in succeeding Congresses.

Discussion of the effect, in the matter of qualifications of Delegates, of a law extending the Constitution over a Territory.

The third and last question arising is, Was he a polygamist at the time of his election; and if so, is that a disqualification?

On the question of fact there could be no doubt, for he had given the following written admission:

In the matter of George Q. Cannon. Contest of Allen G. Campbell's right to a seat in the House of Representatives of the Forty-seventh Congress of the United States as Delegate from the Territory of Utah.

I, George Q. Cannon, contestant, protesting that the matter in this paper contained is not relevant to the issue, do admit that I am a member of the Church of Jesus Christ of Latter-Day Saints, commonly called Mormons; that in accordance with the tenets of said church I have taken plural wives, who now live with me, and have so lived with me for a number of years, and borne me children. I also admit that in my public addresses as a teacher of my religion in Utah Territory I have defended said tenet of said church as being, in my belief, a revelation from God.

GEO. Q. CANNON.

Therefore there remains the question, Does the practice of polygamy disqualify a Delegate? This was the really important question at issue, both in the committee and in the debates on the floor. And its discussion involved the question of the status of Territorial Delegates as distinguished from the status of Members.

Mr. Calkins, in his views, said:

We are now brought face to face with the question whether this House will admit to a seat a Delegate who practices and teaches the doctrine of a plurality of wives, in open violation of the statute of the United States and contrary to the judgment of the civilized world. There are several clauses in our Constitution which may have some bearing on this subject.

Section 2, Article I, of the Constitution is as follows:

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States," etc.

SECTION 5.

"Each House shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business. * * *"

CLAUSE 2.

"Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with a concurrence of two-thirds, expel a member."

AMENDMENT I, SECTION 1.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press."

ARTICLE IV, SECTION 3, CLAUSE 2.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

These are the provisions of the Constitution which may be held to have some bearing on the question of the qualifications of Delegates.

In the first place, Is a Delegate from a Territory a Member of the House of Representatives within the meaning of the Constitution? The second section of the first article says: "The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors in the most numerous branch in the State legislature." There is no provision in the Constitution for the election of Delegates to the House of Representatives or to the Senate. They are entirely the creature of statute. They are clearly not within the clause of the Constitution last above quoted, for the House is "composed of Members chosen every second year by the people of the several States;" and nothing is said of the Territories. Delegates have never been regarded as Members in any constitutional sense, because their powers, duties, and privileges on the floor of the House, when admitted, are limited. They may speak for their Territories; they may advocate such measures as they think proper; they may introduce bills and serve on committees; but they are deprived of the right to vote. And we doubt whether Congress could clothe them with the right to vote on measures affecting the people of the States or of the Territories, because they do not represent any integral part of the nation, but simply an unorganized territory belonging to the whole people. Hence Delegates are creatures of statute, and it would be competent at any time for the legislative branch of the Government to abolish the office altogether.

The writer of this report goes further than that. He holds that it is incompetent for Congress and the Executive to impose on any future House the right of Delegates to seats with defined qualifications. That is to say, when the several laws were passed giving the Territories the right to this limited representation, those laws were binding only on the lower House, which permitted them to be or made it possible for them to be passed, and were persuasive only to the Houses of future Congresses. For some purposes each House of Congress is a separate, independent branch of the Government. It is made so by the Constitution. For example, each House is the judge of the elections and returns of its own Members, and neither the Executive nor the Senate can interfere with that constitutional prerogative. Each House is independent in its expenditure of its contingent fund, and in the government of its own officers. It is independent in the formation of its own committees, in clothing them with power to take evidence, to send for persons and papers, and to investigate such matters as are within its jurisdiction. Each House is independent in its power to arrest and to imprison, during the session of the body, such contumacious witnesses as refuse to abide its order. In many other instances that may be cited each House acts independently of the other. And with reference to the election of Delegates, who (if they hold any office or franchise at all) can be nothing but agents representing the property and common territory of all the people, it operates only on the lower branch of Congress, for their election extends no right to them to interfere with the business of the Senate or to act as members thereof. This must not be construed into an opinion that the writer holds that the House of Representatives may disregard any law which Congress has the constitutional power to pass. Such laws are as binding upon this House as upon any citizen or court. Nor does the writer of this report mean to be understood that it is not competent for Congress to provide, under the Constitution, for legislative representation for Territories, but it is denied that Congress can bind the House by any law respecting the qualification of a Delegate. It can not affix a qualification by law for a Delegate and bind any House except the one assenting thereto. The qualification of Members is fixed by the Constitution. Hence they may not be added to or taken from by law. But as to Delegates, they are not constitutional officers. Their qualification depends entirely upon such a standard as the body to which they are attached may make. It is urged this means a legal qualification. This is admitted; but that legal qualification is remitted to the body to which the Delegate is attached, because it is the sole judge of that requisite. It is unfettered by constitutional restrictions and can not yield any part of this prerogative to the other branch of Congress or the Executive. If it could, the right to amend would follow, and the House might find itself in the awkward position of having the Senate fixing qualifications to Delegates, or the Executive vetoing laws fixing them, and by this means the power which by the Constitution resides alone in the House would be entirely abrogated.

It is claimed this is an autocratic power. This is admitted. All legislative bodies are autocratic in their powers unless restricted by written constitutions. In this instance there is no restriction.

It is contended that the act of Congress extending the Constitution and laws of the United States over the Territory of Utah, in all cases where they are applicable, extends the constitutional privilege to Delegates and clothes them with membership as constitutional officers of the House. We can not assent to that view. The very language of the act itself only extends the Constitution and laws over the Territory in cases where they are applicable. They can not be applicable to the election of a Delegate; for if they were, then Congress would have no authority to deprive a Delegate of the right to vote. To contend that the applicability of the Constitution in that respect extends to Delegates proves too much. It is clear, therefore, that that clause of the Constitution relative to the expulsion of a Member by a two-thirds vote can not apply to Delegates, because they hold no constitutional office. It is equally clear that the clause of the Constitution relative to elections, returns, and qualifications of Members has no applicability except by parity of reasoning; and we do not dissent from the view that, so far as the qualification of citizenship and other necessary qualifications (except as to age) are concerned, they extend to Delegates as well as to Members. (Sec. 1906, R. S. U. S.) This is made so, probably, by the statute, expressly so to all the Territories except to Utah Territory, and inferentially to that Territory. It follows, as a logical sequence, that the House may at any time, by a majority vote, exclude from the limited membership which it now extends to Delegates from Territories any person whom it may judge to be unfit for any reason to hold a seat as a Delegate.

It can not be said that polygamy can be protected under that clause of the Constitution protecting everyone in the worship of God according to the dictates of his own conscience and prohibiting the passage of laws preventing the free exercise thereof.

It is true that vagaries may be indulged by persons under this clause of the Constitution when they do not violate law or outrage the considerate judgment of the civilized world. But when such vagaries trench upon good morals, and debauch or threaten to debauch public morals, such practice should be prohibited by law like any other evil not practiced as a matter of pretended conscience.

The views which we have just expressed render it unnecessary for us to discuss further the various propositions involved. In the face of this admission of Mr. Cannon we feel compelled to say that a representative from that Territory should be free from the taint and obloquy of plural wives. Having admitted that he practices, teaches, and advises others to the commission of that offense, we feel it our duty to say to the people of that Territory that we will exclude such persons from representing them in this House. In saying this we desire to cast no imputation on the contestant personally, because in his deportment and conduct in all other respects he is certainly the equal of any other person on this floor.

Mr. F. E. Beltzhoover, in his views, presented the question of qualification in a somewhat different light:

The only portion of the Constitution of the United States which refers to the Territories is Article IV, section 3, clause 2, which provides:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This clause of the fundamental law has received the most learned and elaborate consideration by the Supreme Court in Scott v. Sanford (19 Howard, 393, etc.), wherein, after going fully into the whole history of the Territories from the time of the first cession to the Government, it is held that this clause—

"Applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British Government to the old confederation of the States in the treaty of peace. It does not apply to territory acquired by the present Federal Government by treaty or conquest from a foreign nation."

To all other territory it is held that the Constitution does not extend, and can not be extended by Congress, except in so far as Congress may enact the provisions of the Constitution into a part of the organic law of such territory. This has been done in regard to Utah, first by the act of Congress which organized that Territory, and which provides that "the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

The Revised Statutes, sec. 1891, provides in somewhat different language, but of the same purport, that "the Constitution and all laws of the United States which are not locally inapplicable shall," etc.

The Constitution and all the laws of the United States are, therefore, a part of the statute law of the Territory of Utah, so far as they are applicable locally to that Territory.

Now, what was the design of the framers of the Constitution in reference to the territory which they provided for in the clause which we have quoted above? The history of the subject clearly shows that they intended to commit the unorganized territories wholly to the discretion and unlimited power of Congress. This is so decided by the courts in all the cases in which the subject is considered; this was so held in Scott v. Sanford (supra), and Judge Nelson, in Benner v. Porter (9 Howard, 235), says:

"They are not organized under the Constitution nor subject to its complex distribution of the powers of government or the organic law, but are the creatures exclusively of the legislative department, and subject to its supervision and control."

It is held by Judge Story that "the power of Congress over the public Territories is clearly exclusive and universal, and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled." (Story, Constitution, sec. 1328; Rawle, Constitution, p. 237; 1 Kent's Commentaries, p. 243.)

The Supreme Court of the United States, in a very recent case, says: "The power is subject to no limitations." (Gibson v. Chouteau, 13 Wall., 99.)

See also Stacey v. Abbott (1 Am. Law, T. R., 84), where it is held by the supreme court of one of the Territories that they "are not organized under the Constitution; they are exclusively the creatures of Congress."

But there is something more shown by the history of the clause in the Constitution in reference to Territories and by the decisions of the courts thereon. It is clear from both these that it was never intended that the status of the Territories should in any respect approach so near the character and position of sovereign States as to require that whatever agents these Territories might be entitled to on the floor of Congress, should have the status and qualifications of Members of Congress. The Territories in the minds of the framers of the Constitution had none of the rights and attributes of the States. No other parts of the Constitution were made to apply to them except the clause we have quoted. On the contrary, they were spoken of as property, and power was given to Congress to dispose of them as property, and to make all needful rules and regulations respecting them as other property of the United States. They were put in the same category with the other chattels of the Government. There is, therefore, nothing in the Constitution which will justify us in believing in the light of its history that the qualifications of agents who might be appointed to look after the interests of the Territories on the floor of Congress should be the same or even like those of Members of Congress. This is so, we maintain, with regard even to that Territory over which the Constitution extends directly and immediately, because it was within the control of the Government at the time the Constitution was framed. If, therefore, the Constitution did not contemplate the requirement of such qualifications for Delegates as agents of the Territory within its immmediate purview, with much less plausibility can it be contended that it should require them where it is only extended as a part of the statute law. The Constitution clearly puts it in the power of Congress to say at any time and in any way it may see proper what qualifications it will exact of the agents whom as a matter of grace and discretion it permits to come from the Territories into its deliberations, and to sit among its Members. Neither the Senate nor the Executive, nor any other power on earth, has any right to interfere except by permission in fixing the qualifications for admission to the House; and the concurrence and cooperation of the Senate and Executive in the passage of any enactment on the subject can go no further in giving it force and validity than to make it a persuasive rule of action which the House is at liberty to follow or disregard. "Each House shall be the judge of the election, returns, and qualifications of its own members." No law that was ever passed on this subject, which is under the exclusive and unlimited control of Congress, by any former Congress is binding on any subsequent Congress. Each Congress may wholly repudiate all such acts with entire propriety. It is customary to regard them as rules of conduct. This is well illustrated by the doctrine laid down by McCrary in his Law of Elections, section 349, in reference to the laws made to govern contested elections:

"The Houses of Congress, when exercising their authority and jurisdiction to decide upon 'the

election, returns, and qualifications' of Members, are not bound by the technical rules which govern proceedings in courts of justice. Indeed, the statutes to be found among the acts of Congress regulating the mode of conducting an election contest in the House of Representatives are directory only, and are not and can not be made mandatory under the Constitution. In practice these statutory regulations are often varied, and sometimes wholly departed from. They are convenient as rules of practice, and of course will be adhered to unless the House, in its discretion, shall in a given case determine that the ends of justice require a different course of action. They constitute wholesome rules, not to be departed from without cause. It is not within the constitutional power of Congress, by a legislative enactment or otherwise, to control either House in the exercise of its exclusive right to be the judge of the election, returns, and qualifications of its own Members.

"The laws that have been enacted on this subject being therefore only directory and not absolutely binding, would have been more appropriately passed as mere rules of the House of Representatives, since by their passage it may be claimed that the House conceded the right of the Senate to share with it in this duty and power conferred by the Constitution. It is presumed, however, that the provisions in question were enacted in the form of a statute rather than a mere rule of the House, in order to give them more general publicity, etc."

It is also important to observe the wide distinction which Congress has always made between the powers and status of a Member of Congress and a Delegate from a Territory.

A Member of Congress is sent by a State by virtue of its irrefragable right to representation under the Constitution of the United States. This right Congress can not abrogate or control or limit or modify in any way.

A Delegate is an agent of a Territory, sent under the authority or permission of an act of Congress. This right or permission is subject to the merest whim and caprice of Congress. It can be utterly wiped out or modified or changed just as Congress may see proper at any time.

A Member of Congress must have certain qualifications under the Constitution.

A Delegate need have none but what Congress sees fit to provide.

A Member of Congress is the representative and custodian of the political power and interests of a sovereign State, which is itself a factor and part of the Government.

A Delegate has no political power, but is only a business agent of the Territory, for the purest business purposes. He has no right to vote or aid in shaping the policy of the Government in war or peace.

A Member of Congress is an officer named in the Constitution of the United States, and contemplated and provided by the framers thereof at the time of the organization of the Government. He is a constitutional officer.

A Delegate is not a constitutional officer in the remotest sense. There were no Delegates mentioned or thought of by the framers of the Constitution.

A Member of Congress is chosen under section 2, Article I, of the Constitution, which provides that—

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

This specifically and definitely and indubitably fixes how and where and by whom Members of Congress shall be chosen and what qualifications they must imperatively have. "No person shall be a Representative," etc., without these qualifications.

A Delegate is chosen under section 1862 of the Revised Statutes, which provides that—

"Every Territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters of the Territory qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating, but not of voting."

This fully and very clearly provides how Delegates shall be chosen and what power they shall have, but does not exact or provide any qualifications or hint at any. This is the same provision substantially which has been made for Delegates from 1787 down to this time. The provision in the act of July 13, 1787, for the government of the Northwest Territory, is that the joint assembly of that Territory "shall have

authority, by joint ballot, to elect a Delegate to Congress, who shall have a seat in Congress with the right of debating, but not of voting."

These few marked points of distinction between the two offices not only show that the constitutional qualifications for members do not apply to Delegates, but that none of the legislation which has ever been enacted on the subject seems to have been founded on the belief that they did.

CONGRESS HAS ADDED TO THE CONSTITUTIONAL QUALIFICATIONS OF MEMBERS; WHY NOT OF DELEGATES.

But admitting for the purposes of this discussion, what can not be maintained, that the same qualifications which entitle a Member of Congress to admission shall also entitle a Delegate to the same right, and I still hold that Congress has the right and power to say that a polygamist shall not be admitted as a Delegate. Under the high power inherent in every organization on earth to preserve its integrity and existence Congress has the indubitable right to keep out of its councils any person whom it believes to be dangerous and hostile to the Government.

During the war almost the whole Congressional delegation from the State of Kentucky were halted at the bar of the House, and, on the objection of a Member, were not permitted to be sworn until it was ascertained whether they or either of them were guilty of disloyal practices. They had each every qualification usually required by the Constitution; they were duly and regularly elected and returned; they were sent by a sovereign State, holding all her relations in perfect accord with the Federal Government; but the House proceeded to inquire into each case, and not until a reasonable investigation was had were any of them admitted. The committee which had the matter in charge reported, and the House adopted and laid down, the following rule on the subject of all such cases:

"Whenever it is shown by proof that the claimant has, by act of speech, given aid or countenance to the rebellion he should not be permitted to take the oath, and such acts or speech need not be such as to constitute treason technically, but must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."

In the case of John Young Brown, who was among the number, the committee almost unanimously reported against his right to admission on the ground that he had written an imprudent and disloyal letter; nothing more. He had never committed an act of treason. He was never arrested or tried or convicted. He denied all treasonable intent in the letter and made every effort in his power to explain and extenuate his offense. But seven out of the nine members of the Committee on Elections of the Fortieth Congress reported that he "was not entitled to take the oath of office, or to be admitted to the House as a Representative from the State of Kentucky." This report was adopted by the House by a vote of 108 to 43. The minority report in that case made an argument against the action of the majority in almost the same words and on identically the same grounds that the minority of the Committee on Elections occupy in the case under consideration. It was argued that Mr. Brown had all the constitutional qualifications, and that Congress had no right to exact more; that in any event he had never been tried or convicted of treason, and unless convicted of the crime even treason was no disqualification. But Congress then laid down the rule above given, and never abrogated since, that, in addition to the ordinary constitutional requirements, every man must be well disposed and loyal toward the Government before he can be admitted to Congress to aid in forming its policy and controlling its destinies.

The act of July 2, 1862, providing what is known as the iron-clad oath, added a new and marked qualification to those required of Members of Congress prior to that time, and every Member who has taken that oath since has submitted to the exaction of that additional qualification. The distinguished counsel who argued the case of Mr. Cannon before the Committee on Elections felt the force of this act, and the long-continued practice of Congress under it and explained it as a war measure. He said:

"The grounds upon which this law was vindicated, although not stated with much care or precision, are nevertheless clearly enough disclosed by the debates. It was enacted as a war measure. The iron-clad oath was adopted as the countersign which should, in time of war, exclude domestic enemies from the civil administration of the Government, in the same manner and for the same reason that the military countersign was employed to exclude those enemies from the military lines of the army. It was enacted as a measure of defense against an armed enemy in time of war, and was as necessary and as justifiable as any other war measure not specifically marked out in the text of the Constitution."

If Congress could, almost without challenge, provide and add such a distinct and imperative qualification, not for Delegate but for a Member of Congress, in 1862, why may we not in 1882 ask a reasonable additional qualification for a Delegate from a Territory who does not come within the letter or spirit of the Constitution? The act of 1862 was a bold and radical assertion of the doctrine of self-preservation on the part of Congress to maintain its integrity and the purity and loyalty of its counsels. The resolution recommended by the majority of the Committee on Elections only says to the people of Utah, you shall not abuse the privilege of representation which we allowed you on the floor of Congress, by sending as your Delegate a person who adheres to an organization that is hostile to the interests of free government, and whose doctrines and practices are offensive to the masses of the moral people of the great nation we represent.

CONCLUSION.

The following is a summary of the reasons for my concurrence in the resolutions of the majority of the committee:

1. The history of the cession and organization of the Territory, which belonged to the Federal Government at the time of its formation, the history of the clause in the Constitution which relates to that Territory, and the Constitution itself, all show clearly that it was not contemplated or intended that Delegates which might be sent from said Territory, then immediately under the Constitution, should have the same qualifications as Members of Congress.

2. The Constitution does not extend over Utah, except as a part of the statute law provided for that Territory by Congress, and there is, therefore, more reason for holding that the qualifications required for Members of Congress by the Constitution do not extend to Delegates from that Territory than there is in relation to Delegates from Territory immediately under the Constitution.

3. The Constitution not only does not provide that Delegates shall have the same qualifications as Members of Congress, but no law, in almost a century of legislation on the subject, has so provided.

4. There is no reason why the qualifications of Delegates should be the same as those of Members of Congress. Their status and duties and powers are widely different, and their qualifications should be made to conform to those powers and duties, which in case of Delegates are purely of a local and business character.

5. The Territories can only be held and governed by Congress with one single purpose in view, which is to adapt and prepare them for admission as States of the Union. It will hardly be contended that Utah will ever be admitted as a State while polygamy dominates it, or that it is preparing it for admission as a State to hold out to its people the delusive doctrine that a polygamist is not disqualified as a Member of Congress, and therefore that polygamy is no bar to the admission of Utah to the Union.

6. No law fixing the qualifications of Delegates passed by any former Congress would be binding on any subsequent Congress. Each House shall be the judge of the qualifications of its own Members, and, for a much stronger reason, it should be the exclusive judge of the qualifications of the Delegates, which are its creatures and which it admits as matter of its own discretion.

7. Congress has held, from 1862 down to this time, that it has the right to prevent the admission of persons as Members who are hostile to the Government by excluding them on that ground, although they possess all the other qualifications required by the Constitution; with much more propriety, and much less stretch of power, Congress has the right to exclude a Delegate who is not well disposed toward the Government, and who openly defies its laws.

Mr. Ambrose A. Ranney, of Massachusetts, took a different view as to the course of procedure desirable:

2. I agree in the main with the report of the chairman, wherein he says, in substance, that it is clear that the clause of the Constitution relative to elections, returns, and qualifications of Members applies and extends to Delegates, and that substantially the same qualifications (unless it be as to age) are prescribed for both Member and Delegate.

I would add to the concession the assertion that the rule of construction which has been established in regard to Constitution relating to Members, to wit, that other qualifications can not be added to those specified, and none taken away, applies for the same reason to Delegates, when the qualifications for them are prescribed and specified by statute; also, what is undoubted law, that judging of the qualifi-

cations comprehends only a determination of the question whether the Member or Delegate answers the qualifications prescribed as the conditions of his eligibility.

The manifest intent of the Constitution was to fix certain things as unalterable conditions of eligibility, and leave all else for the electors to judge of and determine for themselves. Congress has shown the same intention in statutes erecting Territorial governments, and giving a right of qualified representation. So firmly has the House adhered to this fundamental principle of a representative government that the uniform rule of Congress has been not to entertain questions of alleged bad personal character in judging of what are called "qualifications." In exercising the right of expulsion even the established rule has been not to expel for bad character or even crimes committed before the election and known to the electors at the time. (McCrary, secs. 521, 522, 523.) A few cases connected with the rebellion, and arising out of known disloyalty, are exceptions, but they stand on different grounds. A Delegate's power was so limited and circumscribed that some of the organic acts did not even prescribe citizenship as a condition of eligibility, and Congress held it to be implied, as in the Michigan case. (White's case, Hall and Clark, p. 85.)

It follows that all this committee has to do on this point is to see whether Mr. Cannon was eligible or had the prescribed qualifications.

3. It is sought to avoid the conclusion to which the doctrine of the last point leads, on what I consider most untenable and dangerous grounds. They contravene fundamental principles of law, and a practice which has existed from the beginning of the Government.

Mr. Strong, in 1850, then on Election Committee of the House, since an illustrious judge upon the bench of the United States Supreme Court, has forcibly illustrated and stated that all admissions of Delegates to a seat are by virtue of established laws, and not by grace or within the discretion of the House. (See Smith's case, Messervy's case, Babbitt's case, 1 Bartlett, pp. 109, 117, 116.) Showing that he has been admitted only by right from the formation of the confederation down to the Constitution, and since to this time.

It is said that a Delegate is not named in the Constitution and is not the creature of the same, while a Member is, and that his admission to a seat is ex gratia. The legal purport of the opposite contention, when expressed in words, is: "It is incompetent for Congress and the Executive to impose on any future House the right of a Delegate to a seat;" "they (the acts) were persuasive only to the Houses of future Congresses;" and, "in short, it may be said that Delegates sit in the lower House by its grace and permission, and that it makes no difference whether that permission is expressed in a statute or in a mere resolution of the House. The House can disregard it and refuse to be bound by it, because it affects (somewhat) the organization and membership of the House alone."

It does not change the legal purport, in my judgment, to say Congress had no power to impose upon the House a Delegate "with defined qualifications." I concede that powers could not be conferred upon a Delegate which would infringe upon the constitutional rights of State representation or those of a full Member.

The gist of this doctrine is that a statute which the Constitution authorizes Congress to make may be set aside and made null and void at the pleasure of one branch of the lawmaking power.

If the Constitution authorizes Congress to enact the statutes relating to the Territories, and give a Delegate, duly elected and returned, with the requisite qualifications, a right to a seat and to debate, without a right to vote, no power under heaven can rightfully deprive him of these rights and privileges except Congress itself, by some other statute passed by both Houses.

The doctrine must lead to this: That the statutes organizing the Territories, with such powers and rights, are not authorized by the Constitution, and are void, unless the House sees fit to observe them. But this clause of the Constitution has been sanctioned and sustained as authorizing such things too often to require any discussion of the subject.

How the sitting of a Delegate can be said to infringe upon any constitutional rights of a Member I fail to see. Nobody pretends that the statute attempts to make him a Member in the full sense of that term, and he is not a creature of the Constitution in the exact sense of that term, but he is a creature of a statute which that instrument authorizes, and can subsist and enjoy his rights and privileges without infringing upon the constitutional rights of a Member, and that is enough to sustain the statute as valid; and, if so, it is not merely "persuasive" on all future Houses, but absolutely binding on their consciences, and must be obeyed. It can be disregarded only in the exercise of a power without the right, as a sort of usurpation of authority.

The right of representation on the part of the Territory and of a Delegate to his seat has always been accorded as such, and not as a grace or favor, save as the grace and favor of Congress, and not of one House alone. The doctrine contended for strikes at the very root of the right of representation conferred, and commits the Delegate to the discretion and caprice of the House, instead of the full law-making power.

"The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities, but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution. * * *

"It may do for the Territories what the people under the Constitution of the United States may do for the States." (Waite, Ch. J., in Bank *v.* County of Yankton, 101 U. S., 133.)

It follows that Congress, and Congress alone, can give rights by statute law, adopting and applying, if they please, the principles of the Constitution so far as they can be made applicable, and imposing likewise reciprocal obligations upon every other branch of the Government and the people, so the rights conferred may be guaranteed and enforced.

The section 1891 of the Revised Statutes extends over Territories the laws and Constitution of the United States, except so far as locally inapplicable, and this was designed to give a representative form of government and republican institutions to Territories, which were incipient or prospective States, and give the Constitution effect as law, with reciprocal rights and obligations.

A Delegate becomes in one sense a Member, and yet not properly so called. He is enough so to render applicable in spirit the law in regard to contested elections, which in terms applies only to Members, the clause of the Constitution which makes the House judges of the qualifications, returns, etc., of the Members and the other one which relates to the expulsion of Members. (Maxwell *v.* Cannon, Forty-third Congress.)

The analogy, if justified at all, must be carried and applied all through, and such has been the uniform precedent and practice heretofore. The law should not be changed to meet the strain of a special desire in an individual case.

The discussion in Maxwell *v.* Cannon covers the whole subject-matter, and I adopt its doctrine in the main.

I feel very clear that the organic act of Utah and the Revised Statutes, including sections 1860, 1862, and 1863, are constitutional and valid and as such binding upon the House as much as on anybody else.

Section 1862 reads: "Every Territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters in the Territory qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating, but not of voting."

It is to be observed that the language is, "shall have a seat," etc., and we may as well reject everything else as that.

4. It follows, in my judgment, that Mr. Cannon, being eligible and duly elected and returned, makes out his legal right to a seat under the statutes, and having found thus much his "final right" is determined, subject only to the right which the House has to expel him by a two-thirds vote.

The resolution of reference is not to determine which claimant has the strongest case of favor or grace, but which has the "right," i. e., the legal right, and we must find this much only. If no legal right whatever, then we can find that and say so only under this resolution.

5. The only objection urged is polygamy.

My position on that point is: It is not a disqualification affecting the legal right, but concerns only the dignity of the House, and an investigation into matters which concern that alone must be instituted in the House, and can not be started in a contest made by a contestant; for the contest embraced and committed to the committee under chapter 8, page 17, Revised Statutes, affects only the legal right. (Maxwell *v.* Cannon, adopted by McCrary, S. 528.)

The reason for it is apparent and sound, otherwise any outsider, or pretender, or a real contestant, or contestee, may proceed to take evidence of and spread upon the record any amount of scandal or any charge affecting the moral character—the private character—of any Member of the House.

The House must alone proceed to vindicate its own dignity and character, and does not allow anyone outside of it to start and take evidence for them on that subject unless by special order. Such an investigation is usually referred to a special committee.

The principle involved is of more importance than the seating or unseating of any one Member.

I agree with all that is in the report against polygamy, and in the duty of Congress to obviate by law its evils, so far as is possible, but let it be done by law and not in violation of law.

If Mr. Cannon is eligible under existing law and was duly elected and returned, as we find, we give him his legal right to a seat because the law (sec. 1862) says he shall have it.

We can then exercise our right and expel him under another independent provision of the Constitution upon a proceeding started and conducted in the usual and the legal way. We have his admission, put in under protest, and may act on that if sufficient and if he does not demand a hearing.

Minority views signed by Messrs S. W. Moulton, of Illinois; Gibson Atherton, of Ohio; L. H. Davis, of Missouri; and G. W. Jones, of Texas, took the view that Mr. Cannon was not disqualified, and was entitled to the seat.

The grave and important question as to whether polygamy is a disqualification for the office of Delegate from the Territories we think is settled by the Constitution, the laws, and the uniform practice of the Government since its formation, now nearly one hundred years.

As to who shall hold seats in Congress, there are two distinct provisions of the Constitution:

Section 5, Article I of the Constitution is as follows:

"Each House shall be the judge of the elections, returns, and qualifications of its own Members; and a majority of each shall constitute a quorum to do business. * * *"

This provision in its operation requires only a majority vote.

Such has been the general practice of the House.

The other provision is, "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." (Second clause, sec. 5, Art. I.)

The qualifications of Representatives are prescribed by the second section of the first article of the Constitution: They shall be 25 years of age, seven years a citizen of the United States, and, when elected, be inhabitants of the State in which they shall be chosen.

This committee is to report upon "the prima facie right or the final right of the claimants to the seat as the committee shall deem proper."

It must be conceded, as we have seen, that Cannon has an overwhelming majority of the votes cast for Delegate to Congress.

We think, also, it must be conceded, from the facts evidenced in the case by the record, that Cannon possesses the constitutional qualifications prescribed by second section of Article I of the Constitution.

Mr. Cannon, at the time of his election, was over 25 years of age, had been seven years a citizen of the United States, and was an inhabitant of the Territory in which he was chosen. These are the only qualifications to be considered.

There is no power, State or Federal, under the Constitution by which these qualifications can be changed, enlarged, or modified in any manner.

The authorities upon this question are all one way.

In the report of the Committee on Elections of the House in the Forty-third Congress, in the case of Maxwell against Cannon, and upon this point, the committee say:

"The practice of the House has been so uniform and seems so entirely in harmony with the letter of the Constitution that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified."

This is the rule we think should be applied to the case before the House.

The following are some of the authorities on this point: Story on the Constitution, sections 625–627; the contested-election cases of Fouk *v.* Trumbull and Turney *v.* Marshall from the State of Illinois (1 Bartlett, 168; McCrary, Election Laws, sections 227, 228, 252); Donnelly *v.* Washburn, Forty-sixth Congress; the case of Wittemore in Forty-first Congress; the case of Matteson in the Thirty-fifth Congress; the case of Benjamin G. Harris, are all in point.

But it is said that it may be conceded that the rule above stated as to the power of the House relating to Members is correct, but that a Delegate from the Territories is not a constitutional officer, and does not as to qualification stand upon the same ground as a Member from a State, and that the constitutional provision does not apply to a Delegate; that he is a nondescript, and has no right and can claim no protection under the Constitution.

So far as our research has extended since the formation of the Government we can find no case reported that makes any distinction between the qualifications of a Member from a State and a Delegate from the Territory.

Whenever that question has arisen the rule as to qualifications has been the constitutional provision, and this has been applied to the Delegates from the Territories. The case of James White, decided in 1794, is not an exception.

It may be that in express terms the Constitution does not apply to Territories; but the spirit and reason of the Constitution does apply and establishes a proper standard.

If the constitutional standard is not adopted as to qualifications, then there is no rule for the government of the House as to Delegates.

The House at this session may establish one rule, and the next session may revoke or establish another and different one, and the right of a Delegate would be wholly uncertain.

There are laws that have been passed by Congress touching this subject that give color to the views we present. These laws show that a Delegate, except as to a vote in the House, is put upon the same footing as a Member from a State.

Besides, there has always been the same practice from the formation of the Government as to Delegates and Members by referring their cases to the Committee on Elections, both being treated alike in this respect.

The time, manner, and places of elections of Members of Congress, including Delegates from the Territories, are prescribed and made the same by 14 United States Statutes, sections 25, 26, and 27.

By section 30, Revised Statutes, the oath of office of Members of Congress and Delegates from the Territories is prescribed, and is the same for a Delegate as a Member.

It is important to remark that this statute was passed June 1, 1789, and has ever since been the law.

Section 35, Revised Statutes, provides that Members and Delegates are to be paid the same salary.

Section 51 provides that vacancies in the case of Delegates are to be filled in the same way as in case of Members.

The organic law for Utah, September, 1850, provides:

"That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

This is a law of Congress passed by virtue of the Constitution, and is binding on Congress until repealed.

Now, why is the provision of the Constitution relating to qualification of Members not applicable to the Territories? What reason can be given why it should not apply? What better standard for qualification can be made?

The adoption of the rule establishes uniformity and certainty, the operation is salutary, and its adoption since the formation of the Government demonstrates its advantages and necessity.

The argument is made that a Delegate is not a constitutional officer, and, therefore, not a Member of the House in the sense of the Constitution, and that the House may seat or unseat a Delegate at will.

We believe this is the first time since the formation of the Government that this argument has been advanced.

If a Delegate from a Territory is not a Member by virtue of the Constitution and laws, then what rule or law do you apply to him? Is it the arbitrary will or caprice of the House at each session?

If, as is said, a Delegate is not a Member, certainly you can not invoke any provision of the Constitution as to qualification or expulsion.

The constitutional rule wholly fails upon this theory.

It would follow from this view that the constitutional right of the House to judge of the election, returns, and qualifications of its Members does not apply to Delegates, and therefore the House is without constitutional power in the premises, and that whatever power the House possesses as to Delegates it must be derived from some other source.

The extraordinary and dangerous doctrine is advanced by the majority of the committee—

"That the Delegates sit in the lower House by its grace and permission, and it makes no difference whether that permission is expressed in a statute or mere resolution of the House.

"The House can at any time disregard it and refuse to be bound by it.

"It [Congress] can not affix a qualification by law for a Delegate and bind any House except the one assenting thereto. Congress can not bind the House by any law as to the qualification of a Delegate."

Our opinion is that it is competent for Congress, by a proper statute, to provide for the election in the Territories of Delegates to Congress, under Article IV, section 3, clause 2:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

It has been decided under this article of the Constitution a great many times that it gives Congress the right to legislate for the Territories, and to make such laws and rules as may be for the advantage of the Territories and of the country.

Now, under this clause of the Constitution, if, in the opinion of Congress, in making needful rules and regulations respecting the Territories, it should be necessary to provide for the election of a Delegate from said Territory to this House, and Congress should so provide that said Delegate should have a seat and the right to debate, could the House alone nullify that law and refuse to seat the Delegate?

Why is not the House bound by constitutional laws? What right has the House to nullify and refuse to obey a law it has helped to make?

We have already referred to various laws of Congress making express provisions for the election of Delegates from the Territories, giving them a right to a seat in the House, and generally applying the same rules to Delegates as Members, except Delegates have not the right to vote.

Also, as we have seen, the organic law of Utah adopts the Constitution and laws of the United States, so far as applicable, as a part of that organic law.

Also, section 1891, Revised Statutes, gives the Constitution and laws force and effect in all the Territories, so far as applicable.

The law-making department of the Government has made these various laws in a constitutional way, and until repealed they are binding upon every individual in the land and every department of the Government, including Congress. No one is above the laws in this country.

Certainly one House alone can not repeal a law of Congress nor nullify it by any direct or indirect proceeding. It is absolutely bound by the law.

If Congress has the right to make a law and provide for the election of Delegates to this House, and if the constitutional qualifications do not apply to them, and there is no statute fixing their qualifications, it would seem to follow that the House would be bound to admit as a Delegate under the law such persons as the people of the Territory might elect to represent them, however obnoxious they might be to the House. The people of the Territory being satisfied, no one else can complain.

Suppose Congress should pass a law providing that Cabinet officers should be allowed seats in the House, with the privilege of answering questions put to them relating to the Executive Department, and the other Departments of which they were chief, and with the right to debate.

Then, could the House refuse to permit these officers seats and the privileges accorded to them under the law?

Could the House refuse them a seat on the ground that they were not qualified, and set up some fanciful standard of qualifications not prescribed by the statute?

Could the House exclude them under the law upon the ground that they were heretics, or Mormons, or polygamists—Catholics, Democrats, Republicans, or Greenbackers?

Would not the House be bound to obey the law that had been made by Congress and permit the Cabinet to seats, however offensive they might be personally?

The logic of the majority of the committee is that one House alone could nullify the laws and exclude ad libitum.

In the Forty-third Congress, in the case of Maxwell *v.* Cannon, precisely the same question was involved in that case as in the one before the committee.

The question was stated this way:

"That George Q. Cannon is not qualified to represent said Territory or to hold his seat in the Forty-third Congress, for the reason, as shown by the evidence, that he, on and before the day of the election, in August, 1872, was openly living and cohabiting with four women, as his wives, in Salt Lake City, in Utah Territory, and he is still living and cohabiting with them."

On the question of qualifications, and the effect of making the Constitution a part of the law by act of Congress, the committee say:

"It being conceded that the contestee has these qualifications, one other inquiry only under this head remains, to wit: Does the same rule apply in considering the case of a Delegate as a Member of this House? This question seems not to have been raised heretofore. The act organizing the Territory of Utah, approved September 9, 1850, enacts that the Constitution and laws of the United States are hereby extended over, and declared to be in force in, said Territory of Utah, so far as the same, or any provision thereof, may be applicable. It was said, on the argument, that the Constitution can not be extended over the Territories by act of Congress, and the views of Mr. Webster were quoted in support of this position.

"We do not deem it necessary to consider that question, because it will not be denied that Congress had the power to make the Constitution a part of the statutory law of the Territory as much as any portion of the organic act thereof. For the purposes of this inquiry it makes no difference whether the Constitution is to be treated as constitutional or statutory law. If either, it is entitled to be considered in disposing of this case."

Upon this point there does not seem to have been any difference of opinion in the committee.

The committee, in the same case, referring to the question of polygamy, say:

"The question raised in the specification of contestant's counsel, and above transcribed, is a grave one, and unquestionably demands the consideration of the House. This committee, while having no desire to shrink from its investigation, finds itself confronted with the question of jurisdiction under the order referring the case.

"The Committee on Elections was organized under and pursuant to article 1, section 5, of the Constitution, which declares: 'Each House shall be the judge of the elections, returns, and qualifications of its own Members.' The first standing committee appointed by the House of Representatives was the Committee on Elections. It was chosen by ballot, on the 13th day of April, 1789; and from that time to this, in the vast multitude of cases considered by it, with a few unimportant exceptions, in which the point seems to have escaped notice, the range of its inquiry has been limited to the execution of the power conferred by the above provision of the Constitution.

"What are the qualifications here mentioned and referred to the Committee on Elections? Clearly, the constitutional qualifications, to wit, that the claimant shall have attained the age of 25 years, been seven years a citizen of the United States, and shall be an inhabitant of the State in which he shall be chosen. The practice of the House has been so uniform, and seems so entirely in harmony with the letter of the Constitution, that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified, mentioned in the notice of contest, and hereinbefore alluded to.

"We conclude that the question submitted to us, under the order of the House, comes within the same principles of jurisdiction as if the contestee were a Member, instead of a Delegate."

The minority said:

"It is admitted in the report, and the fact has not been and is not denied, that Mr. Cannon possesses the constitutional qualifications, unless the qualifications of a Delegate in Congress from a Territory differ from the qualifications fixed by the Constitution for a Member of the House. There can be no sufficient reason assigned for the position that the qualifications are any different. * * * The line of demarkation between these two great powers of the House, the power to judge of the elections, returns, and qualifications of its own Members, by a mere majority vote, and the power to expel its Members by a two-thirds vote, is clear and well defined."

The "views" of the minority on the point were further expressed in these words:

"But a graver question than those we have considered is the question whether the House ought, as a matter of policy, or to establish a precedent, to expel either a Delegate or Member on account of alleged crimes or immoral practices, unconnected with their duties or obligations as Members or Delegates, when the Member or Delegate possesses all the qualifications to entitle him to his seat.

"If we are to go into the question of the moral fitness of a Member to occupy a seat in the House, where will the inquiry stop? What standard shall we fix in determining what is and what is not sufficient cause for expulsion? If a number of Members engage in the practice of gaming for money or other valuable thing, or are accused of violating the marital vow by intimate association with four women, three of whom are not lawful wives, or are charged with any other offense, and a majority of the House,

or even two-thirds, expel them, it may be the recognition of a dangerous power and policy. If exercised and adopted by one political party to accomplish partisan ends, it furnishes a precedent which it will be insisted justifies similar action by the opposite party, when they have a majority or a two-thirds majority in the House; and thus the people are deprived of representation, and their Representatives, possessing the necessary qualifications, are expelled for causes outside of the constitutional qualifications of Members, or those which a Delegate must possess, so far as his qualifications are fixed by reason or analogy, or are drawn from the principles of our representative system of government."

It may be stated that the reports, both of the majority and minority, were made by Republicans.

That is a precedent that covers the case before this committee in every particular. It was exhaustively discussed in the committee and in the House, and was adopted by the House by an overwhelming majority, and it stands to-day as the rule and law of the House, unless it shall be reversed.

The issue in that case was sharply made, and the rule established that Delegates from Territories are entitled to the benefit of the constitutional limitations as to qualifications, and that polygamy was not a disqualification.

Now, if the rule that has been established and practiced since the formation of the Government as to qualification for Members and Delegates to the House is to be reversed and a different rule adopted, what standard shall it be?

This House may exclude a Member on a charge of polygamy. The next House may exclude a person elected because he is a heretic or a Catholic or a Methodist, or because he had been charged by his opponent with adultery or some other offense.

Everyone can see that such a rule or license would be dangerous to the rights and liberties of the citizens and an end to republican government.

The party in power would be governed by arbitrary will and caprice alone.

Mr. Cannon, the contestant here, claims in good faith that polygamy is a religious conviction and principle with him and his people, and in this he is entitled to protection under the Constitution.

The people he represents have elected him and are satisfied with him, and this House should be content.

The sixth article of the Constitution provides that—

"No religious test shall ever be required as a qualification for any office of public trust under the United States."

It seems to us that the contestant is entitled to the above provision of the Constitution as a protection. He has been convicted of no crime and there is no law on the statute book that disqualifies him as a Delegate.

On the majority view that Mr. Cannon was disqualified and should be excluded another question arose as to whether or not Mr. Campbell should be admitted to the seat. The majority of the committee took the view that as he had only a minority of the votes he could not be admitted under the American practice.

The question was debated at length on April 18 and 19, 1882,[1] the main point at issue being the status of a Delegate in reference to qualifications. On the latter day the resolution of the minority declaring Mr. Cannon elected and entitled to the seat was offered as a substitute for the majority resolutions and was disagreed to—yeas 79, nays 123.

Then the resolutions of the majority were agreed to without division,[2] as follows:

Resolved, That Allen G. Campbell is not entitled to a seat in this Congress as a Delegate from the Territory of Utah.

Resolved, That George Q. Cannon is not entitled to a seat in this Congress as a Delegate from the Territory of Utah.

Resolved, That the seat of the Delegate from the Territory of Utah be, and the same hereby is, declared vacant.

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[1] Record, pp. 3001, 3045–3075. [2] Journal, pp. 1072–1074.

C. Cases where oath was not administered and case was referred to a committee for examination and report; member-elect eventually was not sworn in

II. Crime, disloyalty

BRIGHAM H. ROBERTS, UTAH; 56TH CONGRESS, 1ST SESSION, 1899-1900; I HINDS' §§ 474-480; DEMOCRAT; THE HOUSE HAD 185 REPUBLICANS, 163 DEMOCRATS, 9 OTHERS

In this case the House declined to permit the oath to be administered to Mr. Roberts, pending an examination of his qualifications by a 9-member special committee. The select committee was composed of 6 Republicans and 3 Democrats.

474. The case of Brigham H. Roberts, in the Fifty-sixth Congress.

The House declined to permit the oath to be administered to Brigham H. Roberts pending an examination of his qualifications by a committee.

In 1899 a Member who challenged the right of a Member-elect to be sworn did so on his responsibility as a Member and on the strength of documentary evidence.

In 1899 a Member-elect, challenged as he was about to take the oath, stood aside on request of the Speaker.

The House, by unanimous consent, deferred until after the completion of the organization the question of Brigham H. Roberts's right to take the oath.

The right of Brigham H. Roberts to take the oath and his seat being under consideration, he was permitted to speak, by unanimous consent.

In 1899 the House referred the case of Brigham H. Roberts to a committee, with directions to report on both the prima facie and final right.

In the case of Brigham H. Roberts the committee reported at one and the same time on both the prima facie and final right.

On December 4, 1899,[1] at the time of the organization of the House, and while the swearing in of the Members was proceeding, the State of Utah was called. Thereupon Mr. Robert W. Tayler, of Ohio, said:

Mr. Speaker, I object to the swearing in of the Representative-elect from Utah and to his taking a seat in this body. I do so, Mr. Speaker, on my responsibility as a Member of this House, and because specific, serious, and apparently well-grounded charges of ineligibility are made against him. A transcript of the proceedings of court in Utah evidences the fact that the claimant was in 1889 convicted, or that he pleaded guilty, of the crime of unlawful cohabitation. Affidavits and other papers in my possession indicate that ever since then he has been persistently guilty of the same crime, and that ever since then he has been and is now a polygamist. If this transcript and these affidavits and papers tell the truth, the Member-elect from Utah is, in my judgment, ineligible to be a Member of this House of Representatives both because of the statutory disqualification created by the Edmunds law and for higher and graver and quite as sound reasons. I ought also to say, in addition to what I have just said, that I have in my possession a certified copy of the court record under which the claimant to this seat was supposed to be naturalized, and that eminent counsel assert that if that be the record in the case there is grave doubt if the claimant is a citizen of the United States. I offer and express no opinion upon that proposition.

Mr. Speaker, if it were possible to emphasize the gravity of these charges and of the responsibility that is at this moment imposed upon this House, we will find that emphasis in the memorials, only a small part of which could be physically cared for in this Hall, but all of which I now present to the House, from over 7,000,000 American men and women, protesting against the entrance into this House of the Representative-elect from Utah.

The Speaker requested the Member-elect from Utah to step aside until the remainder of the Members-elect were sworn in.

Then Mr. Tayler offered this resolution:

Whereas it is charged that Brigham H. Roberts, a Representative-elect to the Fifty-sixth Congress from the State of Utah, is ineligible to a seat in the House of Representatives; and

Whereas such charge is made through a Member of this House, on his responsibility as such Member and on the basis, as he asserts, of public records, affidavits, and papers evidencing such ineligibility:

Resolved, That the question of the prima facie right of Brigham H. Roberts to be sworn in as a Rep-

[1] First session Fifty-sixth Congress, Record, p. 5; Journal, p. 6.

resentative from the State of Utah in the Fifty-sixth Congress, as well as of 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; and until such committee shall report upon and the House decide such question and right the said Brigham H. Roberts shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath in relation to the subject-matter of this resolution.

By unanimous consent the consideration of the resolution was postponed until after the organization of the House had been completed and the President's message had been received and read.[1]

On December 5,[2] the resolution being considered, Mr. James D. Richardson, of Tennessee, offered the following amendment in the nature of a substitute:

Whereas Brigham H. Roberts, from the State of Utah, has presented a certificate of election in due and proper form as a Representative from said State: Therefore, be it

Resolved, That without expressing any opinion as to the right or propriety of his retaining his seat in advance of any proper investigation thereof, the said Brigham H. Roberts is entitled to be sworn in as a Member of this House upon his prima facie case.

Resolved further, That when sworn in his credentials and all the papers in relation to his right to retain his seat be referred to the Committee on the Judiciary, with instructions to report thereon at the earliest practicable moment.

During the debate Mr. Roberts, by unanimous consent, addressed the House.

On a division the amendment was disagreed to—59 ayes, 247 noes. The resolution was then agreed to—304 yeas, 32 nays.

The Speaker appointed the following special committee: Robert W. Tayler, of Ohio; Charles B. Landis, of Indiana; Page Morris, of Minnesota; R. H. Freer, of West Virginia; Charles E. Littlefield, of Maine; Smith McPherson, of Iowa; David A. DeArmond, of Missouri; Samuel W. T. Lanham, of Texas; Robert W. Miers, of Indiana.

The committee reported[3] on January 20, 1900, the majority holding that Mr. Roberts ought not to have a seat in the House and declaring his seat vacant. As to the prima facie right the committee say:

Upon this question little need be said except what is hereafter said in relation to the final right to a seat. The questions are inextricably interwoven, and for convenience the main body of authority against his prima facie right to be sworn in is presented in the argument made against his final right to a seat.

Both Houses of Congress have in innumerable instances exercised the right to stop a Member-elect at the threshold and refuse to permit him to be sworn in until an investigation had been made as to his right to a seat. In some cases the final right was accorded the claimant; in many cases it was denied.

This question, as we veiw it, is always to be answered from the standpoint of expediency and propriety. The inherent right exists of necessity. The danger of disorder and of blocking the way to an organization vanishes in veiw of the proper procedure. The most strenuous objection is made by those who imagine, for instance, that if the person whose name was first called should be objected to, he might refuse to stand aside until the remaining Members were sworn in. The claim is made that this must inevitably result in confusion and demoralization, and in furnishing an opportunity for an arbitrary and unjust exercise of power on the part of the House.

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[1] Mr. Roberts did not vote on the roll call which occurred after this action took place. His name was stricken from the roll and not again called.

[2] First session Fifty-sixth Congress, Record, pp. 38–53; Journal, p. 34.

[3] House Report No. 85, first session Fifty-sixth Congress.

The answer to this is that every person holding a certificate, whose name is on the Clerk's roll, where it is placed by operation of law, is entitled to participate in the organization of the House, whether sworn in or not. Such is the effect and the only effect of the certificate. If the Members-elect, other than the person objected to, desire so to do they can prevent his being sworn in. This lodges no more power in the majority, however arbitrary it may be, than that majority always has, whether on the day of the organization or a week or a month thereafter.

The fear that injustice may be done by it in time of great party excitement is not justly grounded in theory, nor has it occurred in practice; while on the other hand injustice has often occurred in the unseating of Members in case of contested elections. It is always, whether at the threshold or after the House is fully organized, a question of the power of the majority. It is no more dangerous or disorganizing in the one instance than in the other. There can be no injustice done when every man holding a certificate, whether sworn in or not, is entitled to vote for a Speaker and upon the right of every other Member-elect to be sworn in.

If, by way of illustration, Mr. Roberts had been the first person whose name was called, and he had objected to standing aside, the House, for the purpose of organization, and for the purpose of voting upon the question as to whether he should then be sworn in, would be completely organized, and every other Member present, although not one of them had been sworn in, would be entitled to vote upon that question. This, it seems to us, dissolves every imagined difficulty and permits the easy organization of the House.

If every individual Member had been objected to, seriatim, the only objectionable result would have been the inconvenience and delay involved in the time necessary to vote upon all the cases.

Judge McCrary's statement (sections 283 and 284 in his work on Elections) is a sound and correct declaration of the law applicable to the right of the House to compel a Member who is objected to to stand aside, and not permit him to be sworn in until his case is investigated. It is as follows:

"If a specific and apparently well-grounded allegation be presented to the House of Representatives of the United States that a person holding a certificate of election is not a citizen of the United States, or is not of the requisite age, or is for any other cause ineligible, the House will defer action upon the question of swearing in such person until there can be an investigation into the truth of such allegations.

"It is necessary, however, that such allegations should be made by a responsible party. It is usually made, or vouched for, at least, by some Member or Member-elect of the House. It is to be presented at the earliest possible moment after the meeting of the House for organization, and generally at the time that the person objected to presents himself to be sworn in. The person objected to upon such grounds as these is not sworn in with the other Members, but stands aside for the time being, and the House, through its committee, will with all possible speed proceed to inquire into the facts.

"The certificate of election does not ordinarily, if ever, cover the grounds of the due qualifications of the person holding it. It may be said that by declaring the person duly elected the certificate by implication avers that he was qualified to be elected and to hold the office. But it is well known that canvassing officers do not in fact inquire as to the qualifications of persons voted for; they certify what appears upon the face of the returns and nothing more."

This is not quoted as being authoritative in itself, but because it is an exact statement of what the precedents and authorities on that subject clearly disclose.

The minority of the committee, Messrs. Littlefield and De Armond, filed views in opposition, holding that Mr. Roberts had the constitutional right to take the oath of office and be admitted to his seat on his prima facie right.[1]

475. The case of Brigham H. Roberts, continued.

In the investigation of the qualifications of Brigham H. Roberts, the committee permitted his presence and suggestions during discussion of the plan and scope of the inquiry.

Witnesses were examined under oath and in the presence of Brigham H. Roberts during the committee's investigation of his qualifications.

[1] House Report No. 85, Part II, first session Fifty-sixth Congress, pp. 53–77.

In considering the qualifications of Brigham H. Roberts the committee tendered to him the opportunity to testify in his own behalf.

The committee also state in regard to the method of procedure:

The committee met shortly after its appointment, and in Mr. Roberts's presence discussed the plan and scope of its inquiry. Mr. Roberts submitted certain motions and supported them by argument, questioning the jurisdiction of the committee and its right to report against his prima facie right to a seat in the House of Representatives. The determination of these questions was postponed by the committee, to be taken up in the general consideration of the case.

Subsequently certain witnesses appeared before the committee and were examined under oath, in the presence of Mr. Roberts and by him cross-examined, relating to the charge that he was a polygamist. This testimony has been printed and is at the disposal of the Members of the House.

The committee fully heard Mr. Roberts and gave him opportunity to testify if he so desired, which he declared he did not wish to do.[1]

476. The case of Brigham H. Roberts, continued.

In a sustained report in 1900 the majority of the committee favored the exclusion and not the expulsion of a Member-elect admitted to be engaged in practice of polygamy.

Discussion of the power of expulsion under the Constitution.

May the House expel a Member-elect before he is sworn in?

Preliminary to the discussion the committee agreed unanimously on the following finding of facts:

We find that Brigham H. Roberts was elected as a Representative to the Fifty-sixth Congress from the State of Utah and was at the date of his election above the age of 25 years; that he had been for more than seven years a naturalized citizen of the United States and was an inhabitant of the State of Utah.

We further find that about 1878 he married Louisa Smith, his first and lawful wife, with whom he has ever since lived as such, and who since their marriage has borne him six children.

That about 1885 he married as his plural wife Celia Dibble, with whom he has ever since lived as such, and who since such marriage has borne him six children, of whom the last were twins, born August 11, 1897.

That some years after his said marriage to Celia Dibble he contracted another plural marriage with Margaret C. Shipp, with whom he has ever since lived in the habit and repute of marriage. Your committee is unable to fix the exact date of this marriage. It does not appear that he held her out as his wife before January, 1897, or that she before that date held him out as her husband, or that before that date they were reputed to be husband and wife.

That these facts were generally known in Utah, publicly charged against him during his campaign for election, and were not denied by him.

That the testimony bearing on these facts was taken in the presence of Mr. Roberts, and that he fully cross-examined the witnesses, but declined to place himself upon the witness stand.

The examination of the law and the precedents applicable to the facts stated above involved an examination of several subjects:

1. As to whether the proper remedy should be exclusion or expulsion.

The majority of the committee held:

The objection is made to the refusal to admit Roberts that the Constitution excludes the idea that any objection can be made to his coming in if he is 25 years of age, has been seven years a citizen of the United States, and was an inhabitant of Utah when elected, no matter how odious or treasonable or criminal may have been his life and practices.

[1] The meetings of the committee during this examination were open and not secret.

To this we reply:

1. That the language of the constitutional provision, the history of its framing in the Constitutional Convention, and its context clearly show that it can not be construed to prevent disqualification for crime.

2. That the overwhelming authority of text-book writers on the Constitution is to the effect that such disqualification may be imposed by the House, and no commentator on the Constitution specifically denies it. Especial reference is made to the works of Cushing, Pomeroy, Throop, Burgess, and Miller.

3. The courts of several of the States, in construing analogous provisions, have with practical unanimity declared against such narrow construction of such constitutional provisions.

4. The House of Representatives has never denied that it had the right to exclude a Member-elect, even when he had the three constitutional requirements.

5. In many instances it has distinctly asserted its right so to do in cases of disloyalty and crime.

6. It passed in 1862 the test-oath act, which imposed a real and substantial disqualification for membership in Congress, disqualifying hundreds of thousands of American citizens. This law remained in force for twenty years, and thousands of Members of Congress were compelled to take the oath it required.

7. The House in 1869 adopted a general rule of order, providing that no person should be sworn in as a Member against whom the objection was made that he was not entitled to take the test oath, and if upon investigation such fact appeared, he was to be permanently debarred from entrance.

The interesting proposition is made that the claimant be sworn in and then turned out. Upon the theory that the purpose is to permanently part company with Mr. Roberts, this is a dubious proceeding. Such action requires the vote of two-thirds of the Members. We ask if such a vote is possible or right, in view of the following observations.

The expulsion clause of the Constitution is as follows:

"Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member."

No lawyer can read that provision without raising in his own mind the question whether the House has any power to expel, except for some cause relating to the context. The ablest lawyers, from the beginning of the Republic, have so insisted and their reasoning has been so cogent that these propositions are established, namely:

1. Neither House of Congress has ever expelled a Member for acts unrelated to him as a Member or inconsistent with his public trust and duty as such.

2. Both Houses have many times refused to expel where the guilt of the Member was apparent; where the refusal to expel was put upon the ground that the House or Senate, as the case might be, had no right to expel for an act unrelated to the member as such, or because it was committed prior to his election.

The majority then proceed to quote and comment on the cases of Humphrey Marshall, John Smith, and William N. Roach in the Senate; and those of O. B. Matteson, Oakes Ames James Brooks, George Q. Cannon. and Schumacher and King in the House.

After commenting on the bearing of these cases, the majority continue:

If there is any fact apparent in this case it is that the constituents of Mr. Roberts knew all about him before his election.

Can there be room to doubt the proper action of the House? Is it prepared to yield up this salutary power of exclusion? Will it declare itself defenseless and ridiculous?

Nor are those who assert that expulsion is the remedy necessarily barred from voting for the resolution declaring the seat vacant. He must, indeed, be technical and narrow in his construction of the Constitution who will not admit that if a vote to declare the seat vacant is sustained by a two-thirds majority the Constitution is substantially complied with. He may not agree with the committee that a mere majority can exclude, but he can reserve the right to make the point of order that the resolution is not carried if two-thirds do not vote for it.

Recurring again in their report to the right to expel, the majority say:

Upon this alternative proposition that the proper method of procedure is to permit the claimant to be sworn in, and then, if a two-thirds vote can be obtained to expel him, we desire to call attention first of all to what Story says on that subject, section 837:

"The next clause is, 'Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.' No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power, and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior or disobedience to those rules. And as a Member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence of clamor, the power to expel for very aggravated misconduct was also indispensable, not as a common but as an ultimate redress for the grievance."

And again, section 838:

"What must be the disorderly behavior which the House may punish, and what punishment other than expulsion may be inflicted, do not appear to have been settled by any authoritative adjudication of either House of Congress. A learned commentator supposed that Members can only be punished for misbehavior committed during the session of Congress, either within or without the walls of the House, though he is also of opinion that expulsion may be inflicted for criminal conduct committed in any place."

And after a reference to the Blount case Story says:

"It seems, therefore, to be settled by the Senate upon full deliberation that expulsion may be for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Senator."

On the subject of expulsion, Rawle says, second edition, page 48:

"Both the Senate and the House of Representatives possess the usual power to judge of the elections and qualifications of their own Members, to punish them for disorderly behavior, which may be carried to the extent of expulsion, provided two-thirds concur. It had not been yet precisely settled what must be the disorderly behavior to incur the punishment, nor what kind of punishment is to be inflicted. * * *"

Paschal on the Constitution, page 87:

"It seems to be settled that a Member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Member."

We do not need to call particular attention to the phraseology of the constitutional provision, nor do we think it very important to consider the evolution, from the standpoint of punctuation, through which that provision went in the constitutional convention. It now appears as following in the same sentence as the provision for disorderly behavior, with only the rhetorical separation of a comma from it.

It thus appears that the language of the provision for expulsion, in the view of the ablest commentators, furnishes clear and cogent reasons for its construction, and that neither House ought to expel for any cause unrelated to the trust or duty of a Member.

This has been the uniform practice of both Houses of Congress.

The case of Hiss *v.* Bartlett (3 Gray, 468) is cited as showing the unlimited power of a legislative body to expel.

A casual reading of this case, which a careful reading confirms, will show that it directly sustains the position of the majority.

As there was no constitutional provision in Massachusetts respecting expulsion, the legislature of that State was, of course, clothed with all the powers incident to expulsion which are inherent in a legislative body whose powers are not limited by a constitution.

In addition to that, Hiss was expelled on the ground that his "conduct on a visit to Lowell, as one of a committee of the house, was highly improper and disgraceful, both to himself and to the house of which he was a member."

Everything said by the court had relation to such a state of facts. The case is one of expulsion for gross misconduct as a member and in the performance of his duty as a member.

Neither House has ever expelled a Member for any cause unrelated to the trust or duty of a Member.

Both Houses have refused to expel where the proof of guilt was clear, but where the offense charged was unrelated to the trust or duty of a Member.

Again the majority review the precedents in the House and Senate, including the case of Herbert in the Thirty-fourth Congress.

The minority views, after discussing the cases of Matteson in the House and Smith in the Senate, say:

The Matteson case was in 1858. With the exception of a suggestion that a case had been decided in Massachusetts, the purport of which was not stated, no reference was made to a leading Massachusetts case. The opinion of the court in that case, an authoritative construction of the clause of the constitution under which they were acting, was written by Chief Justice Shaw, conceded to be one of the greatest judges that ever sat in any court in any land at any time. The report containing it was published in 1857. It is the only case which we have been able to find where the court has had occasion, with authority, to determine this precise question. The constitution of Massachusetts contained no provision authorizing the expulsion of a member of the house of representatives. Joseph Hiss was expelled by the house upon the ground that his conduct on a committee at Lowell "was highly improper and disgraceful, both to himself and to this body of which he is a member." This was not disorderly conduct in the house, and it is significant that the facts that made it "improper and disgraceful" were not disclosed by the case.

Hiss, after his expulsion, was arrested at the instance of one of his creditors on mesne process and committed to jail. He brought a petition for habeas corpus on the ground that he was a member of the house of representatives, and as such privileged from arrest. This raised the precise question of the legality of his expulsion, and speaking through Chief Justice Shaw, the court, among other things, said:

"The question is whether the house of representatives have the power to expel a member."

After adverting to the fact that the constitution did not in terms authorize expulsion, he says:

"There is nothing to show that the framers of the constitution intended to withhold this power. It may have been given expressly in other States, either ex majori cautela, or for the purpose of limiting it, by requiring a vote of more than a majority."

In the Constitution of the United States it was given evidently "for the purpose of limiting it," as a two-thirds vote is required.

Again:

"The power of expulsion is a necessary and incidental power, to enable the house to perform its high functions, and is necessary to the safety of the State. It is a power of protection. A member may be physically, mentally, or morally, wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent and disorderly, or in the habit of using profane, obscene, and abusive language. It is necessary to put extreme cases to test a principle.

"If the power exists, the house must necessarily be the sole judge of the exigency which may justify and require its exercise."

After having fully examined the law and practice of Parliament, he says:

"But there is another consideration, which seems to render it proper to look into the law and practice of Parliament to some extent. I am strongly inclined to believe, as above intimated, that the power to commit and to expel its Members was not given to the House and Senate, respectively, because it was regarded as inherent, incidental, and necessary, and must exist in every aggregate and deliberative body, in order to the exercise of its functions, and because without it such body would be powerless to accomplish the purposes of its constitution; and therefore any attempt to express or define it would impair rather than strengthen it. This being so, the practice and usage of other legislative bodies exercising the same functions under similar exigencies and the reason and grounds, existing in the nature of things, upon which the rules and practice have been founded, may serve as an example and as some guide to the adoption of good rules, when the exigencies arise under our Constitution.

"But independently of parliamentary custom and usages, our legislative houses have the power to protect themselves, by the punishment and expulsion of a Member.

"'It is urged that this court will inquire whether the petitioner has been tried. But if the House have jurisdiction for any cause to expel, and a court of justice finds that they have in fact expelled--'"

He then held that their action was conclusive, and dismissed the petition. (Hiss *v.* Bartlett, 3 Gray, 468.)

It is instructive on this point to note that this paragraph of the Constitution, as originally drawn, read:

"Each House may determine the rules of its proceedings; may punish its Members for disorderly behavior; and may expel a Member;" making three distinct clauses separated by semicolons.

This extract from the records of the debates in the Federal Convention shows clearly why the two-thirds provision was inserted in the expulsion clause:

"Mr. Madison observed that the right of expulsion (art. 6, sec. 6) was too important to be exercised by a bare majority of a quorum; and, in emergencies of faction, might be dangerously abused. He moved that "with the concurrence of two-thirds," might be inserted between "may" and "expel."

"Mr. Randolph and Mr. Mason approved the idea.

"Mr. Gouverneur Morris. This power may be safely trusted to a majority. A few men, from factious motives, may keep in a Member who ought to be expelled.

"Mr. Carroll thought that the concurrence of two-thirds, at least, ought to be required.

"On the question requiring two-thirds, in cases of expelling a Member, ten States were in the affirmative; Pennsylvania divided."

Article 6, sec. 6, as thus amended, was then agreed to, nem con. (Madison Papers, Vol. V, p. 406.)

While we think this Hiss case establishes beyond successful controversy the power of expulsion as discretionary and unlimited, it is proper to note that no decided case or elementary writer militates against it. We give all that we have found on the question.

In discussing this question the court, in State *v.* Jersey City (25 N. J. L., 539), said:

"The power vested in the two Houses of Congress by the Constitution, article 1, section 5, paragraph 2, is in different phraseology; it is, that "each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." Under this power, the Senate in 1797 expelled a Member of that body for an offense not committed in his official character as a Member, nor during a session of Congress, nor while the Member was at the seat of government. (Blount's case, Story's Commentaries on the Constitution, ch. 12, sec. 836.) But it is not clear that the power to expel is limited by the Constitution to the cause of disorderly behavior.

Evidently without having in mind the accurate use of the term "qualification" as used in the Constitution, the court, in State ex rel. *v.* Gilmore (20 Kansas, 554), said:

"The Constitution declares (art. 2, sec. 8) that 'Each House shall be judge of the elections, returns, and qualifications of its own Members.' This is a grant of power, and constitutes each House the ultimate tribunal as to the qualifications of its own Members. The two Houses acting conjointly do not decide. Each House acts for itself and by itself, and from its decision there is no appeal, not even to the two Houses. And this power is not exhausted when once it has been exercised and a Membe admitted to his seat. It is a continuous power and runs through the entire term. At any time and at all times during the term of office each House is empowered to pass upon the present qualifications of its own Members."

Story says:

"And as a Member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamor, the power to expel for very aggravated misconduct was also indispensable, not as a common, but as an ultimate redress for the grievance. But such a power, so summary and at the [same] time so subversive of the rights of the people, it was foreseen, might be exerted for mere purposes of faction or party, to remove a patriot or to aid a corrupt measure; and it has, therefore, been wisely guarded by the restriction that there shall be a concurrence of two-thirds of the Members to justify an expulsion. * * *

"In July, 1797, William Blount was expelled from the Senate for 'a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator.' The offense charged against him was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British Government among the Indians. It was not a statutable offense, nor was it committed in his official character; nor was it committed during the session of Congress, nor at

the seat of government. Yet, by an almost unanimous vote he was expelled from that body; and he was afterwards impeached (as has been already stated) for this, among other charges. It seems, therefore, to be settled by the Senate, upon full deliberation, that expulsion may be for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Senator." (Story on the Constitution, vol. 1, p. 607.)

Paschal states:

"It seems to be settled that a Member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Member. (Blount's Case, 1 Story Const., sec. 838; Smith's Case, 1 Hall's L. J., 459; Brook's Case, for assaulting Senator Sumner in the Senate Chamber, for words spoken in debate.) It extends to all cases where the offense is such, as in the judgment of the House, unfits him for parliamentary duties. (Paschal's Annotated Constitution, p. 87, par. 49.)

"It has not yet been precisely settled what must be the disorderly behavior to incur punishment, nor what kind of punishment is to be inflicted; but it can not be doubted that misbehavior out of the walls of the House or within them, when it is not in session, would fall within the meaning of the Constitution. Expulsion may, however, be founded on criminal conduct committed in any place, and either before or after conviction in a court of law." (Rawle on the Constitution, 2d ed., 47.)

Cooley is specific:

"Each House has also power to punish Members for disorderly behavior, and other contempts of its authority, as well as to expel a Member for any cause which seems to the body to render it unfit that he continue to occupy one of its seats. This power is generally enumerated in the Constitution among those which the two Houses may exercise, but it need not be specified in that instrument, since it would exist whether expressly conferred or not. It is 'a necessary and incidental power to enable the House to perform its high functions, and it is necessary to the safety of the state. It is a power of protection. A Member may be physically, mentally, or morally wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language.' And, 'independently of parliamentary customs and usages, our legislative houses may have the power to protect themselves by the punishment and expulsion of a Member,' and the courts can not inquire into the justice of the decision, or even so much as examine the proceedings to see whether or not the proper opportunity for defense was furnished. (Cooley's Constitutional Limitations, pp. 159, 160.)

"Since there has been repeated occasion to take steps against Members of each House under each of these two clauses, and since the majority has never taken this standpoint, it may now be regarded as finally settled that that interpretation is correct which is the broader and at the same time according to ordinary speech, unquestionably the more natural one. Both Houses of Congress must have been granted every power needed to guard themselves and their Members against any impropriety on the part of a Member, and to preserve their dignity and reputation among the people. It is wholly for them to say what conduct they are to regard as dishonorable enough to require expulsion. An appeal from their decision lies only to the court of public opinion, a court which brings in its verdict at the elections. (Von Holst's Constitutional Law of the United States, 102.)

"The power of expulsion is unlimited, and the judgment of a two-thirds majority is final. (Pomeroy on Constitutional Law, p. 139, 1895.)

"It seems necessary also to remark that a Member may be expelled, or discharged from sitting, as such, which is the same thing in milder terms, for many causes, for which the election could not be declared void. (Cushing, Law and Practice Legislative Assemblies, p. 33, sec. 84.)

"The power to expel a Member is naturally and even necessarily incidental to all aggregate and especially all legislative bodies; which, without such power, could not exist honorably, and fulfill the object of their creation. In England this power is sanctioned by continued usage, which, in part, constitutes the law of Parliament. (Ibid., p. 251, sec. 625.)

"Blount was expelled from the Senate for an offense inconsistent with public duty, but it was not for a statutory offense, nor was it in his official character, nor during the session of Congress, nor at the seat of government; the vote of expulsion was 25 to 1.

"The motion to expel a Member may be for disorderly behavior, or disobedience to the rules of the House in such aggravated form as to show his unfitness longer to remain in the House, and the cases above cited, as well as the reason of the provision, would justify the expulsion of a Member from the House

where his treasonable and criminal misconduct would show his unfitness for the public trust and duty of a Member of either House. But expulsion, which is an extreme punishment, denying to his constituency the right to be represented by him, can only be inflicted by the concurrence of two-thirds of the House, and not by a bare majority only. (Citing Story on the Constitution, sec. 837; Tucker on the Constitution, p. 429.)

"It has since been held by the House of Representatives that a Member duly elected could not be disqualified for a cause not named in the Constitution, such as immorality, and that the remedy in such a case, if any, was expulsion. The distinction between the right to refuse admission and the right of expulsion upon the same ground is important, since the former can be done by a majority of a quorum, whereas expulsion requires the vote of two-thirds. The question can not be said to have been authoritatively decided. (Foster on the Constitution, p. 367.)

Mr. Foster's attention does not appear to have been directed to the case of Hiss *v.* Bartlett, as it is in point on his doubt if the doubt relates to the power of expulsion; he does not refer to it.

It is proper to observe that the determinations of the court and the opinions of eminent legal authors, unexcelled in reputation and learning, are entitled upon these propositions to great weight, as they are in every instance the result of careful, dispassionate, and disinterested research and sound reasoning, unaffected by considerations that must necessarily have been involved in legislative precedents. The two-thirds limitation upon the right to expel not only demonstrates the wisdom of the fathers, but illustrates the broad distinction between exclusion and expulsion.

A small partisan majority might render the desire to arbitrarily exclude, by a majority vote, in order to more securely intrench itself in power, irresistible. Hence its exercise is controlled by legal rules. In case of expulsion, when the requisite two-thirds can be had, the motive for the exercise of arbitrary power no longer exists, as a two-thirds partisan majority is sufficient for every purpose. Hence expulsion has been wisely left in the discretion of the House, and the safety of the Members does not need the protection of legal rules.

It seems to us settled, upon reason and authority, that the power of the House to expel is unlimited, and that the legal propositions involved may be thus fairly summarized: The power of exclusion is a matter of law, to be exercised by a majority vote, in accordance with legal principles, and exists only where a Member-elect lacks some of the qualifications required by the Constitution. The power of expulsion is made by the Constitution purely a matter of discretion, to be exercised by a two-thirds vote, fairly, intelligently, conscientiously, with a due regard to propriety and the honor and integrity of the House, and the rights of the individual Member. For the abuse of this discretion we are responsible only to our constituents, our consciences, and our God.

We believe that Mr. Roberts has the legal, constitutional right to be sworn in as a Member, but the facts are such that we further believe the House, in the exercise of its discretion, is not only justified, but required by every proper consideration involved, to expel him promptly after he becomes a Member.

In the course of the debate, on January 24, 1900, Mr. John F. Lacey raised and discussed the proposition that the House might expel a Member before he was sworn in.[1]

477. The case of Brigham H. Roberts, continued.

In the case of Brigham H. Roberts, the House assumed its right to impose a qualification not specified by the Constitution; and excluded him.

2. As to the qualifications of a Member under the Constitution.

The majority of the committee held that the clause of the Constitution specifying the qualifications of a Member did not preclude the imposition of other disqualifications by the Congress or by either House, arguing thus:

This question meets us at the threshold: Does the constitutional provision, "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen," preclude the imposition of any disqualification by Congress or by either House?

[1] Record, p. 1135.

Must it be said that the constitutional provision, phrased as it is, really means that every person who is twenty-five years of age, and who has been for seven years a citizen of the United States, and was, when elected, an inhabitant of that State in which he was chosen, is eligible to be a Member of the House of Representatives and must be admitted thereto, even though he be insane, or disloyal, or a leper, or a criminal?

Is it conceivable that the Constitution meant that crime could not disqualify? The whole spirit of government revolts against any such conception.

Not now discussing the question as to whether or not that constitutional provision is exclusive, so far as ordinary qualifications are concerned, is it to be said that there is in it no implied power of disqualification for reasons which appeal to the common judgment of mankind, and which are vital and essential to the very constitution and integrity of the legislative body as such?

We are compelled to answer that that provision, in the sense to which we have just adverted, is not exclusive, and that reasonable disqualifications may attach to certain individuals, which may, for the sake of argument, be assumed to amount in practice to added qualifications.

A marked distinction is to be made between arbitrary disqualifications and those which arise out of the voluntary act of the individual who places himself, by the commission of an offense against the law or civilization, within the prohibited class. We believe, whatever general statements may have been made by public men, that no commentator on the Constitution, no court, or either House of Congress has ever questioned the propriety of that distinction, but that the contrary doctrine has been universally held wherever the question was clearly raised.

In our opinion it is demonstrable that no such exclusive meaning can be given to the provision above quoted as is contended for on the other side of this proposition, and that the sound rule is declared by Burgess in his work on Political Science and Constitutional Law, when on page 52, he says:

"I think it certain that either House [of Congress] might reject an insane person * * * or might exclude a grossly immoral person."

We desire at the very threshold of this discussion to lay down these general propositions, never to be forgotten and always to be kept clearly in mind:

First. That the House has never denied that it had the right to refuse to permit a Member-elect to be sworn in, although he had all of the three constitutional qualifications.

Second. That it has in many instances affirmatively declared that it had the right to thus refuse.

Third. That the right to so refuse is supported on principle and by the overwhelming weight of authority of constitutional writers and judicial opinions on analogous constitutional questions; and

After reviewing the status of Roberts the majority continue:

We assert that it is our duty, as it is our right, to exclude him; to prevent his taking the oath and participating in the councils of the nation.

Three methods present themselves by which to test the soundness of this view:

First. On principle, and this involves—

(1) The nature of the legislative assembly and the power necessarily arising therefrom;

(2) The express language of the constitutional provision;

(3) The reasons for that language;

(4) Its context and its relation to other parts of the instrument;

(5) The obvious construction of other portions of the same instrument necessarily subject to the same rule of construction.

Second. The text-books and the judicial authorities.

Third. Congressional precedents. These are of two classes—

(1) Action respecting the rights of individual Members;

(2) Acts of Congress and general resolutions of either House.

FIRST.—*On principle.*

As to the first proposition, what is the argument on principle? We think it will be undoubted that every legislative body has unlimited control over its own methods of organization and the qualifications or disqualifications of its members, except as specifically limited by the organic law. We do not think that this proposition needs amplifying; it is axiomatic. It is apparent that every deliberative and legislative body must have supreme control over its own membership, except in so far as it may be

specifically limited by a higher law; there is a distinction to be drawn between the legislative power of a legislative body and its organizing power, or those things which relate to its membership and its control over the methods of performing its allotted work. That is to be distinguished from the legislative power to be expressed in its final results.

When our Constitution was framed there was practically no limit to the right and power, in these respects, of the English Parliament. Such power is necessary to the preservation of the body itself and to the dignity of its character. In England it was at one time admissible to permit the admission into the House of Commons of minors, of aliens, and of persons not inhabitants of the political subdivision in which they were elected. To this day it is well known that an inhabitant of London may be elected by a Scotch constituency, and a member has been elected by more than one constituency to the same Parliament.

The framers of the Constitution, familiar with these facts, proposed to prevent their happening in this country. They knew also that a similar latitude of choice had been exercised in the original colonies and in the States of the Federation, and it was proposed to put a stop to it so far as Congress was concerned. A very luminous argument was made on this subject by John Randolph in the House of Representatives in 1807.

We quote as follows from his remarks:

"If the Constitution had meant (as was contended) to have settled the qualifications of Members, its words would have naturally run thus: 'Every person who has attained the age of twenty-five years and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives.' But so far from fixing the qualifications of Members of that House, the Constitution merely enumerated a few disqualifications within which the States were left to act."

"It is said to the States, 'You have been in the habit of electing young men barely of age. You shall send us none but such as are five and twenty. Some of you have elected persons just naturalized. You shall not elect any to this House who have not been some seven years citizens of the United States. Sometimes mere sojourners and transient persons have been clothed with legislative authority. You shall elect none whom your laws do not consider as inhabitants.'"

In pursuance of the idea in the mind of the framers of the Constitution, we have the peculiar words "no person shall be a Representative who shall not have attained, etc." How happy indeed are these words if we give them precisely the force and meaning for which we contend. How unhappy and how misleading, how impossible, in fact, to the masters of the English language who wrote them, if they were intended to exclude all other possible requirements or disqualifications. We might admit such construction if suitable language was difficult to find or frame; but note how easily such a purpose could have been served in fewer words and with unmistakable meaning. Thus: "Any person," or "a person," or "every person, may be a Representative who shall have attained the age of twenty-five years," etc.

The provision seems to be worded designedly in the negative so as to prevent the suspicion that it was intended to be exclusive, and so as to prevent the application of the rule, "the expression of one thing is the exclusion of another.[1]" The immediately preceding clause is affirmative, and says: "The electors in each State shall have the qualifications," etc. With some show of propriety it can be claimed that this provision is exclusive. It at least does not have the negative form to condemn such construction

Story says (Constitution, sec. 448):

"The truth is, that in order to ascertain how far an affirmative or negative proposition excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction. There can be no doubt that an affirmative grant of powers in many cases will imply an exclusion of all others."[2]

It is a notable fact that in the first draft of this constitutional provision which provides for qualifications of Representatives in Congress the language was affirmative and positive and that when it was finally presented for adoption it appeared in the form in which we now find it.

The slight contemporaneous discussion in the constitutional convention was upon the provision in the affirmative form. Why was it changed in the negative? Surely not for the sake of euphony, and certainly not to make it more explicitly exclusive.

In the report of the committee of detail, submitting the first draft of the Constitution, this section read in the affirmative and as follows:

"Every Member of the House of Representatives shall be of the age of 25 years at least; shall have been a citizen of the United States for at least three years before his election, and shall be at the time of his election a resident of the State in which he shall be chosen."

In the discussion Mr. Dickinson opposed the section altogether, expressly because it would be held exclusive, saying he "was against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the legislature from supplying omissions."

Mr. Wilson took the same view, saying:

"Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters."

The next day after this discussion, and when the clause respecting age, etc., had, in its general sense, been informally approved, a proposed section respecting a property qualification was discussed. Mr. Wilson said (Madison Papers, vol. 5, p. 404) that he thought "it would be best, on the whole, to let the section go out; this particular power would constructively exclude every other power of regulating qualifications." What did Mr. Wilson mean if the result of the discussion in which he participated on the preceding day was to "constructively exclude every other power of regulating qualifications?"

In view of the objections urged by Dickinson and Wilson and their opinions as to the construction that would result and the consequences thereof, the conclusion seems reasonable, if not absolutely irresistible, that the change from the affirmative to the negative form was intentionally made and with the very purpose of obviating such objections, and hence that in being negatively stated it was considered by the convention that the particular qualifications mentioned would not be exclusive and would not render impossible the "disqualifying odious and dangerous characters" and would not prevent "supplying omissions."

This section was finally reported and adopted in the negative form in which it now appears. The report of the committee seems to have been elaborately discussed.

Where do we find ourselves in such a case as this? Suppose that Brigham H. Roberts, instead of being charged with polygamy, was charged with treason, not constructive treason, but actual treason, and suppose that a witness appeared before the committee—a credible witness, whose testimony was undisputed—who testified that he had seen Brigham H. Roberts wage war against the United States in the Spanish war, giving aid and comfort to Spain, not constructively, but actively; and suppose that Roberts appeared himself before the committee and said, "All that this man says is true; I did wage war against the United States; I did give aid and comfort to its enemies in time of war against a foreign foe, and I glory in it." Now, in that state of facts the law could not lay its hand upon him for the crime treason, for the Constitution provides that no person shall be convicted of treason except upon the testimony of two witnesses to the same over fact or by confession in open court. So that under the state of facts thus presented he could not be convicted of treason.

Suppose he was here with a certificate of election from a great State and demanded admission. Upon the theory of the other side we must admit him. The minority insist that in such a case he must be sworn in. It will not do to say that practically no wrong would be done on the ground or on the theory that he might be immediately thereafter expelled, for he would have a right to be heard in his own defense, he would have a right to be heard as to whether the House had a right upon those facts to expel, and it might take much time. In any event he would be there fully armed with all of the powers and privileges of a Member of the American House of Representatives. We think that the civilized world would declare that it made itself ridiculous if it confessed its want of power to keep out from the councils of the nation a man who was a confessed traitor.

Another illustration. Suppose that on the 1st day of January, 1899, two months after his election and two months before his term as a Representative should commence, he had been convicted of the crime of bigamy or of adultery, either one of which is a felony under the statutes of Utah, for an offense, we will presume, committed prior to his election, so that it can not be charged that after his election he voluntarily put himself in that position, and he was tried, convicted, and sentenced to the penitentiary for a term of two years; and it so occurs that his term of imprisonment should expire on the 3d day of March, 1901, the day before his term as Representative in Congress expires. Suppose he presented himself on the 3d day of March, 1901, no action having been previously taken in his case, would the House have to admit him, or would not the proper proceeding be, while he was still in the penitentiary, for such

an offense, for the House to declare his seat vacant; that he ought not to have or retain a seat in the American House of Representatives?

It may be said that that imprisonment would amount to a constructive resignation. There is no precedent for that. The Yell case is entirely different. An election was held for a successor to Yell, and the seat was recognized to be vacant upon the express ground that he had taken another office incompatible with his position as a member of Congress, and that since he was occupying and exercising the functions of that office, of course that vacated ipso facto his position as Representative in Congress.

It is well settled that while the mere appointment or election to an office the duties of which are incompatible with those of one already held will not vacate such an office, the acceptance of the incompatible office ipso facto vacates the first office held. This doctrine is laid down in Willcox, in Angel and Ames on Corporation, section 434; in Whitney against Canique, 2 Hill, 93; Cushing's Law on Practice of Legislative Assemblies, section 479, and many other authorities.

Let us assume, further, that that sentence of imprisonment would not expire until after the 4th of March, 1901, so that during all of that period Roberts would be incapacitated from being present to demand the right to be sworn in; what is she remedy? We think it clear that the seat is not vacated by the mere fact that he does not present himself; by the mere fact that he remains absent. A man might be sick, and he might remain away the entire session, hoping that he might become well enough to attend, and Roberts might indulge the hope that he would be pardoned, and thus get in. Is it to be said that the House on that state of facts can not declare the seat vacant and permit the governor to issue a new writ and call another election? If it can not, then we are face to face with the proposition that the people of the State must remain unrepresented during the entire term of Congress.

Suppose another case. That in the midst of the organization, and before being sworn in, a Member-elect should so indecently and outrageously conduct himself before the eyes of the House and the assembled multitude as to demand and justify expulsion if he had so conducted himself after he had been sworn in. What would the House do? In the midst of his outrageous misconduct must the House, with tender persuasiveness, beg him to honor it by being sworn in so that he may be turned out, or would it refuse to swear him in and proceed to declare his seat vacant? Could the strictest constructionist of the Constitution deny that the Constitution was substantially complied with if he was excluded by a two-thirds vote, even if he did not assent to our view in all respects.

Suppose that the claimant to this seat, while enjoying through the courtesy of the House the privilege of the floor, should declare his contempt for this body and for the Government; that he respected none of its decrees or the laws of the land as having any binding force upon him; that if he became a Member of the House he should become so merely for the purpose of obstructing its business and to tear down the Government. What would the House do? Swear him in that it might have the ineffable privilege of turning him out? Or would it declare him unfit to have a seat in that body and declare his seat vacant?

As Judge Shaw says in Hiss *v.* Bartlett (3 Gray, 473), "it is necessary to put extreme cases to test a principle."

So much for illustrations upon that question. Look, now, at the last paragraph of Article VI of the Constitution:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

Here is an affirmative declaration that a certain oath shall be administered to certain officials. If the theory of exclusion is applied to the qualification clause as to Representatives, it must be applied to this clause, and therefore Congress has no power to demand any other oath, or superadd to this oath any other provisions.

And yet the very oath we took as Members of this House has additional provisions. Congress passed also the test oath act in 1862, making vital additions to the constitutional oath, and, indeed, adding a new ground of disqualification for Members of Congress. This act was passed by a large majority and compelled Members of Congress to submit to that oath for many years. Chief Justice Marshall, the great expounder of the Constitution, in the case of McCulloch *v.* Maryland, declared that "He would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution such other oath or oaths as its wisdom might suggest," and the whole opinion in that case is addressed in principle to the very doctrine that is here advocated.

If Congress could add to the constitutional oath, the same theory of construction must permit it to at least add reasonable qualifications to the requirements for members of the legislative body, at least to the extent of declaring disqualifications which in their nature ought to bar a man from entrance into a great legislative body.

The same clause to which we have just referred has this provision:

"But no religious test shall ever be required as a qualification to any office or public trust under the United States."

If the Constitution had laid down all the qualifications which Congress or any other power had the right to impose it was unnecessary to go on and declare that no religious test should be required. That great instrument is inconsistent in its parts and contradictory of itself if it be true that it meant that no disqualifications should be provided except those named. Nor was it necessary, if the proviso means an oath merely, that such exception should be made, for the preceding words of the paragraph set out the required oath.

The effort to make the negative declaration of minimum qualifications exclusive of all others, whatever the necessities of the House may be, falls to the ground if we admit that the paragraph respecting oaths is in the same instrument as that which defines the qualifications of Members of Congress.

SECOND.—*The text-books.*

Let us now proceed with what we have called the text-book and judicial authority.

There is a statement in Story's work on the Constitution to the effect that the clause in the Constitution describing the qualifications for Representatives in Congress would seem to imply that other qualifications could not be added.

Now, whether or not that be sound, these two observations are to be made upon it:

First. That it is dismissed in a very few words. Justice Story himself disclaims explicitly in his work that he gives his own opinion as to what the Constitution means, but asserts that he undertakes merely to give the statements of others.

Second. This statement of Judge Story does not at all interfere with the proposition we have laid down: That the power of the House to exclude from its membership a person who is, for instance, disloyal, a criminal, insane, or infected with a contagious disease is not superadding any qualification, within the meaning of Story, such as a property qualification or an educational qualification.

We find, however, that Story's expression, if it means all that is claimed for it by the minority, does not accord with the opinion of other commentators, with the courts, or with the Congressional precedents. We have already quoted and will not now repeat what is said by Prof. John W. Burgess, professor of history, political science, and international law, and dean of the university of political science in Columbia College, New York. This ambitious work, published in 1896, must be considered an authority on the subject of constitutional law.

In Pomeroy's Constitutional Law, 3d edition, page 138, is the following:

"The power given to the Senate and to the House of Representatives, each to pass upon the validity of the elections of its own Members, and upon their personal qualifications, seems to be unbounded. But I am very strongly of the opinion that the two Houses together, as one House, can not pass any statute containing a general rule by which the qualifications of Members as described in the Constitution are either added to or lessened. Such a statute would not seem to be a judgment of each House upon the qualifications of its own Members, but a judgment upon the qualifications of the Members of the other branch. The power is sufficiently broad as it stands. Indeed, there is absolutely no restraint upon its exercise except the responsibility of the Representatives to their constituents. Under it the House inquires into the validity of the elections, going behind the certificates of the election officers, examining the witnesses, and deciding whether the sitting Member or the contestant received a majority of legal votes. The House has also applied the test of personal loyalty to those claiming to be duly elected Representatives, deeming this one of the qualifications of which it might judge."

Pomeroy is discussing the power of the House, not stating what somebody may have said.

So, also, in the lectures of Justice Miller on the Constitution of the United States, page 194, is the following:

"Very few controversies, if any, have ever arisen in either body (that is, of Congress) concerning the qualifications of its Members. It was at one time a question somewhat mooted whether the States

could add to the qualifications which the Constitution has prescribed for the Members of the Senate or the House of Representatives, but it is now conceded that this must be decided by the Constitution alone, because, though it might be conceivable that Congress might make some conditions or limitations concerning the eligibility of its Members, it has not been done, and the constitutional qualifications alone regulate that subject."

If a profound constitutional authority like Justice Miller had believed that the provision we are considering was absolutely exclusive and prevented the House or the Senate from exerting any such power it seems to us that he would have so declared.

Throop on Public Offices, section 73, says:

"The general rule is that the legislature has full power to prescribe qualifications for holding office in addition to those prescribed by the Constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the Constitution."

Who shall say that the exclusion of Roberts on the ground of polygamy is "opposed to the spirit of the Constitution?"

Cushing (Law and Practice of Legislative Assemblies, p. 195, sec. 477) says:

"To the disqualifications of this kind may be added those which may result from the commission of some crime which would render the Member ineligible."

The courts.

What have the courts said on similar propositions? We first have the case of Barker *v.* The People (3d Cowen) [New York]. In that case it was held that every person not specifically disqualified by the Constitution was eligible to election or appointment to office. In so far as that particular statement goes, it is a denial of the broad right to superadd to the constitutional provision as to qualifications. But that statement, as applied to this case, loses all of its applicability, for two reasons:

(1) Because it was not the question that it had to decide.

(2) Because the judge distinctly and positively declares—and that was the point involved in the case—that notwithstanding that want of power in the legislature to add to the Constitution qualifications it did have the right to disqualify for crime. He proceeds to say that it might disqualify for crime upon conviction thereof. We apprehend that that is unimportant here, for if the House of Representatives has a right to disqualify for crime it has the power and the right to determine for itself whether the crime was committed, and not to depend upon a judicial conviction. The necessity for a judicial conviction is the more apparent where the person who seeks to take office undertakes to assume an executive office to which he has been elected or appointed, for there may not be any other than the ordinarily constituted court in which to try the question of his guilt of the offense that created his ineligibility.

But it is not the settled doctrine of the law that disqualification for crime must be first adjudicated in the courts. The authorities are, the most of them, against that proposition, and for the sake of convenience we shall refer to them here.

We quote from Royall *v.* Thomas (28 Gratton (Va.), 130). The syllabus is as follows:

"Under the constitution and statute of Virginia, a party who has aided and assisted in a duel fought with deadly weapons may be removed from office by proceeding of quo warranto, or if that writ be not in use, by information in the nature of a quo warranto, though he has not been convicted of the offense in any criminal prosecution against him."

The court in this case say that the principal authority relied on in support of the contrary position to that stated in the syllabus is the Kentucky case of Commonwealth *v.* Jones.

"It was held in that case that the clause of the Kentucky constitution imposing the disqualification for office of the offense of dueling is not self-executing, except so far as it prevents those who can not or will not take the requisite oath from entering upon office. It was there held that a citizen willing to take such oath could not be proceeded against for usurpation of such office until he had been first indicted, tried, and convicted of the disqualifying offense.

"It was found, however [said the Virginia court in the Gratton case], on examination, that much of the reasoning of the court in the Jones case turns upon the peculiar phraseology of the Kentucky constitution, in which it is declared that the offender shall be deprived of the right to hold any office, post, or trust under the authority of the State.

"The court agreed that if, instead of the words 'shall be deprived' the phrase 'shall not be eligible' had been used, some of the difficulties attending the argument to show that the provision is self-executing would have been obviated.

"In the case of Cochran *v.* Jones, involving the same question, the board for the determination of contested elections arrived at a very different conclusion upon the same clause of the Kentucky constitution. It will thus be seen that even in Kentucky there is such conflict of opinion in respect to the true interpretation of the constitutional provisions in question as deprives the decision relied on by the defendants of the weight of being considered even persuasive authority.

"The provision in the Virginia constitution is as follows: 'No person who, while a citizen of this State, has, since the adoption of this constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, shall be allowed to vote or hold any office of honor, profit, or trust under this constitution.'"

The court goes on to explicitly hold that previous conviction was unnecessary, arguing it with great force.

The same doctrine is held in Mason *v.* The State (58 Ohio State), where Mason, who had been elected probate judge of a county in Ohio, had expended more money to bring about his election than the corrupt practices act allowed, and as this act disqualified such person from holding the position to which he was elected, the supreme court held that he could be thus disqualified and kept out of office without conviction.

To the same effect is the case of Commonwealth *v.* Walter (83 Pennsylvania State, 105).

Proceeding with the enumeration of authorities as to the exclusive effect of the constitutional provision defining or declaring qualifications for office, the next case to which we call attention is Rogers *v.* Buffalo (123 New York). We quote from page 184:

"The case of Barker *v.* The People (3 Cowan, 686) has been cited by counsel. That case holds the act to suppress dueling, which provided as a punishment for sending a challenge that the person so sending should, on conviction, be disqualified from holding any public office, was constitutional. The chancellor, in the course of his opinion, said he thought it entirely clear that the legislature could not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution had not required. What he meant by such expression is rendered clear by the example he gives. Legislation would be an infringment upon the constitution, he thought, which should enact that all physicians, or all persons of a particular religious sect, should be ineligible to hold office, or that all persons not possessing a certain amount of property should be excluded, or that a member of assembly must be a freeholder, or any such regulation.

"But, in our judgment, legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor to a general regulation requiring qualifications not mentioned in the constitution. The 'qualifications' which were in the mind of the learned chancellor were obviously those which were, as he said, arbitrary, such as to exclude certain persons from eligibility under any circumstances. Thus, a regulation excluding all physicians would be arbitrary. But would a regulation which created a board of health and provided that not more than one physician from any particular school, or none but a physician, should be appointed thereon be arbitrary or unconstitutional as an illegal exclusion from office? I think not.

"The purpose of the statute must be looked at and the practical results flowing from its enforcement. If it be obvious that its purpose is not to arbitrarily exclude any citizen of the State, but to provide that there shall be more than one party or interest represented, and if its provisions are apt for such purposes, it would be difficult to say what constitutional provision is violated or wherein its spirit is set at naught."

And, again, on page 188—

"It is said that the legislature had no right to enact that a person who shall be appointed to a public office shall have the qualifications necessary to enable him to discharge the duties of such office, nor to provide that the fact that he does possess such qualifications shall be ascertained by a fair, open, and proper examination. Nothing but the bare oath mentioned in the constitution can be asked of any applicant for an appointive office is the claim of the appellant. We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense we are quite sure that the framers of our organic law never intended to impose a constitutional

barrier to the right of the people through their legislature to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means to accomplish such end are appropriate therefor they must be within the legislative power.

"The idea can not be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enacted under cover of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people."

And, again, on page 190—

"In this case we simply hold that the imposing of a test by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and intelligently perform the duties of such office, violates no provision of our constitution."

This opinion was delivered by Justice Peckham, now a member of the Supreme Court of the United States.

Another instructive case is that of Ohio ex rel. Attorney-General *v.* Covington, 29 Ohio State, page 102. The opinion is by Judge McIlvaine. one of the ablest and most careful judges that ever sat in the supreme court of Ohio. He says:

"The last objection made to the validity of this act is based on section 4 of article 15 of the constitution, which declares: 'No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector.'

"The question arises under the fourth section of the act (which the court is construing), which provides: 'Each member and officer of the police force shall be a citizen of the United States, and a resident citizen for three years of the city in which he shall be appointed, and able to read and write the English language.'

"There is no claim made that the qualifications prescribed in the act, in view of the nature of the duties to be performed, are unreasonable, or even unnecessary, to the discharge of the duties. The point made is that disqualifications are imposed by the statute which are not imposed by the constitution.

"It is apparent that this statute is not in conflict with the terms of this constitutional provision. It does not authorize the appointment of a person who is not an elector. The express provision of the constitution is that a person not an elector shall not be elected or appointed to any office in this State. Now, unless the clear implication is that every person who has the qualifications of an elector shall be eligible to any office in this State, there is no conflict between the statute and the constitution. I do not believe that such implication arises. There are many offices the duties of which absolutely require the ability of reading and writing the English language. There are many electors who, from habit of life or otherwise, are wholly unfit to discharge the duties of many offices within this State. If the framers of the constitution had intended to take away from the legislature the power to name disqualifications for office other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration. The power under the general grant being ample and certain, a statute should not be declared void because in conflict with an alleged implication, unless such implication be clear and indubitable."

We find the same doctrine in the case of Darrow *v.* The People, 8 Colorado, page 417. The syllabus relating to this question is as follows:

"The statute designating the payment of taxes as a necessary qualification of membership in the board of aldermen is not in conflict with section 6, article 7, of the constitution."

The provision of that section is as follows:

"No person except a qualified elector shall be elected or appointed to any civil or military office in the State."

The court says, on page 420, that it is argued that this provision "by implication inhibits the legislature from adding the property qualification under consideration. There is nothing in the constitution which expressly designates the qualifications of councilmen in a city or town, and this section contains

the only language that can possibly be construed as applicable thereto. But it will be observed that the language used is negative in form—that it simply prohibits the election or appointment to office of one not a qualified elector. There is no conflict between it and the statute. By providing that a supervisor or an alderman shall be a taxpayer the legislature does not declare that he need not be an elector. Nor is the provision at all unreasonable. On the contrary, it is a safeguard of the highest importance to property owners within the corporation.

"The right to vote and the right to hold office must not be confused. Citizenship, and the requisite sex, age, and residence constitute the individual a legal voter; but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office. And certainly no doubtful implication should be favored for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the constitution by this provision intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded, and no other qualifications should be imposed."

THIRD.—*Legislative precedents.*

We proceed now to the legislative precedents upon this matter of exclusion, without admitting the person objected to to be sworn in.

JEREMIAH LARNED.

One Jeremiah Larned, as long ago as 1785, was elected to the legislature of Massachusetts, but it turned out that he had violated a law that that legislature had passed. And what was it? On election day he headed a riot for the purpose of preventing the collection of taxes. What did the fathers of that day do? They were not men who were regardless of human rights; they held that inasmuch as Larned had violated the law he was unworthy to take a seat upon that floor, and they kept him out.

The majority further cite and discuss the cases of John M. Niles, Philip F. Thomas, and Benjamin Stark in the Senate, and the Kentucky cases and those of Whittemore and George Q. Cannon in the House. The majority then say:

Thus we see that the Senate and the House have taken the ground that they had the right to exclude for insanity, for disloyalty, and for crime, including polygamy, and, as we believe, there is no case in either the House or the Senate, where the facts were not disputed, in which either the Senate or House has denied that it had the right to exclude a man, even though he had the three constitutional qualifications. There is a large amount of debate, where opinions are given on both sides of the proposition, but as against that is the never-varying action of the two bodies themselves.

* * * * * * *

Some importance is given by the minority to the final action of the House of Commons in the Wilkes case. We are asked to infer from some remark attributed to Edmund Burke that he had written "finis" to the chapter on exclusions from parliamentary bodies.

As to that, we have to say that after diligent search we find no cases where the House of Commons ever held or decided that it had not the right to exclude at the very threshold a member whose certificate or credentials were perfect and uncontested, although the ground of exclusion was not a want of legal qualifications, and there are scores of cases since 1780 where it has claimed and exercised that right. We have found several cases where the House of Commons has declared that it possessed (and exercised) the right not only to exclude and suspend, but in a few instances to expel, a member for an offense unrelated to the functions of a member of Parliament, which offense was in a few instances committed before his election to Parliament, but was held to be of a continuing character.

The Houses of the American Congress have not accepted or followed these last-named precedents, due undoubtedly to the radical differences between organization, jurisdiction, and powers of the English Parliament and the American Congress. The most striking of these differences, as stated by Mr. Cushing, are that in this country Members of both branches of Congress are elected for specified terms and that the Members of the House of Representatives are apportioned among and elected by their several constituencies—so far as possible—upon the principle of equality; whereas in England the House of Lords is composed of members who are not elected at all, but who sit as members during their lives by virtue of hereditary or conferred right, as the nobility, or temporal lords, or of their appointment to places of

high dignity in the church, as the archbishops and bishops, or lords spiritual; and the members of the House of Commons, though elected, are not apportioned among the several constituencies and elected upon the principle of equality or representation, but chiefly upon the principle of corporate or municipal right, and for no fixed period of time.

Another important difference is that the existence and powers of the House of Commons rest largely on custom and tradition, aided, of late years, by statute provisions, whereas in the House of Representatives (as well as the Senate) these powers are founded in and for a great part regulated, limited, and controlled by a written Constitution and laws.

It may be said that the House of Commons has uniformly taken the view that under the right to judge of the "qualifications" of its members—their legal election and return being conceded—it rests wholly within the discretion of that body to establish a new test or requirement of qualification for membership, and that it may be either mental, such as for imbecility or insanity; physical, as for paralysis; or for grave offenses against criminal laws.

The minority of the committee, arguing that the three qualifications specified in the Constitution are the only ones which may be imposed, say:

The Constitution, article 1, section 5, provides that "each House shall be the judge of the elections returns, and qualifications of its own Members."

As to qualifications of Representatives, it provides:

"No person shall be a Represntative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. (Constitution, article 1, section 2.)"

Is it seriously contended that this House can of its own motion, by its own independent action, create for the purposes of this case a legal qualification or disqualification? This House alone can not make or unmake the law of the land. Before any one of its acts can become law it must must be concurred in by the Senate and approved by the President, or passed by two-thirds of each House over his veto. It is quite clear that the House, by its independent action, can not, if it would, make for this case any disqualifying regulation that would have the force of law.

The qualifications being negatively stated in the Constitution, it is said that Mr. Roberts is ineligible under the provisions of the act of March 22, 1882, section 8, known as the Edmunds law, viz:

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesiad in this section, in any Territory or other place over which the United States have exclusive jurisdiction,s hall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

The existence of the disqualification in this act is predicated not upon a conviction of or as a punishment for the offenses of polygamy or unlawful cohabitation, but simply as incident to the existence of those conditions.

It is a very grave question as to whether Congress can, by a law duly enacted, add to the qualifications negatively stated in the Constitution. There is no decision of the United States Supreme Court directly or indirectly construing this provision. There is no decision of any State court directly in point. In Ohio *v.* Covington (29 Ohio Stat., 102), relied upon, the court was passing upon the right of the defendants to hold the offices of police commissioner and member of the board of health for the city of Cincinnati. The constitution provided that—

"No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector."

The court distinctly held that "the defendants, as members of the board of police commissioners * * * are officers for whose election and appointment no provision is made in the Constitution of the State or of the United States," and were therefore such as the legislature had, by the express provisions of the Constitution, authority to create. When the legislature created the offices in question, it attached to them the condition that each officer should be "a resident citizen for three years of the city in which he shall be appointed, and able to read and write the English language."

The offices in question were creatures of the statute, and not of the constitution. It is familiar law that whatever office the legislature creates it can create with such conditions, limitations, qualifications,

and restrictions as it sees fit to impose; and this was all that it was necessary for the court to say in that case in upholding the validity of the statute. It is true that it did go further than that, further than the case required, and held that no implication arose, from the negative language of the constitution, that other qualifications could not be added by the legislature. In so far, however, as the opinion goes beyond the requirements of the case, it certainly is doubtful authority. It should be stated that this case has been fully approved in the recent case of Mason *v.* State (58 Ohio St., 54).

The case of Darrow *v.* People (8 Colo., 420), relied on, is also subject to the same criticism as State *v.* Covington, as the office there considered was that of alderman, the creature of the statute.

The case of People *v.* May (3 Mich., 598) is relied upon to support the proposition that statutory additions may be made to the constitutional qualifications. We submit that so far as that case is an authority it is directly in point against the contention. In that case a layman had been elected to an office designated in the constitution as "a prosecuting attorney." The question was whether any person not a lawyer was eligible to the office. It was objected that to hold that eligibility was confined to the legal profession would be adding a qualification in violation of the constitution.

The court held that they must give to the words "a prosecuting attorney" such a construction as would be consistent with the sense in which they were used, and that the obvious intention of the constitution was that the office should be held by an attorney at law. Certainly not a very violent inference. This did not add a qualification; merely held that one already existed. But the court did not stop there, or leave their position as to the right to add qualifications open to doubt, as they emphatically said:

"We concede to the fullest extent that it is not in the power of the judiciary or even the legislature, to establish arbitrary exclusions from office, or annex qualifications thereto, when the Constitution has not established such exclusions, nor annexed such qualifications. But it is begging the question to assume that the act of construing the Constitution has that effect." (610.)

It is not perceived how this case gives any aid or comfort to those who promote the contention adverted to.

The remark of the court in McCulloch *v.* Maryland (4 Wheaton, 416), purely a dictum made by way of illustration, when discussing the powers reasonably to be implied from the concise and general provisions of the Constitution, necessary, appropriate, and plainly adapted to effectuate its purposes, that—"he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution, such other oath of office as its wisdom might suggest" does not impress us as entitled to much weight in construing a provision of the Constitution which the court was not considering and to which the doctrine "that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution," can have little, if any, application. This seems to us more obvious when it is noted that the oath prescribed by the Constitution is simply to support the Constitution. In the line of the doctrine stated it might be said that an oath to faithfully discharge the duties of the office was a proper "means for their execution," and one reasonably involved in the implied powers.

It is suggested that the existence of the clause "but no religious test shall ever be required as a qualification to any office or public trust under the United States," which is found in Article VI of the Constitution, in a paragraph relating wholly to oaths, has a direct tendency to show that the previous paragraph in Article I, section 2, prescribing qualifications, was not intended to be exclusive, inasmuch as this paragraph in Article VI is said to add a qualification which is entirely inconsistent with the idea that the prior paragraph was exclusive. Reflection, however, leads us to the conclusion that this paragraph in Article VI has no proper connection with or relation to the paragraph in Article I, section 2. We think the word "qualification" in connection with "religious test" is used in an entirely different sense from that in which the word "qualification" is used in Article I, section 5. It is clearly applied to and is a description of the "religious test," and must be construed in connection with that phrase, no "religious test * * * as a qualification." The clause is found in a paragraph which relates solely to the oath to be administered.

Qualification, when in used in discussing the elements which a member-elect must possess in order to be entitled to enter upon the office, is synonymous with eligibility. This is substantially the definition of legal lexicographers—Bouvier, Rapalje, and Anderson. "The recognized legal meaning in our constitutions" of the word "test" " is derived from the English test acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding

of framers of constitutions." (Attorney-General *v.* Detroit Common Council (58 Mich., 217); Anderson's Dictionary of Law, "Test;" "Test act;" "Test oath.")

The English test acts (25 Geo. II, c. 2) required persons holding office within six months after appointment to take the oath of allegiance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England. The qualification of a "religious test" thus prohibited relates clearly to something "required" to be done by an officer when entering upon or after having entered upon the office, and not to qualifications or elements of eligibility which he must possess or disqualifications or elements of ineligibility which he must not possess before he can enter upon the office. Qualification or disqualification, eligibility or ineligibility is a status that either does or does not exist at the time of entering upon the office. The qualification of a religious test has no existence as a status; it is not a status, it is simply a condition to be performed. No member can change his status as to the elements of eligibility or qualification as defined in Article I, section 2, at the time of entering upon the office; but if the qualification of a religious test existed every member could, if his conscience were sufficiently elastic, comply with the test. One is predicated upon the past and the other upon the future. One relates to things done or not done; the other to things to be done.

An examination of the constitutional history of this clause fully corroborates this view. The last paragraph of Article VI, with the exception of the clause as to the test oath and the word "affirmation" (which was added by amendment), is substantially Article XX of the first draft of the Constitution, as reported by the committee of detail August 6, 1787. (The Madison papers, containing debates on the Confederation and Constitution, vol. 5, p. 381; Elliott's Debates.)

The clause in question first appears in the proceedings August 20, 1787, and was introduced by Mr. Pinckney, as an independent proposition to be referred to the committee of detail, and then read:

"No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States." (Ibid., 446.)

That the word "qualification" as here used related to the oath, and to nothing else, is too clear for argument, and that it was not used in the sense in which it was used in Article I, section 5, is likewise clear. This conclusion is emphasized by the fact hereafter noted that it was at one time proposed, by an independent constitutional provision, to confer upon the legislature express authority to add one qualification. The effort failed, and it is hardly to be supposed that the Constitution makers would do indirectly by this clause what they had directly decided not to do. Later, when Article XX was being considered, Mr. Pinckney moved as an amendment to the article his original proposition in precisely the language in which it now appears in the Constitution. (Ibid., 498.)

There is nothing in the proceedings to indicate that by a change in the phraseology he intended any change in its meaning. The selection by him for amendment of the clause as to the oath, and not that relating to the qualification, is in harmony with this view.

For these reasons it seems to us that the clause relating to religious tests can serve no legitimate purpose in enlarging that prescribing the elements of eligibility.

With the exception of Barker *v.* The People (20 Johns. (N. Y.), 457), which is affirmed in Barker *v.* The People (3 Cowen, 636) and Rogers *v.* Buffalo (123 N. Y., 173), hereinafter discussed, we do not find any case construing a similar constitutional provision which sustains the right to add qualifications.

Among the elementary writers, Throop on Public Offices, section 73, says:

"The general rule is that the legislature has full power to prescribe qualifications for holding office, in addition to those prescribed by the Constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the Constitution."

But he cites no authority to sustain his text as to constitutional offices.

Cushing (Law and Practice of Legislative Assemblies, p. 195, sec. 477) says: "To the disqualifications of this kind may be added those which result from the commission of some crime, which would render the Member ineligible," and cites no authority.

Burgess, in his work on Political Science and Constitutional Law, without giving any authority, says:

"I do not think that either of these bodies can add anything, in principle, to these constitutional qualifications. Certainly the Commonwealths can not add anything in principle or in detail. They have attempted to do so, but Congress has always disregarded these attempts. If the Congress can add anything by law, or if either House can do so through the power of judging of the qualifications of its

Members, it must be something already existing, by reasonable implication, in these constitutional qualifications. For example, I think it certain that either House might reject an insane person, i. e., might require sanity of mind as a qualification, or might exclude a grossly immoral person, i. e., might require fair moral character as a qualification. (Vol. II, p. 52.)

"The Commonwealths can not add to or substract from these qualifications. On the other hand, the Congress may by law, or either House may, in the exercise of the power to judge of the qualifications of its Members, make anything a disqualification that is reasonably implied in the constitutional provisions in regard to this subject. Certainly they may make the corrupt use of his powers by a legislator a disqualification; and they have done so." (Vol. II, pp. 52, 53.)

The case of Whittemore, in the Forty-first Congress, is suggested as a legislative precedent for the right to exclude. We have examined that case with care, and we feel bound to say that we do not think it entitled to any weight as a precedent. The argument upon which it was based shows the action of the House to have been unwarranted and ill advised in excluding Whittemore. The only speeches made in support of the proposition were by Mr. Logan. He does not in any way refer to the one great legal question involved, as to whether Congress, to say nothing of the House, acting alone, had the power to add to the qualifications specified in the Constitution, and that question was not raised during the debate, although at that time (1870) several State courts, one at least, had discussed it, People *v.* Barker having been decided in 1824.

The House had, apparently, never heard that there was such a question. The only provision of the Constitution that could possibly justify the action of the House, that constituting the House the judge of the "election returns and qualifications of its own Members," was not referred to directly or indirectly, and, if the debate is the criterion, the House acted without any reference to it whatever. The clause stating the qualification was incidentally referred to once. Indeed, they apparently acted upon an entirely different provision that does not relate to exclusion or determining eligibility or qualifications, and Mr. Logan distinctly based his case upon it when he says:

"I base my opinion, first, upon the Constitution of the United States, which authorizes Congress to prescribe rules and regulations for the government of their Members, and provides that by a two-thirds vote either House may expel any one of its Members without prescribing the offenses for which either House may expel."

He then proceeded to make this gratuitous and unwarranted assumption:

"This being the theory with which I start out, I then assume that where the House of Representatives has power to expel for an offense against its rules or a violation of any law of the land, it has the same power to exclude a person from its body."

Without giving any attention to the legal distinctions involved, or even referring to the constitutional right of passing upon qualifications, or adverting to the fact that exclusion is the act of a majority and expulsion of two-thirds, he begs the whole question and assumes their identity. He quotes a statute which makes a disqualification to hold office absolutely dependent upon a conviction, and then assumes it disqualified Whittemore, although there had been no conviction. He admits there was no Congressional precedent for the action which he proposed. He cites the Wilkes case in the English Parliament as a precedent, when, as he states it, that case was directly in point against him. Wilkes, he says, was elected four successive times to the same Parliament, three times without opposition and the fourth time against an opposing candidate. Three times he was expelled. The fourth time his opponent was seated. Neither time, according to his statement, was Wilkes excluded.

Just how that case could be an authority for excluding as against expelling Whittemore we can not see. These considerations (and many more could be suggested), in view of the fact that the House, under Mr. Logan's lead, absolutely refused to allow any committee to examine, for the information of the House, the legal questions involved or to have the case referred to any committee—though such a course was desired by such men as Poland of Vermont, Farnsworth of Illinois, and Schenck and Garfield of Ohio—and would not allow Schenck and Garfield to be heard on the law for even ten minutes each, deprive this case, in our opinion, of all weight as a precedent.

As might perhaps be expected, Mr. Logan's statement of the Wilkes case was by no means accurate. It is extremely interesting, as well as important, to note that the whole history of that case is a striking condemnation of the position of Mr. Logan. While the record is not full, and the distinction between the power of exclusion and that of expulsion was not emphasized in argument, the result makes it the

conspicuous proposition. On the occasion of Wilkes's third election the House of Commons adopted this resolution:

"That John Wilkes, esq., having been in this session of Parliament expelled this House, was, and is, incapable of being elected a member to serve in the present Parliament." (Cavendish, Debates, vol. 1, p. 231.)

In opposing the adoption of this resolution, Edmund Burke said:

"I rise to obtain some information upon this great constitutional point. You are going to make a disqualification of a member to sit in Parliament; you are going to make a disqualification contrary to the unanimous opinion of a whole county. Words have been thrown out by the noble lord importing that this is the law of Parliament. Is that, sir, a fact? Is this the law of Parliament? I wish to have that law established on the ground which establishes all laws. Has it acts of Parliament? It has none. Has it records? Has it custom? I have not heard a variety of precedents used." (Ibid., p. 231.)

Here it will be seen that of all who took any part in that debate, the only man who lives in history made the specific point that the House of Commons was adding, in violation of law, by its own action, a disqualification in Wilkes's case. The resolution which declared Wilkes ineligible in effect was adopted by an overwhelming majority February 17, 1769. Before this he had been twice expelled. May 3, 1782, when reason had resumed its sway and the House was no longer overawed by power, a resolution revising in emphatic terms a portion of its prior action in the Wilkes case was adopted. It is significant that it did not attempt to impeach the propriety or validity of the action of the House in twice expelling Wilkes, but it wholly reversed its action in establishing a disqualification and then excluding him therefor. The resolution adopted on the motion of Wilkes himself reads:

"That the said resolution [that of February 17, 1769, declaring him incapable of being elected] be expunged from the journals of this House, as being subversive of the rights of the whole body of electors of this Kingdom." (Hansard, vol. 22, p. 1409.)

That the significance of this resolution and its vital importance, as declaring the lack of power of one branch of the legislature to add a qualification, was fully appreciated at that time, clearly appears from the discussion on its adoption. While Fox conceded the principle, he thought the resolution unnecessary, as it would not have the force of law and would not change the doctrine. The Lord-Advocate agreed with Mr. Fox and spoke principally to the "idea of excluding anyone from a seat in that House by a mere resolution of the House, and without the concurrence of the other branches of the legislature. Such a resolution would be contrary to all law, and to the very spirit of the constitution, according to which no one right or franchise of an individual was to be taken away from him but by law." (Ibid, p. 1411.)

May, in his able work on Parliament, very clearly states the law when he says:

"But, notwithstanding their extensive jurisdiction in regard to elections, the Commons have no control over the eligibility of candidates, except in administration of the laws which define their qualifications." (May on Parliament, p. 53.)

Thus at that early day was the distinction between exclusion and expulsion emphasized by the House of Commons and the first legislative precedent established against the pretended right to add a disqualification for office in violation of law.

So far as the Edmunds Act, which does not require a conviction for disqualification, goes, the case of Barker *v.* The People (3 Cowen, 686) is distinctly adverse to the conclusion of the majority of the committee. The court were passing upon the validity of a statute authorizing a judgment rendering a party ineligible to office on a conviction for sending a challenge to fight a duel, and the court sustained the judgment in the following expressive language:

"Whether the legislature can exclude from public trusts any person not excluded by the express rules of the Constitution, is the question which I have already examined; and according to my views of that question, there may be an exclusion by law, in punishment for crimes, but in no other manner and for no other cause."

Again—

"I therefore conceive it to be entirely clear, that the legislature can not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution has not required."

It appeared that no qualification whatever in respect to members of the assembly was required

by the Constitution, and the court said, arguendo, that a regulation requiring a member of the assembly to be a freeholder "would be an infringement of the Constitution." There was a blank, not even a negative provision.

We do not understand that Rogers *v.* Buffalo (123 N. Y., 173) in any way affects the authority of Barker *v.* The People, supra, but on the other hand cites it with approval, and clearly distinguishes from it the case which they were deciding. They were construing a statute which created a board of civil-service commissioners, and after citing and assenting to Barker *v.* The People, supra, said (p. 184):

"But, in our judgment, the legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor to a general regulation requiring qualification not mentioned in the Constitution."

The opinion thus clearly eliminated the constitutional question as to eligibility and determined the case upon another ground.

Sound reason does not sustain this claimed right to exclude. If the construction contended for is admitted, it must be conceded that the power of adding qualifications is unlimited, as there is nothing in the Constitution which circumscribes it. The suggestion in Barker *v.* The People that the only power to add is in case of a conviction of crime is purely arbitrary and gratuitous, and absolutely no constitutional authority is given therefor. The rigid confinement by the court of the right to break away from the Constitution to a conviction for crime must have been in the nature of expiation, a satisfying of the judicial conscience for the departure thus made from the Constitution. If the power exists, it must be unlimited, and, therefore, while you can not take from or narrow the two elements first specified, you have unlimited power to add to them. For instance, unless a man is at least 25 years of age he is not eligible, therefore the Constitution does not undertake to say that a greater age may not be required. In fact, the necessary inference is that only the minimum limit as to age has been established, and the legislature has unlimited power to add to that qualification, and hence may require all Representatives to be 50 years of age. The same course could be pursued with reference to the seven years' citizenship clause: You can not act within the domain to which the Constitution has confined itself. Outside of it, you can do anything. We can not indorse any such doctrine or help to work it into a decision of the House in the case now under consideration.

The consequences just suggested are the logical result of the theory, and while the illustrations are extreme, they are the best test of the principle. Would anyone feel justified in asserting that any such change in the age qualification was either contemplated or is possible? Yet it must have been, and must be, if the argument is sound.

Inasmuch as the argument of John Randolph in 1807 is thought to be able, ingenious, and persuasive upon this clause, we have taken occasion to examine it, and find him expressing "extreme surprise" because the Committee on Elections had so construed this clause as to restrict "the States from annexing qualifications to a seat in the House of Representatives. He could not view it in that light. Mark the distinction between the first and second paragraphs. The first is affirmative and positive." Then he draws a contrast between the affirmative and negative provisions. He conceded that if the Constitution had read in the affirmative it would have settled the question of qualification and been exclusive. He does not appear to have gone for light to the proceedings of the Federal Convention. The House in that case, Barney *v.* McCreery (Digest Election Cases, vol. 1, p. 157), decided against his contention, and his proposition has long been obsolete.

The whole case of the right to add qualifications is based upon the fact that such qualifications as are prescribed are negatively expressed. The juxtaposition of the affirmative and negative clauses, it is said, has some significance. It does not appear that any of the courts' elementary writers or lawyers that have had occasion to insist upon this have ever availed themselves of the debates in the Federal Convention for the purpose of ascertaining the intention of the framers of the Constitution. While this precaution has not hitherto been observed, common fairness and a due regard for a thorough investigation require that these great men, whose handiwork has so well withstood the assaults of time, should now and upon this important question be allowed to speak for themselves. An inquiry as to the origin of this clause will not only be interesting and instructive, but possibly determining. This course is stated by Cooley to be proper. (Cooley's Constitutional Limitations, p. 80.)

And Story, in his great work on the Constitution, makes constant use of the debates in the Federal Convention.

In the report of the committee of detail giving the first draft of the Constitution, August 6, 1787 (Madison Papers, etc., vol. 5, p. 376), the paragraph in question appears as an independent section, i. e., section 2, Article IV, and reads:

"SEC. 2. Every Member of the House of Representatives shall be of the age of twenty-five years at least, shall have been a citizen of the United States for at least three years before his election, and shall be at the time of his election a resident of the State in which he shall be chosen."

It is significant that this section is affirmative, and is therefore exclusive, as is conceded, in its character. It is important to inquire whether the change in phraseology was made for the purpose of changing its legal effect. That it was understood by the framers of the Constitution to be exclusive will, we think, clearly appear. The first consideration which indicates this is the incorporation in the same draft of the Constitution of section 2 of Article VI, which reads:

"SEC. 2. The Legislature of the United States shall have authority to establish such uniform qualifications of the Members of each House, with regard to property, as to the said Legislature shall seem expedient."

The inference that the framers of this draft must have understood that section 2 of Article IV was exclusive, and that in order that the legislature might have any power at all over qualifications it was necessary to confer it by a later and specific provision, is imperative and obvious. The debates confirm this idea.

Madison opposed the proposed section 2, Article VI, "as vesting an improper and dangerous power in the legislature. The qualifications of elector and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate those of either, it can by degrees subvert the Constitution.

"A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected as the number authorized to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their constituents, there was the same reason for being jealous of them as there was for relying upon them with full confidence when they had a common interest. This was one of the former cases."

Gouverneur Morris moved to strike out "with regard to property," in order, as he said, "to leave the legislature entirely at large"—precisely what is now claimed without any such constitutional provision. This was objected to by Mr. Williamson on the ground that should "a majority of the legislature be composed of any particular description of men—of lawyers, for example—which is no improbable supposition, the future elections might be secured to their own body."

Mr. Madison further observed that "the British Parliament possessed the power of regulating the qualifications both of the electors and the elected, and the abuse they had made of it was a lesson worthy of our attention. They had made changes in both cases, subservient to their own views of political or religious parties." (Madison Papers, etc., vol. 5, p. 404.)

This article was not agreed to.

Note the significance and primal importance of Mr. Madison's assertion that "the qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution," as otherwise the legislature might "subvert the Constitution."

His insistence upon these grounds prevented the adoption of the provision that only conferred this power upon the legislature in one particular, and the convention thus evidently adopted his views as to the exclusiveness of the provisions of Article IV, section 2.

Again, when the original proposition which resulted in Article IV, section 2, was under discussion prior to the draft reported by the committee of detail, Mr. Dickinson opposed the section altogether, expressly because it would be held exclusive, saying he "was against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the legislature from supplying omissions." (Ibid., p. 371.)

Mr. Wilson took the same view, saying, "Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters." (Ibid., 373.)

When this section in the draft was under discussion, after "three" had been stricken out and "seven" inserted as to citizenship, Alexander Hamilton moved "that the section be so altered as to require merely citizenship and inhabitancy," and suggested that "the right of determining the rule of naturalization will then leave a discretion to the legislature on the subject which will answer every purpose." (Ibid., p. 411.)

Here it is clear that, as Hamilton construed this provision, without this latitude as to naturalization, the legislature had no discretion or power. From the affirmative language of this provision, then, as it stood in the report of the committee of detail, and the understanding of the framers of the Constitution, it is clear that it was exclusive. This section was not changed to the negative form by amendment or as the result of any debate. In its affirmative form with other sections that had been finally acted upon, and their construction and terms definitely settled, it was referred to a committee "to revise the style of and arrange the articles which had been agreed to by the House," and this committee consisted, among others, of Mr. Hamilton, Mr. Gouverneur Morris, and Mr. Madison. (Ibid., p. 530.)

This committee had no power to make any change in the legal effect of any of the clauses submitted to them. They were simply "to revise the style of and arrange." Certainly, with his very pronounced views, Mr. Madison would not have made a change in Article IV, section 2, that would, in his opinion, have placed it within the power of the legislature to "subvert the Constitution."

Yet, when the committee reported the Constitution as it now stands, Article IV is rearranged so as to be included in Article I, and the original affirmative section 2 of Article IV appears in the negative form as the second independent paragraph of Article I, somewhat changed, it is true, but in no sense connected with or dependent upon the preceding paragraph, which, with an improvement in phraseology, is section 1 of Article IV of the draft. This reference to the original sources of information, we submit, deprives the argument sought to be derived from the juxtaposition of all significance. (Ibid., p. 559.)

An examination of the finished work discloses the fact that the rearrangement and changes in phraseology by the committee were extensive. The object unquestionably was to make the arrangement more orderly and lucid and the language more perspicuous and felicitous. To hold that in any particular any change was intended to be made in the legal effect is to impeach the integrity of men whose characters are of the most illustrious in our history. To assert that they unwittingly made such changes is a much more grievous assault upon their intelligence and ability.

Moreover, we are not left to inference as to how this clause in its present form was interpreted by the most eminent of the framers of the Constitution. The Federalist, as is well known, was published while the Constitution was undergoing public discussion, and while it was being ratified by the States. It had been ratified by six States only when the numbers of the Federalist hereafter referred to appeared. The author of No. 52 evidently assumes that all of the qualifications of representatives had been "very properly considered and regulated by the convention."

He says:

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A Representative of the United States must be of the age of 25 years; must have been seven years a citizen of the United States; must at the time of his election be an inhabitant of the State he is to represent, and during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the Federal Government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth or to any particular profession of religious faith."

If the learned author had supposed that any limitations in addition that might appeal to the caprice of a legislature could be added, he would hardly have used the term "these reasonable limitations," as he evidently did, as descriptive of all of the limitations to be imposed. In No. 57 a general reference to this clause is made, which evidently proceeds upon the idea that the qualifications to be required are stated in the Constitution. It reads: "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of the country. No qualification of wealth, of birth, of religious faith, or of civil professions is permitted to fetter the judgment or disappoint the inclination of the people."

How could he know that unless the Constitution settled the qualifications? The authorship of these two numbers is in doubt between Madison and Hamilton. Hamilton is conceded to be the author of No. 60, and with many no authority is greater than his; and this, so far as his authority goes, settles it beyond cavil. He says:

"The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property, either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. The qualifications of the

persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the legislature."

This unequivocal declaration was made after the negative form of expression had been adopted; made concerning the provision as it now exists in the Constitution. It is not contended that the Federalist was a determining factor in securing the ratification of the Constitution, though it was undoubtedly published for that purpose. So far, however, as this clause weighed in the public mind, as this is the only construction that appears to have been placed upon it, it may be inferred that this construction was adopted by the States which afterwards ratified.

In the light of these facts it is to be deplored that exigencies arise which are supposed to justify a construction in direct conflict with the intention and interpretation of those who framed and assisted in ratifying the Constitution. It seems clear that the negative form of expression has no interpretive significance, and as it affords no support for the proposition which involves the right to add qualifications, that proposition must fall with the erroneous construction upon which it is based.

The great weight of the other authorities sustains this conclusion.

In Thomas *v.* Owens (4 Md., 223) the court said:

"Where a constitution defines the qualifications of an officer, it is not within the power of the legislature to change or superadd to it, unless the power be expressly, or by necessary implication, given to it."

And in Page *v.* Hardin (8 Ben. Mon., 661) the court said:

"We think it entirely clear that so far as residence is to be regarded as a qualification for receiving or retaining office, the constitutional provision on the subject covers the whole ground, and is a denial of power to the legislature to impose greater restrictions."

In Black *v.* Trover (79 Va., 125), also, the court said:

"Now, it is a well-established rule of construction, as laid down by an eminent writer, that when the Constitution defines the qualifications for office, the specification is an implied prohibition against legislative interference to change or add to the qualifications thus defined."

Mr. Justice Story is conceded to be one of the greatest authorities upon the construction of the Constitution, and upon this point he states the law as follows:

"It would seem but fair reasoning upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." (Story on the Constitution, sec. 625.)

Cooley certainly stands equal in authority to Story, and he says:

"Another rule of construction is that where the Constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the supreme court of Maryland that where the Constitution defined the qualifications of an officer it was not in the power of the legislature to change or superadd to them, unless the power to do so was expressly, or by necessary implication, conferred by the Constitution." (Cooley's Constitutional Limitations, p. 78.)

Cushing, as against his former statement, says:

"The Constitution of the United States having prescribed the qualifications required of Representatives in Congress, the principal of which is inhabitancy within the State in which they shall be respectively chosen, leaving it to the States only to prescribe the time, place, and manner of holding the election, it is a general principle that neither Congress nor the States can impose any additional qualifications. It has therefore been held, in the first place, that it is not competent for Congress to prescribe any further qualifications or to pass any law which shall operate as such." (Cushing on Law and Practice of Legislative Assemblies, second edition, p. 27, sec. 65.)

John Randolph Tucker, one of the latest writers on the Constitution, and an able one, is explicit on this point:

"Nor can the Congress nor the House change these qualifications. To the latter no such power was delegated, and the assumption of it would be dangerous, as invading a right which belonged to the constituent body, and not to the body of which the representative of such constituency was a member. (Tucker on the Constitution, 394.)

"The principle that each House has the right to impose a qualification upon its membership which is not prescribed in the Constitution, if established, might be of great danger to the Republic. It was on this excuse that the French directory procured an annulment of elections to the Council of Five Hundred, and thus maintained themselves in power against the will of the people, who gladly accepted the despotism of Napoleon as a relief. (Foster on the Constitution, p. 367.)

"It is a fair presumption that where the Constitution prescribed the qualifications it intended to exclude all others. (Paschal's Annotated Constitution, second edition, p. 305, sec. 300.)

"Where the Constitution prescribed the qualifications for an office, the legislature can not add others not therein prescribed." (McCrary on Elections, sec. 312.)

McCrary also takes the ground that statutory and constitutional provisions making ineligible to office any person who has been guilty of crime presuppose a conviction before the ineligibility attaches. (Ibid, p. 345.)

Paine, in his work on elections, takes the same view (pp. 104–108).

Certainly the great weight of authority is against the right to add, even by law, to the qualifications mentioned in the Constitution.

478. The case of Brigham H. Roberts, continued.

In 1900, in a sustained report, the majority of the committee held that a Member of Congress was an officer, subject to statutory disqualifications as such.

Discussion of the laws of Congress against polygamy as creating a statutory disqualification.

Discussion of the oath of July 2, 1862, as creating a statutory disqualification.

3. As to the status of the Member as an officer, and disqualifications under the statute:

The majority report says:

We present now the statutory declarations where disqualifications have been imposed.

Section 21 of the act of April 30, 1790, is as follows:

"That if any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present, or reward, or any promise, contract, obligation, or security, for the payment or delivery of any money, present, or reward, or any other thing, to obtain or procure the opinion, judgment, or decree of any judge or judges of the United States, in any suit, controversy, matter, or cause depending before him or them, and shall be thereof convicted, and so forth, shall be confined and imprisoned, at the discretion of the court, and shall forever be disqualified to hold any office of honor, trust, or profit under the United States."

Section 5499, which was passed in 1791, provides: "That every judge of the United States who in any wise accepts or receives any sum of money or other bribe, etc., shall be fined and imprisoned, and shall be forever disqualified to hold any office of honor, trust, or profit under the United States."

Is a Member of Congress an officer?

Before citing other acts of Congress it is proper to discuss the question as to whether a Member of Congress is an officer within the meaning of the statute.[1]

If a Member of Congress is not an officer, if the qualifications of a Member of Congress are only those named in the Constitution, then, of course, the makers of the Constitution meant that nobody could be made ineligible for Congress, either by law or by the act of either body, even though laws passed immediately after the adoption of the Constitution made him ineligible for all other positions under the Government.

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[1] The question as to whether or not a Member of the Senate or House is an officer of the United States was discussed incidentally in a learned debate in the Senate on December 19, 1863, and January 20, 21, and 25, 1864, the occasion being a proposed rule, which was agreed to, providing that Senators should take and subscribe in open Senate to the oath or affirmation provided by the act of July 2, 1862. (First session Thirty-eighth Congress, Globe, pp. 48, 275, 290, 320–331.)

Now, upon that proposition we make these observations as to the meaning of the word "office."

First. Undoubtedly under the Constitution, in one or two instances, the word "office" does not include Representatives in Congress, as, for example, the last paragraph of section 6, article 1: "No person holding any office under the United States shall be a Member of either House during his continuance in office."

In that case the words "holding any office" means an office other than a Member, but the context is absolutely unmistakable, and no person is in danger of assuming, even if a Member of Congress hold an office, that it meant to say that no Member of Congress shall be eligible to be a Member of Congress.

In the second place, the provision in the last paragraph of section 3 of article 2, relating to the duties of the President, that he shall commission all the officers of the United States, does not mean that he is to commission Members of Congress, but he is himself an officer, and he does not commission himself, nor does he commission the Vice-President, who is also an officer under the United States.

So also paragraph 2, section 1, article 2: "But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

There the distinction is made "No Senator or Representative, or person holding an office of trust."

But under the Constitution the word "office" must include in certain of its provisions a Representative in Congress.

It is inconceivable that in the Constitution the word "office" never includes a Member of Congress. Look at the last paragraph of section 3, article 1.

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

It is conceivable that the framers of the Constitution meant that a man might be adjudged guilty in case of impeachment, and that that judgment of guilty could carry with it a judgment disqualifying him from holding any office, save only to be a Representative or Senator in Congress?

Paragraph 8, section 9, article 1, is as follows: "No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."

Did the Constitution mean that Representatives and Senators in Congress could receive emoluments, presents, office, or title from some king, prince, or foreign state, but no other person holding an office could without the consent of Congress?

But in the next place, as to statutes. Whatever may be held to be the meaning of the word "office" in the Constitution, it does not follow that the same meaning must be given to it in the statutes. We find a varying meaning in the Constitution, and we find a varying meaning in the statutes. The act of 1790 has always been assumed to cover Members of Congress.

Section 5500 of the Revised Statutes, originally passed in 1853, and now in substantially the form in which it was when originally passed, provides: "Any Member of either House of Congress who asks, accepts, or receives any money, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money, * * * either before or after he has been qualified or has taken his seat as such Member, with intent to have his vote or decision on any question, matter, cause, or proceeding * * * pending in either House, * * * shall be punished by a fine, etc."

Section 5502 is as follows: "Every Member, officer, or person convicted under the provisions of the two preceding sections who holds any place of profit or trust shall forfeit his office or place, and shall thereafter be forever disqualified from holding any office of honor or trust or profit under the United States."

This section applies explicitly to a Member of Congress, and brings forfeiture of the office or place held by him. If "office" in this section does not include a Member of Congress the word "place" must include him.

Now, the word "office" in that concluding part of this section must refer to "Member." First, because the word "office" is used in the preceding line as necessarily including a place that is held by a Member. It can not fail to include that, for it refers to a "Member" and what shall happen to him. In the next place, because it is not conceivable that the legislative body intended that the violation of that law by a Member should forfeit the position that the Member had and then not intend to disqualify him from being elected again as a Member of the House when it disqualifies him from holding all other offices or places under the United States.

But that is not the only statutory construction of the word office. It is still more explicitly declared in the test-oath act, of July 2 1862: "That hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation:

"'I, A B, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto.

"'And I do further swear (or affirm) that to the best of my knowledge and ability I will support the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.'"

"Which said oath, so taken and signed, shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain.

"Any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that offense, shall be deprived of his office and rendered incapable forever thereafter of holding any office of trust under the United States."

It will be noticed that the only person required to take that oath is an officer, a person elected or appointed to any office of honor or profit, but it does not include in this phraseology a Member.

By reference to the concluding portion of the act it will appear that the word office does not include a Member of Congress.

"Which said oath so taken and signed shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain."

We not only have the use of the word "Congress" as indicating to what the word "office" appertains, but also the universal, unquestioned construction by the acts of the Senate and of the House in compelling the test oath to be taken year after year until it was repealed. Each House of Congress recognized that that oath was an oath to be taken by a Representative in Congress, notwithstanding the fact that the act passed made it apply only to a person elected or appointed to an office of honor or trust in the United States.

We quote this section here, as well for the purpose of showing the Congressional precedents imposing a substantial qualification, or disqualification, upon the Members of Congress, really substantial in its character, as the facts of history show, as to exhibit what is meant in the statutes by the word "office."

There are many other statutory provisions, passed from time to time since 1790, disqualifying for office of trust or profit under the United States persons guilty of the several crimes defined in those statutes. We do not refer to them specifically, but they are illustrated by the statutes already quoted.

It ought also to be said that section 8 of the Edmunds Act, whatever meaning may be given to it, evidences the legislative will to disqualify polygamists for office. It indicated the legislative purpose so aptly described by Justice Matthews, in the Ramsey case, when he said that no more cogent or salutary method could be taken than was taken by the Edmunds Act, which undertook to withdraw from all political influence those persons who showed a practical hostility to the development of a commonwealth based upon the idea of the union for life of one man and one woman in the holy estate of matrimony.

The statutory declaration, if we may use that form of expression as applicable to the joint action of the House, coupled with the President's approval, is only a more solemn declaration by both Houses of the principle that it has the right to exclude under certain conditions; that either House may do it. That very point was made in the discussion on the test oath in the Senate—that of course that law could not with certainty bind any succeeding Senate or any succeeding House, but that it was apparent that so long as there existed any necessity for such an oath, and in the very nature of things the time would come in a few years when it would not be necessary, either House would respect its requirements and compel a submission to it; and that was the action of the Senate and House for nearly twenty years.

The minority, in their views, hold:

If the right to add a disqualification by law be assumed, the disqualification imposed by the Edmunds Act does not apply to a Member of Congress, and therefore does not affect Mr. Roberts. The only portion of the section that can be said to have any application to a Member of the House of Representatives is that which declares that no polygamist, etc., shall "be entitled to hold any office or place of public trust, honor, or emolument, * * * under the United States." Unless a Member of the House holds an office "under the United States," within the meaning of the Constitution and the law, there is no disqualification.

As to the nature of their offices, whether "under the United States" or otherwise, Members of the House and Senate are evidently the same. The words "office" and "offices" occur in the Constitution and amendments twenty-three times, and the words "officer" and officers" fifteen times, and, with the exception of possibly two instances, these terms are never used, either directly or indirectly, as relating to or in connection with a Representative or Senator.

One possible exception referred to is found in Article I, section 3, and reads: "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States."

The term "office" in the first clause, as to "removal from office," clearly does not relate to a Member of either House, as it will be seen that the provisions as to impeachment do not apply to them. It would seem that a civil officer guilty of conduct that would justify impeachment ought not to be eligible to a seat in Congress, though unless the clause "office of honor, trust, or profit, under the United States" be held to include a Member, he could not be disqualified thereby. Still, if a Member is not the subject of impeachment, there is perhaps as much reason in exempting him from the disqualifications of impeachment.

The other possible exception is in Article I, section 9, paragraph 8: "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

Standing alone, we might understand the paragraph as broad enough and comprehensive enough to include Members of Congress, but, taken with the other provisions of the Constitution—and they are numerous—wherein the like terms do not embrace or apply to Senators or Representatives in Congress, what support can this paragraph possibly afford to those who invoke it as authority for adding anything whatever to the prescribed qualifications of a Representative?

The clause in Article I, section 6, provides: "And no person holding any office under the United States shall be a Member of either House during his continuance in office."

Here it is very clear that "any office under the United States" can not include a Member, as otherwise it would be equivalent to a provision that no Member of either House shall be a Member of either House during his continuance in office—an absurdity. A clause in Article II, section 1, provides: "But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Here "Senator or Representative" and "person holding an office of trust or profit under the United States" are used in the alternative, or in contradistinction from each other. If they were one and the same, their separate enumeration was unnecessary. If identical, there would be no occasion to particularize "Senator or Representative."

If identical, the adjective "other" should have been used, so that the clause should read, "or person holding any other office of trust or profit under the United States," etc.

These observations apply to the following provisions:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, etc. (Constitution, Art. VI.)

"No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath," etc. (Fourteenth Amendment, sec. 3.)

Article II, section 4—"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors"—has been construed by the only tribunal therefor known to the Constitution,

the Senate sitting as a court of impeachment, which held that a Senator was not a "civil officer," and therefore was not liable to impeachment. It was the case of William Blount, a Senator, who was impeached before the bar of the Senate by the House of Representatives. In his plea he claimed that as a Member of the Senate he was not one of the "civil officers of the United States," and on the 11th of February, 1797, the Senate announced its conclusion as follows:

"The court is of the opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that said impeachment is dismissed." (Annals of Congress, vol. 8, p. 2319.)

Story concurs in this view. (Story on the Constitution, sec. 792.)

Who can be said to hold office "under the United States" was practically decided in United States v. Germaine (99 U. S., 508–512), where the court said:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when officers become numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

In United States v. Mouat (124 U. S., 303–308), the Germaine case is cited and approved, the court saying: "In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law or the head of a department."

The same principle is affirmed in United States v. Hendee (124 U. S., 309–315).

If, then, "all its officers," "under the Constitution," are appointed in the manner above indicated, clearly a Member of either House does not hold an office "under the United States," and the Edmunds Act can not apply.

(4) Applying the law to the facts the majority of the committee found three distinct grounds of disqualification of Roberts:

(a) By reason of his violation of the Edmunds Act and the declared policy of disqualification in section 8.

On this point the majority report holds—

Let us see in what attitude and status the claimant appears and claims the right to be sworn in. No appreciative opinion as to his status can be formed without some knowledge of the judicial and statutory characterization of his offense.

Section 5352, passed by Congress in 1862, declared: "Every person having a husband or wife living who marries another, whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.'

It did not, however, make unlawful the practice of polygamous living. There was no pretense of obedience to this law in Utah, the claim being made that it was unconstitutional because an interference with the religion of the Mormons. There is no doubt but that a large body of the Mormons, not only those who practiced polygamy, but those that did not, believed that the act of 1862 was an unconstitutional infraction of their rights.

In 1878, however, in the case of Reynolds v. The United States (98 U. S., 145) the Supreme Court held that section 5352 was "in all respects valid and constitutional." So that after 1878 no man in Utah could claim that the practice of polygamy was right as related to the laws of the land without doing violence, not only to the statute, but to the unanimous opinion of the highest court of the land.

The opinion in this case was by Chief Justice Waite, and in the course of it polygamy receives judicial characterization as follows (we think it highly important to quote it because it is a judicial declaration and leads us up to a proper recognition of Mr. Roberts's status):

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.

"By the statute of James I the offense was made punishable by death.

"It is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration of the bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of James I, death penalty included, because as recited in the preamble, 'it hath been doubted whether bigamy and polygamy be punishable by the laws of this Commonwealth.' From that day to this we think it may safely be said there never has been a time in any State of the Union where polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity."

And continuing the quotation:

"Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people to a greater or less extent rests. Professor Lieber says polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle can not long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound.

"Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

So also in Murphy *v.* Ramsey (114 U. S., 45). Construing the Edmunds Act, Justice Matthews says:

"Certainly no legislation can be supposed more wholesome and necessary in the founding of a free self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."

How cogent and prophetic are these words. How applicable to this situation; that all political influence ought to be withdrawn from those practically hostile to the establishment of a "Commonwealth on the basis of the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony."

There was no machinery for enforcing the act of 1862 until 1882, when Congress passed what is known as the Edmunds law. This act defined and punished bigamy and polygamy in the same terms as the act of 1862, but also punished unlawful cohabitation, and declared ineligible for office any person who maintained the status of a polygamist or who cohabited with more than one woman.

Section 8 of that act is as follows: "That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust, honor, or emolument in, under, or for such Territory or place, or under the United States."

This law had not only the force of a public law, but it was the outcome of years of agitation and reflection. It crystallized the sober sense of the American people; it represented the settled views of our wisest and most conservative statesmen, and later received the stamp of approval from the Supreme Court of the United States in many well-considered cases.

Prior to 1882 Brigham H. Roberts had married one Louisa Smith. She has borne him six children, and is still living.

About 1885, when Utah was fairly ringing with the blows of the Edmunds Act of 1882; while numerous prosecutions were going on and after the Supreme Court had passed upon the validity of the

act; when the American people supposed that polygamy had received its deathblow; when no man of the many whose cases went to the United States Supreme Court pretended that the provisions against polygamous marriages were invalid, with all these facts insistently before him, Brigham H. Roberts took another wife—his first polygamous wife—Celia Dibble by name, who in the following twelve years, bore him six children.

This second wife he married in defiance of the Edmunds law. He spat upon that law; he declared by his act that he recognized no binding rule upon him of a law of Congress; he declared by it that he recognized a higher law. The Congress of the United States was to him an object of contempt. The Supreme Court of the United States might declare the law for others, but not for him. He laughed at its futile decrees and spurned its admonitions. The Executive which had declared in solemn messages its gratification that polygamy seemed gone forever he defied and despised. Of what consequence to him were laws of Congress and declarations of the highest court and proclamations of Presidents as against his sensual interpretation of a sensual doctrine?

And all the time the Edmunds law declared not only polygamy but cohabitation with more than one woman unlawful. Roberts not only bigamously married a second wife, but he persisted in violating and defiantly trampling under foot every other provision of the act.

But he had not yet sufficiently proclaimed his utter contempt for the Supreme Court, for Congress and its most solemn enactments. A few years later he took a third wife.

From the time of his second marriage to the third he cohabited with two women. From the date of his third marriage down to his election, and, we doubt not, to the present time, he has been cohabiting with three women.

As recently as December 6, 1899, he defined his position as follows:

"These women have stood by me. They are good and true women. The law has said I shall part from them. My church has bowed to the command of Congress and relinquished the practice of plural marriage. But the law can not free me from obligations assumed before it spoke. No power can do that. Even were the church that sanctioned these marriages and performed the ceremonies to turn its back upon us and say the marriages are not valid now, and that I must give these good and loyal women up, I'll be damned if I would."

In this statement he adheres to the audacious assumption that the law of 1882 did not speak to him and that he did not recognize it as a rule of conduct to him.

The amnesty proclamation of 1893 and 1894 never embraced him. There was never a moment when its provisions were complied with by him. There has never been a moment since he married Celia Dibble down to the present moment when he has not been a persistent, notorious, defiant, demoralizing, audacious violator of every provision of the State and Federal law relating to polygamy and its attendant crimes. And this is the man who seeks admission to this body.

It was declared in the Kentucky cases, and in the Thomas case in the Senate, and in the Test Oath Act of 1862 that disloyalty created ineligibility; that fidelity to the Constitution was a necessary qualification to membership in this body. What is loyalty? It is faithfulness to the sovereign or the lawful government. A mere violator of the law may not necessarily be disloyal. One may violate the law and still recognize the sovereign and the lawfulness of the government. His only concern may be that he shall not be found out and punished. But that man is surely disloyal, and in the fullest sense disloyal, when by his words, his acts, and his persistent practices he declares unequivocally in this wise: "You have solemnly enacted certain laws; you have crystallized into statute the will of the sovereign people. I bid defiance to your law. I will not recognize it. I here and now before your very eyes do the things you say I shall not do. I recognize a higher law than your man-made law—no law of yours can relieve me from the obligations which I thus take in defiance of your enactments. The only thing I promise not to do is to take a fourth wife."

The case of a bribe taker, or of a burglar, or of a murderer is trivial, is a mere ripple on the surface of things, compared with this far-reaching, deep-rooted, audacious lawlessness.

What was the case of Whittemore, who was excluded, as hereafter set out? He had not been convicted of any crime, but a committee had found that he had sold a cadetship. He did not pretend that he was wiser or greater than the people, or that he had the right to sell cadetships and was above the law. The acts of Roberts are essentially disloyal. They deny the sovereign; they repudiate the lawful government. Look at them from whatever point you will, they are subversive of government. They do not merely breed anarchy, they are anarchy.

We observe that this is not a moral question. It goes to the root of our own constitutional government. What we have just quoted from Justice Waite and Justice Matthews are as much a part of our Constitution as the written instrument itself.

* * * * * * *

Having in mind that portion of this report in which we have heretofore set out the status and condition of Brigham H. Roberts, we would inquire where the specific provisions of the Edmunds Act place him.

Two facts appear as pertinent to this inquiry:

First. That he was convicted in 1889 of unlawful cohabitation under that act, and served a term in the penitentiary therefor.

Second. That he has been ever since 1885, and is now, a polygamist, as that word is used in section 8 of the Edmunds Act and defined by the Supreme Court of the United States in the cases of Murphy *v.* Ramsey (114 U. S., 15) and Cannon *v.* The United States (116 U. S., 55). Section 8 is as follows:

"No polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

Reading that act as applicable to this case, eliminating the irrelevant portions, it appears as follows: "No polygamist shall be entitled to hold any office or place of public trust, honor, or emolument under the United States."

In the Ramsey case, above referred to, a specific distinction is made between a polygamist and a person cohabiting with more than one woman. A polygamist is a person having a certain status respecting more than one woman. The condition, therefore, of a polygamist may be merely passive and requiring no affirmative act. To cohabit with more than one woman is, however, to do an affirmative thing. The result is that one who has two or more wives that he holds out to the world as such is a polygamist, wherever he may be, while one who cohabits with more than one woman is not cohabiting except in the place in which, of necessity, cohabitation must occur.

In the Ramsey case the court illustrated its definition of a polygamist as being a status or condition like any other qualification for elector, or for office, and declared that it was as if Congress had undertaken to make a married man ineligible. It would be the status in that event of being a married man which would create and continue the ineligibility.

It therefore appears that the fact that a man is a polygamist is a fact that inheres in him and stays with him, and persists in remaining with him wherever he may go, so long as he is the possessor of more than one wife; and just as one who is a married man in the State of Maryland continues to be a married man if he leaves his wife at home and comes to the District of Columbia, so Mr. Roberts, being in the condition or status of a polygamist in the State of Utah, does not leave that status behind, nor does he dissociate himself from that status or cast off the garb of a polygamist by leaving his wives at home and traveling from that State into the District of Columbia.

In the very nature of things the House of Representatives, wherever it is as a House of Representatives, is in a place under the exclusive jurisdiction of the United States; therefore when Roberts comes into the District of Columbia, in the status of a polygamist, he is ineligible under the Edmunds Act to hold any office or place under the United States, and therefore ineligible to hold the position of Member of the House of Representatives.

The minority, in their views, say that if the propositions of law already laid down by them are not conclusive, then—

it seems to us very clear that no ineligibility can be predicated upon section 8 of the Edmunds Act, upon the facts as they must be conceded to exist. A brief statement of the history of the legislation involved may be useful.

The Edmunds Act became a law March 22, 1882. Section 1 amended section 5352 of the Revised Statutes of the United States, and defined and prohibited polygamy. Section 3 defined and prohibited unlawful cohabitation, and reads as follows:

"SEC. 3. That if any male person, in a Territory or other place over which the United States have

exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

Section 8, relating to eligibility to hold office, has already been quoted.

The Edmunds-Tucker Act, which became a law March 3, 1887, supplemented the Edmunds law, imposed penalties for various kindred offenses, dissolved the corporation known as the Church of Jesus Christ of Latter-Day Saints, and contained, among other things, various provisions as to dower and the law of descent. With reference to eligibility to office it contained, among others, this paragraph, in the last part of section 24:

"No person who shall have been convicted of any crime under this act, or under the act of Congress aforesaid, approved March twenty-second, eighteen hundred and eighty-two, or who shall be a polygamist, or who shall associate or cohabit polygamously with persons of the other sex, shall be entitled to vote in any election in said Territory, or be capable of jury service, or hold any office or emolument in said Territory."

It will be noticed that this act applied only to "office or emolument in said Territory." It did not go as far as the similar provision in the Edmunds Act and apply to "any office under the United States."

February 4, 1892, Chapter VII of the laws of the Territory of Utah was enacted. Section 1 defined and punished polygamy substantially as did section 1 of the Edmunds Act. Section 2, relating to cohabitation, in all material parts is an exact transcript of section 3 of the Edmunds Act. There is no provision whatever in this act relating to ineligibility to office by reason of any of these offenses. (Laws of Utah, 1892, p. 5.)

The enabling act, authorizing the people of Utah to form a constitution and State government and to be admitted into the Union, became a law July 16, 1894. This act required the convention to provide by ordinance irrevocable without the consent of the United States and the people of the State—

"First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited."

The constitution of Utah was adopted by the convention May 8, 1895, by the people November 5, 1895, and the proclamation of the President of the United States announcing the result of the election and admitting the State into the Union was issued January 4, 1896. Article III, ordinance of the constitution, contained the provision as to religious liberty and polygamous or plural marriages in the exact language of the enabling act. (R. S. Utah, 1898, p. 40.)

Article XXIV, section 2, of the constitution reads as follows:

"SEC. 2. All laws of the Territory of Utah now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature. The act of the governor and the legislative assembly of the Territory of Utah entitled 'An act to punish polygamy and other kindred offenses,' approved February 4, A. D. 1892, in so far as the same defines and imposes penalties for polygamy, is hereby declared to be in force in the State of Utah." (R. S. Utah, 1898, p. 67.)

This did not give the State of Utah any law making persons ineligible to any office by reason of polygamy or cohabitation, as no such provisions existed in the act of 1892, chapter 24, or in any of the "laws of the Territory of Utah."

Sections 4208 to 4216, inclusive, of the Revised Statutes of Utah (R. S. Utah, 1898, p. 899) are substantially the act of 1892. Section 2 of the act of 1892 and section 4209 of the Revised Statutes, relating to unlawful cohabitation, are precisely alike. This statute has not been changed.

The laws of the State of Utah, then, do not now impose and never have imposed any disqualification for holding office by reason of polygamy or unlawful cohabitation. Mr. Roberts was a resident of the Territory of Utah, and since its organization as a State has been a resident of the State of Utah. Under these circumstances we do not think that the disqualifications imposed by the Edmunds Act have had any operation as to him since the organization of the State of Utah. It is settled by an unbroken line of decisions that all Territorial Congressionallegislation is superseded by the adoption of a State constitution and the organization of a State.

In discussing the effect of the adoption of the constitution of Louisiana upon the laws of Congress, the court, in Permoli *v.* First Municipality (3 How., 610), said:

"So far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State constitution; nor is any part of them in force unless they were adopted by the constitution of Louisiana as the laws of the State."

The case of Strader et al. *v.* Graham (10 How., 94) determines the same question, and says:

"The argument assumes that the six articles which that ordinance declares to be perpetual are still in force in the State since formed within the Territory and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the regulation of Congress, under the old confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court any control over them. The ordinance in question, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State, nor give this court jurisdiction upon the subject.

"But it has been settled by judicial decision in this court, that this ordinance is not in force.

"The case of Permoli *v.* The First Municipality (3 How., 589) depended upon the same principles with the case before us."

The same doctrine is held in Pollard et al. *v.* Hagan (3 How., 212).

It is approved by all of the court, from Chief Justice Taney to Judge Curtis, in Dred Scott *v.* Sandford (19 How., 490).

It is approved in Woodman *v.* Kilbourne Manufacturing Company (1 Abb. U. S., 162), opinion by Justice Miller, of the United States Supreme Court. Columbus Insurance Company *v.* Curtenius (6 McLean, 212).

This precise question, in the application to the State of Utah of a law of Congress which was not continued in force by any legislation, has been determined in Moore *v.* United States (85 Fed. Rep., 468).

The court were determining whether a law of Congress against unlawful combinations was in force in Utah, and held:

"By its terms the provision of the statute under which this indictment was found applies only to the Territories of the United States, and while it may yet be in full force within the Territories, it is clear that no prosecution could be maintained under it for entering into a combination or conspiracy in restraint of trade in Utah after the date of her admission as a State. * * * When Utah became one of the States of the Union, this statute ceased to be in force within its boundaries, unless, by appropriate legislation it was continued in force for the purpose of prosecuting violations thereof committed during the existence of a Territorial form of government. * * * The act of July 2 was not repealed by the enabling act, for it yet applies to the Territories of the United States. It ceased to be in force in Utah only because it was superseded by the constitution upon the admission of the State."

We have seen that there was no legislation of any kind continuing in force section 8 of the Edmunds Act, relating to disqualifications. It is to be observed that this section does not undertake by its terms to operate within the limits of any State. It is expressly confined in its operation, by its terms, to "any Territory or other place over which the United States have exclusive jurisdiction." The meaning of the terms "polygamist" or "person cohabiting," with reference to the restriction as to voting, has been fully settled by the United States Supreme Court in Murphy *v.* Ramsey. (114 U. S., 39; 29 L. C. P., 47.)

This was an action for damages sustained by reason of being deprived, under this section, of the right to vote in the Territory of Utah, and among other things the court held:

"The requirements of the eighth section of the act, in reference to a woman claiming the right to vote, are that she does not, at the time she offers to register, cohabit with a polygamist, bigamist, or person cohabiting with more than one woman. * * * Upon this construction the statute is not open to the objection that it is an ex post facto law. It does not seek in this section and by the penalty of disfranchisement to operate as a punishment upon any offense at all. * * * The disfranchisement operates upon the existing state and condition of the person, and not upon a past offense. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or a polygamist, or is then actually cohabiting with more than one woman. * * * So that, in respect to those disqualifications of a voter under the act of

March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecution for crime.

"In respect to the fact of actual cohabitation with more than one woman, the objection is equally groundless, for the inquiry into the fact, so far as the registration officers are authorized to make it, or the judges of election, on challenge of the right of the voter if registered, are required to determine it, is not, in view of its character as a crime, nor for the purpose of punishment, but for the sole purpose of determining, as in case of every other condition attached to the right of suffrage, the qualification of one who alleges his right to vote. It is precisely similar to an inquiry into the fact of nativity, of age, or of any other status necessary by law as a condition of the elective franchise."

The principles which apply to eligibility as a voter must apply to eligibility to office, as they are in the same section and the same language is employed as to each, and in order to be affected by the disqualification prescribed by this section a person must be a polygamist or unlawfully cohabiting within the meaning of the section "at the time" of entering upon the office. It is not enough to show that at some former period Mr. Roberts was a polygamist or unlawfully cohabiting, as the disfranchisement does not operate "upon a past offense." It would have been entirely competent for Roberts to have taken himself from under the operation of this section while Utah was still a Territory, simply by ceasing to be a polygamist or cohabiting, or by moving into a State, as the "disfranchisement" operates upon "the existing state and condition of the person" only. In other words, the offense must be continuous. The offense and the disqualification are coterminous.

There is a further legal proposition, too well settled to require the citation of authority, and that is, no statute can operate, either directly or indirectly, extraterritorially. The statute in question does not undertake to.

The offense of polygamy and unlawfully cohabiting is localized by the statute. The provision is not general. No polygamist or person thus cohabiting "anywhere, without any restriction as to place," is not the language; on the other hand, the prohibition is confined to a specified locality. No polygamist or any person thus cohabiting—where? "In any Territory or other place over which the United States have exclusive jurisdiction." The United States had no power to make the prohibition apply to any other place, and did not attempt it. The offense and the place defined must coexist. He must be a polygamist or person unlawfully cohabiting in "any Territory," or the statute does not apply. The statute applies only to residents of the Territory.

In the light of these propositions let us analyze the case as it is.

Mr. Roberts presents himself as a Member-elect of this House. It is objected that he is disqualified under this section as a polygamist or person unlawfully cohabiting. The disqualification must exist at the time of his becoming a Member. But since January, 1896, he has resided in the State of Utah, and this statute has not since then operated upon him, and does not now operate upon him. It can not, therefore, now disqualify him. The conditions of offense and place required by the statute to coexist do not coexist in his case, and therefore the statute does not apply. In other words, it is said he is ineligible. Why? Because there is a statute of the United States which says that no polygamist or person unlawfully cohabiting in "any Territory" is eligible, and he is a polygamist or person thus cohabiting. It is a complete answer to say, "while I am a polygamist I am not such in 'any Territory.'"

While the penal provisions of the Edmunds Act are in full force in "any Territory," it would not for a moment be contended that Mr. Roberts would be liable to prosecution thereunder since January, 1896. Why? Simply because since that time he has committed no crime within "any Territory," as all of his acts have been in the State of Utah. A fortiori, the disqualifying provisions do not apply to him, as they do not even "operate as a punishment upon any offense at all." The moment Utah became a State he, living in Utah, became a resident of the State, and one of the indispensable elements of the condition to which the disqualification attaches—residence within "any Territory"—ceased to exist, and the disqualification ceased to apply. The offense of polygamy or unlawful cohabitation in "any Territory" and the disqualification were no longer coterminous. He is now doing no act in "any Territory" to which the disqualification applies, and therefore, as to him, it does not exist.

It is true that while Utah was a Territory Roberts was unlawfully cohabiting, and the disqualification existed, and his status was then that of ineligibility, and therefore, it may be suggested, it continues. But this would make the disqualification the result of a past offense, and the law says that it "operates upon the existing state and condition of the person and not upon a past offense." It does not "operate as a punishment" at all, all of which it clearly would do if the supposition were correct.

If the disqualification attaches to Roberts by reason of acts committed in Utah, the State, then the act would be operating extraterritorily, outside of "any Territory" to which by its specific terms it is expressly confined. The fact that Roberts still resides in the same place where he resided in 1895, though Utah is now a State, but then was a Territory to which the law applied, undoubtedly is the cause of some confusion of thought. It is clear that his legal rights are precisely the same as though since 1896 he had been residing in Maine, and had been elected to Congress from that State. It would not be contended that this act could have any application to him in such case to affect his present status, as it never operated there. No more has it in Utah since January, 1896.

It seems to us beyond question that this act does not now apply to Mr. Roberts. Then there is no law having any application to this case by which the attempt is made to add anything to the constitutional qualifications. This House, by its independent action, can not make law for any purpose. The adding by this House, acting alone, of a qualification not established by law would not only be a violation of both the Constitution and the law, but it would establish a most dangerous precedent, which could hardly fail to "return to plague the inventor." You might feel that the grave moral and social aspects of this case allowed you to—

"Wrest once the law to your authority
To do a great right, do a little wrong."

But what warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House with other standards of morality and propriety, which will create other qualifications with no rightful foundations, that, in the heat and unreason of partisan contest—since there will be no definite standard by which to determine the existence of qualifications—will add anything that may be necessary to accomplish the desired result? Exigency will determine the sufficiency. It would no longer be a government of laws, but of men. To thus depart from the Constitution and substitute force for law is to embark upon a trackless sea, without chart or compass, with almost a certainty of direful shipwreck.

479. The case of Brigham H. Roberts, continued.
The question of loyalty as a qualification of a Member.

(*b*) By reason of disloyalty thus described by the majority report—

He is disqualified because for years he has been living in open, flagrant, and notorious defiance of the statutes of Utah and in open, flagrant, and notorious defiance of the statutes of Congress—of the very body which he now seeks to enter; in defiance of the law as declared by the Supreme Court of the United States, and in defiance of the proclamations of Presidents Harrison and Cleveland. He has persistently held himself above the law. This is disloyalty in its very essence. In the language of Chief Justice Waite, in the Reynolds case, this would in effect "permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

The majority say on this point:

The principles underlying the second main ground of disqualification, hereinbefore asserted, have already been fully discussed, but the ground is appropriately restated at this point.

We assert before the House, the country, and history that it is absolutely and impregnably sound, not to be effectively attacked, consonant with every legislative precedent, in harmony with the law and with the text-books on the subject:

That Brigham H. Roberts's persistent, notorious, and defiant violation of one of the most solemn acts ever passed by Congress, by the very body which he seeks now to enter, on the theory that he is above the law, and his defiant violation of the laws of his own State, necessarily render him ineligible, disqualified, unfit, and unworthy to be a member of the House of Representatives. And this proposition is asserted not so much for reasons personal to the membership of the House as because it goes to the very integrity of the House and the Republic as such.

The minority do not specifically refer to this point, but discuss it generally in their treatment of the subject of qualifications.

480. The case of Brigham H. Roberts, continued.

A constituency having violated the understanding on which it came into the Union, was the status of a Member-elect thereby affected?

(c) Because, in the words of the majority report—

His election as Representative is an explicit and most offensive violation of the understanding by which Utah was admitted as a State. It is an act of unmatched audacity, the possibility of which could no more have been considered when the State of Utah was admitted than that a specific permission would have been given to renew the practice of polygamous marriages.

The majority say on this point:

Utah was admitted to the Union with the distinct understanding upon both sides that polygamous practices were under the ban of the church, prohibited and practically eradicated, both as a practice and a belief, and that they would not be renewed.

The effort is made to alarm people upon this proposition that some similar objection might be made to representation from States in which the claim might be made that the right to vote was denied to some citizens. It is a sufficient answer to this to say that if such ground of complaint exists the Constitution specifically tells us what our remedy is, and declares precisely in the fourteenth amendment what we may do in any event when the right of suffrage is improperly denied. There is no possible escape from that position, even assuming that there was anything in the bogie man.

But as to Utah, she was admitted on the express statement that the practice of polygamous living was interdicted by the church, was practically abandoned by the people and eradicated as a belief. Of course, that sporadic instances of the violation of the law against cohabitation might occur no one doubted.

The manifesto forbidding plural marriages and enjoining obedience to the laws relating thereto was issued by Wilford Woodruff, president of the Church of Jesus Christ of Latter-Day Saints, September 25, 1890.

Some doubt having arisen as to whether that manifesto prohibited association in the plural marriage relation, as well as the contracting of plural marriages as a ceremony, President Woodruff himself testified under oath as follows:

"Q. Did you intend to confine this declaration and advice to the church solely to the question of forming new marriages without reference to those that were existing—plural marriages?—A. The intention of the proclamation was to obey the law myself—all the laws of the land on that subject—and expecting that the church would do the same.

"Q. You mean to include, then, in your general statement the laws forbidding association in plural marriages as well as the forming of new marriages?—A. Whatever there is in the law with regard to that—the law of the land.

"Q. Let me read the language and you will understand me, perhaps, better: 'Inasmuch as laws have been enacted by Congress forbidding plural marriages, * * * I hereby declare,' etc. Did you intend by that general statement of intention to make the application to existing conditions where the plural marriages already existed?—A. Yes, sir.

"Q. As to living in the state of plural marriage?—A. Yes, sir; that is, to the obeying of the law.

"Q. In the concluding portion of your statement you say, 'I now publicly declare that my advice to the Latter-Day Saints is to refrain from contracting any marriage forbidden by the laws of the land.' Do you understand that that language was to be expanded to include the further statement of living or associating in plural marriage by those already in the status?—A. Yes, sir; I intended the proclamation to cover the ground—to keep the laws, to obey the law myself—and expected the people to obey the law."

The significance of this statement by the spiritual head of the church is the more apparent when we remember that it was made but a short time before the question of the admission of Utah was debated in the House of Representatives.

Is it to be an occasion for wonder, therefore, that the proclamation of amnesty issued by President Harrison January 4, 1893, should contain these words:

"Whereas it is represented that since the date of said declaration the members and adherents of

said church have generally obeyed said laws and abstained from plural marriages and polygamous cohabitation; and

"Whereas by a petition dated December the 19th, 1891, the officials of said church, pledging the membership thereof to the faithful obeyance of the laws against plural marriages and unlawful cohabitation, applied to me to grant amnesty for past offenses against said laws."

Is it strange that the House Committee on Territories in 1893 should report that "polygamy is dead?" And if that is not fully convincing, let the unprejudiced mind consider the following extracts from the debate in the House of Representatives on the admission of Utah, December 12, 1893: (Here the report quotes the debate at length.)

And so the enabling act was passed. Every incredulous Member who cast doubt upon the sincerity of polygamists in Utah was whistled down the wind. Every legislator who doubted if the funeral of polygamy had really taken place, was laughed to scorn. Polygamy was dead! That was the battle cry, and on it the battle was fought and won.

What would have become of the bill if Mr. Rawlins had declared that the State of Utah, just about to be born, would reserve the right to send a polygamist to Congress? His bill would have been buried beneath an avalanche of votes beyond the hope of resurrection.

The language of the enabling act is, "provided that polygamous or plural marriages are forever prohibited."

The understanding was that those words prohibited the practice of living in the status or condition of polygamous marriage.

Bouvier's Law Dictionary says:

"*Marriage.*—A contract made in due form of law by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife. Marriage, as distinguished from the agreement to marry, the mere act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on themselves.

"'Marriage' is the legal status or condition of husbands and wives just as infancy is the legal relation or condition of persons under age. (1 American and English Encyclopedia of Law, vol. 14, p. 470.)

"The act of marriage having been once accomplished, the word becomes afterwards to denote the relation itself. (Schouler on Domestic Relations, 22.)

"Marriage is the civil status of one man and one woman united in law for life under the obligation to discharge to each other and to the community those duties which the community, by its laws, holds incumbent on persons whose association is founded on the distinction of sex. (1 Bishop on Marriage and Divorce, 3.)

"Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary. (Hart's California Civil Code, 55.)

"Marriage is the union of one man and one woman so long as they shall both live together to the exclusion of all others by an obligation which during the lifetime the parties can not of their own volition or will dissolve, but which can be dissolved only by the authority of the State." (19 Indiana, p. 57.)

Senator Rawlins was asked before this committee the following question:

"Without reference to any assumed facts in this case, do you think that Congress would have admitted Utah to statehood if it had been predicted that Utah would send here in a few years a man as her Representative who was polygamously living with more than one wife?"

He answered: "I do not think the Congress of the United States would have admitted Utah if they at that time had believed that a revival of the practice of polygamy would occur."

It is not to be assumed from the fact that a rare or sporadic case of polygamous marriage occurred in Utah, or sporadic instances of unlawful cohabitation had come to light, that that would be a violation of the agreement; but we take it that it is in the last degree a violation of the agreement or understanding when that State sends to Congress a man who is himself engaged in the persistent practice of the very thing the abandonment of which was the condition precedent to its admission; and that man the most conspicuous defier of the law and violator of the covenant of statehood to be found in Utah.

As bearing on this, we here quote the manifesto issued a few days ago by the Mormon Church and presented by Senator Rawlins to the Senate:

"In accordance with the manifesto of the late President Wilford Woodruff, dated September the 25th, 1890, which was presented to and unanimously accepted by our general conference on the 6th of

October, 1890, the church has positively abandoned the practice of polygamy, or the solemnization of plural marriages, in this and every other State, and that no member or officer thereof has any authority whatever to perform a plural marriage or enter into such a relation. Nor does the church advise or encourage unlawful cohabitation on the part of any of its members."

In other words, the Mormon Church has left it to us and not to the church to say what shall be done with Mr. Roberts. Is the House of Representatives to respond in any uncertain tone?

The minority, in their views, say:

It is contended that if all other reasons assigned for exclusion are found to be insufficient, as we believe they are, still Mr. Roberts should be excluded, upon the alleged ground that, by virtue of the enabling act, a compact now exists between the United States and Utah which has been violated by the election of Roberts to Congress, and that the State can be in this manner punished for such breach of the compact. Compact is synonymous with contract. The idea of a compact or contract is not predicable upon the relations that exist between the State and the General Government. They do not stand in the position of contracting parties. The condition upon which Utah was to become a State was fully performed when she became a State. The enabling act authorized the President to determine when the condition was performed. He discharged that duty, found that the condition was complied with; and that condition no longer exists.

What did Congress require by the enabling act? Simply that "said convention shall provide by ordinance irrevocable," etc., and the convention did in terms what it was required to do. It was a condition upon the performance of which by the "convention" the admission of Utah depended. Its purpose accomplished, its office is gone, and as a condition it ceases to exist. No power was reserved in the enabling act; nor can any be found in the Constitution of the United States, authorizing Congress, not to say the House of Representatives alone, to discipline the people or the State of Utah, because the crime of polygamy or unlawful cohabitation has not been exterminated in Utah. Where is the warrant to be found for the exercise of this disciplinary, supervisory power? This theory is apparently evolved for the purposes of this case; is entirely without precedent; and has not even the conjecture or dream of any writer or commentator on the Constitution to stand upon.

In accordance with the facts and arguments as set forth in their report the majority recommended the following:

Resolved, That under the facts and circumstances of this case, Brigham H. Roberts, Representative-elect from the State of Utah, ought not to have or hold a seat in the House of Representatives, and that the seat to which he was elected is hereby declared vacant.

The minority proposed as a substitute the following:

Resolved, That Brigham H. Roberts, having been duly elected a Representative in the Fifty-sixth Congress from the State of Utah, with the qualifications requisite for admission to the House as such, is entitled, as a constitutional right, to take the oath of office prescribed for Members-elect, his status as a polygamist, unlawfully cohabiting with plural wives, affording constitutional ground for expulsion, but not for exclusion from the House.

The resolutions were called up in the House on January 23, 1900,[1] and debated until January 25, when the question was taken on substituting the minority for the majority resolutions, and resulted—yeas 81, nays 244. The question then recurring on the adoption of the majority resolution, there were—yeas 268, nays 50. So the majority resolution was agreed to unamended.[2]

During the debate, on January 23,[3] Mr. Roberts was permitted, by unanimous consent, to address the House.

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[1] First session Fifty-sixth Congress, Record, pp. 1072–1104, 1123–1149, 1175–1217; Journal, pp. 187, 192, 196–198.

[2] Mr. John F. Lacey, of Iowa, had proposed an amendment for expelling Mr. Roberts without swearing him in; but it was ruled out on a point of order as not germane. First session Fifty-sixth Congress, Record, pp. 1215, 1216; Journal, p. 196.

[3] Record, p. 1101.

EXCLUSION OR EXPULSION: I HINDS' § 484 EXCERPTED FROM DISCUSSION IN H. REPT. NO. 2307, 55TH CONG., 3D SESS., 1899, OF COMMITTEE ON ELECTION OF PRESIDENT, VICE-PRESIDENT AND REPRESENTATIVES IN CONGRESS

It will be seen that, the qualifications of Senators and Representatives being fixed by the Constitution, it is only within the power of each House to determine whether a person otherwise entitled to a seat possesses those qualifications and no more. Should the person possess those qualifications and the question be raised that he is ineligible in another or other respects--for instance, that he is a polygamist in violation of the laws of his State--is a question which it is generally conceded (the case being hypothetical and, we believe, never having been actually raised) neither House would have the right to entertain. The case of George Q. Cannon v. Allen G. Campbell, in the Forty-seventh Congress, presents features resembling the hypothetical one stated, but that case originated in the Territory of Utah, over which the laws of the United States extended, while in the one under consideration we are dealing with the States and the limitations placed upon Congress by the Constitution to judge of the qualifications of its members duly elected by the States.

In the case of Cannon v. Campbell the conclusion was reached that the contestant having admitted that he has plural wives and that he teaches and advises others to the commission of that offense, he should be excluded from the House, and contestant having received only a minority of the votes cast was not elected, and the seat was declared vacant....

The distinction should be clearly noted between this case and one growing out of a State.

In a hypothetical case of the kind presented above what could either House of Congress legitimately do? Your committee do not feel it their right even if they were so disposed, to volunteer an answer to the question. The author of the so-called "Edmunds Act," an acknowledged constitutional lawyer of great ability, recently expressed the opinion in the press that in such a case the House would have to admit the Representative-elect to membership and then, if it saw fit, expel him, as permitted by Article I, section 5, paragraph 2 of the Constitution. This would be the only power left to either House, the exercise of which would require the concurrence of two-thirds.

VICTOR L. BERGER, WISCONSIN; 66TH CONGRESS,
1ST-3RD SESSIONS, 1919; VI CANNON'S §§ 56-59; SOCIALIST;
THE HOUSE HAD 237 REPUBLICANS, 191 DEMOCRATS, 7 OTHERS

For disloyalty to the United States, for giving aid and comfort to a public enemy, for publications of expressions hostile to the Government, Mr. Berger, a Member-elect, was denied a seat in the House. He was not sworn in at the convening of the Congress and his case was referred to a special committee of nine Members to consider and report on his prima facie and final right to a seat.

In a special election held to fill the vacancy created by the exclusion of Mr. Berger, he was again elected (66th Congress) and again denied a seat in the same Congress on the grounds that the same facts existed under which the House had made the initial determination to deny him a seat.

Chapter CLVII.[1]

THE OATH AS RELATED TO QUALIFICATIONS.

1. Provisions of the fourteenth amendment. Sections 56–59.

56. The case of Victor L. Berger, of Wisconsin, in the Sixty-sixth Congress.

For disloyalty to the United States, for giving aid and comfort to a public enemy, for publication of expressions hostile to the Government a Member-elect was denied a seat in the House.

The Committee on Elections declined to be governed by judgment and verdict of judge and jury of Federal court and proceeded to determine for itself the question of guilt or innocence of Member-elect charged with violation of Federal laws.

Nature and limitations of the constitutional power of expulsion discussed.

The constitutional power of expulsion is limited in its application to the conduct of Members of the House during their term of office.

On October 24, 1919,[2] Mr. Frederick W. Dallinger, of Massachusetts, from the Special Committee on Victor L. Berger Investigation, submitted the report of the majority of the committee.

On May 19, preceding,[3] at the organization of the House, when the State of Wisconsin was called, during the administration of the oath to Members, Mr. Dallinger challenged the right of Victor L. Berger, a Member-elect from that State, to be sworn in. By direction of the Speaker[4] the Member-elect stood aside and the administration of the oath to Members was concluded.

Thereupon Mr. Dallinger offered the following resolution which was agreed to:

Whereas it is charged that Victor L. Berger, a Representative-elect to the Sixty-sixth Congress from the State of Wisconsin, is ineligible to a seat in the House of Representatives; and

Whereas such charge is made through a Member of the House, and on his responsibility as such a Member, and on the basis, as he asserts, of public records and papers evidencing such an ineligibility:

[1] Supplementary to Chapter XIV.

[2] First session Sixty-sixth Congress; House report 413; Record, p. 7475.

[3] Record, p. 8; Journal, p. 7.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

Resolved, That the question of the prima facie right of Victor L. Berger to be sworn in as a Representative of the State of Wisconsin of the Sixty-sixth Congress, as well as of 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; and until such committee shall report upon and the House decide such question and right, the said Victor L. Berger shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath relative to the subject matter of this resolution,

The findings of fact by the committee appointed pursuant to this resolution are in part as follows:

Victor L. Berger was born in Austria in 1860 and came to this country in 1878, settling in Bridgeport, Conn.

In 1911 he started the Milwaukee Leader, which was at first a weekly and later became a daily paper, of which he has been the editor ever since. In 1910 he was elected as a Socialist to the Sixty-second Congress from the fifth district of the State of Wisconsin, taking the usual oath of a Member of Congress to support the Constitution of the United States, and serving from March 4, 1911, to March 4, 1913. At the election held on November 5, 1918, he was again elected as a Socialist to the Sixty-sixth Congress.

Diplomatic relations between the United States and Germany were broken off February 3, 1917, and in March, 1917, the President issued a proclamation calling a special session of Congress, which, on April 6, 1917, passed a joint resolution declaring the existence of a state of war between this country and the Imperial German Government.

On April 7, 1917, on the call of the executive committee, of which Victor L. Berger was one of the five members, there was convened in St. Louis an emergency national convention of the Socialist Party, at which a "Proclamation and War Program" was adopted, a copy of which will be found on page 117 of volume 2 of the printed hearings, and which ex-President Roosevelt characterized as "treason to the United States." This proclamation and war program was favorably reported to the convention by the committee on war and militarism, of which Victor L. Berger was a member, and his name was signed to the report.

On April 14, 1917, the Milwaukee Leader characterized the report as a "cool, scientific Marxian declaration," a copy of the entire editorial in which this characterization appears being reprinted on page 906, of volume 1 of the printed hearings; and on December 30, 1917, Berger published an editorial in the Milwaukee Leader entitled "The Party Will Stand No Wobbling," a copy of which will be found on page 907 of volume 1 of the printed hearings, which was plainly intended to intimidate D. W. Hoan, the Socialist mayor of Milwaukee, who had doubted whether he could subscribe to the Socialist war program without violating his oath of office.

This "Proclamation and War Program," which was signed by Victor L. Berger, was published in both the Milwaukee Leader and the American Socialist, and was printed and distributed in pamphlet form throughout the country, during the period from April to October, 1917, to the extent of over a million copies.

The St. Louis convention also adopted a platform making certain political demands, among them being "Resistance to compulsory military training and to the conscription of life and labor," and the "Repudiation of war debts."

On August 13, 1917, 300,000 copies of this platform were printed by order of Adolph Germer, the national secretary, and the platform was also published in the Milwaukee Leader September 8, 1917.

On July 18, 1917, at the time the Government was preparing to float a Liberty loan, the Milwaukee Leader referred to the repudiation of war debts plank in the Socialist platform as being a sentiment that would "gain rather wide popularity as time went on."

The American Socialist, of which J. Louis Engdahl was editor, Adolph Germer business manager, William F. Kruse and Irwin St. John Tucker frequent contributors, and the title to which was in the name of the national executive committee of the Socialist Party, of which Victor L. Berger was a member, contained a series of articles from the time of our entrance into the war

and throughout the year 1917, copies of which will be found in full in the Government exhibits of the printed hearings.

The article entitled "The Price We Pay," written by Irwin St. John Tucker, was afterwards printed as a pamphlet and widely circulated by Germer, the national secretary, during the summer of 1917. On June 9, 1917, the Milwaukee Leader in an editorial favorably commented upon this pamphlet and its sale was repeatedly advertised in its columns.

In the Milwaukee Leader, of which Victor L. Berger was the editor in chief, and for all articles in which, both at the Chicago trial and before your committee, he assumed full responsibility, there appeared during the period from June 18 to September 13, 1917, a series of editorials and articles, copies of which will be found on pages 514 to 530, inclusive, of volume 1 of the printed hearings. As a result of the publication of these articles, on October 3, 1917, the second-class mailing privilege of the Milwaukee Leader was revoked by the Postmaster General, on the ground that the matter there published evinced a purpose and intent to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, to promote the success of its enemies during the present war, and willfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces of the United States, and to willfully obstruct the recruiting or enlistment service in the United States, to the injury of the service and of the United States," under the provisions of section 1 of Title 12 of the act of June 15, 1917, commonly known as the espionage act. The Court of Appeals of the District of Columbia, a copy of the decree of which will be found on page 504 of volume 1 of the printed hearings, in affirming the judgment of the lower court in dismissing a petition for a writ of mandamus, says in regard to these articles:

"No one can read them without becoming convinced that they were printed in a spirit of hostility to our own Government and in a spirit of sympathy for the Central Powers; that, through them, appellant sought to hinder and embarrass the Government in the prosecution of the war."

In this opinion your committee concurs.

On February 2, 1918, Victor L. Berger, Adolph Germer, J. Louis Engdahl, William F. Kruse, and Irwin St. John Tucker were indicted by the grand jury in the District Court of the United States for the Northern District of Illinois, eastern division, for the violation of the provisions of sections 3 and 4 of Title 1, of the act of June 15, 1917, known as the espionage act.

Their trial, which was a most exhaustive one, began in Chicago on December 9, 1918, before Judge Landis and a Federal jury, and on January 8, 1919, the defendants were found guilty as charged in the indictment, and on February 20, 1919, each was sentenced to 20 years' imprisonment in the United States Penitentiary at Fort Leavenworth, Kans. An appeal from this decision was taken by the defendants, which is still pending in the United States Circuit Court of Appeals for the Seventh District.

Your committee decided at the outset that it would not be governed by the action of the judge and jury at the Chicago trial, but would carefully consider all the evidence both at that trial and in the proceedings before the Court of Appeals of the District of Columbia, together with all the evidence introduced at the hearings before the committee, to determine for itself the question of whether or not Victor L. Berger was guilty of a violation of the espionage act, whether or not he did give aid or comfort to the enemies of the United States during the war with Germany, and whether or not he is ineligible to a seat in the House of Representatives.

After a careful consideration of all the evidence, in the opinion of your committee the admitted acts, writings, and declarations of Victor L. Berger and of the men with whom he was associated in the management and control of the Socialist Party from the time of the entrance of this country into the war until their indictment by a Federal grand jury, giving such acts and the language of the writings and declarations their ordinary everyday meaning and without considering any other evidence, clearly establishes a conscious, deliberate and continuing purpose and intent to obstruct, hinder, and embarrass the Government of the United States in the prosecution of the war and thus to give aid and comfort to the enemies of our country. The writings and activities of Mr. Berger and his associates could have had no other purpose. That Victor L. Berger was disloyal to the United States of America and did give aid and comfort to its enemies at a time when its existence as a free and independent Nation was at stake there can not be the slightest doubt.

The briefs submitted in the case contended that the House was without authority to expel a Member-elect. As to this contention the majority report says:

Inasmuch as some question has been raised as to the authority of the House of Representatives to exclude a Member elect, it may be well to review briefly the legal precedents involved the in present case.

Section 5, Article I, of the Constitution of the United States, provides:

"Each House shall be the judge of the elections, returns, and qualifications of its own Members."

Under this provision of the Constitution, the House of Representatives has always maintained its absolute right to exclude Members-elect and to prevent their taking the oath of office.

The report then discusses the right of the House to exclude, as maintained by decisions of the House, in the Kentucky Cases of 1867, the Whittemore case in the Forty-first Congress, the case of Cannon *v.* Campbell in the Forty-seventh Congress, and the Roberts case in the Fifty-sixth Congress. The report thus differentiates between the last two cases and the case at bar:

In the present case there is a fourth qualification prescribed by the Constitution, or rather a fourth prohibition, as the qualifications set forth in the Constitution are put in negative form, which applies to Representative elect Berger, and did not apply in the Cannon and Roberts cases. Section 3 of the fourteenth amendment to the Constitution of the United States provides as follows:

"No person shall be a Senator or Representative in Congress, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

In reference to this very plain prohibition of the Constitution, counsel for Representative elect Berger contends that the fourteenth amendment was adopted as a result of the Civil War and that section 3 has been entirely repealed by an act of Congress passed in 1898, which provided as follows:

"That the disability imposed by section three of the fourteenth amendment to the Constitution of the United States *heretofore incurred* is hereby removed.

"(U. S. Stats. L., vol. 30, ch. 389, p. 432.)"

It must be perfectly evident that Congress has no power whatever to repeal a provision of the Constitution by a mere statute, and that no portion of the Constitution can be repealed except in the manner prescribed by the Constitution itself. While under the provisions of section 3 of the fourteenth amendment Congress was given the power, by a two-thirds vote of each House, to remove disabilities incurred under this section, manifestly it could only remove disabilities incurred previously to the passage of the act, and Congress in the very nature of things would not have the power to remove any future disabilities. This was plainly recognized when the words "heretofore incurred" were placed in the act itself.

It was also seriously contended by counsel that section 3 of the fourteenth amendment was an outgrowth of the Civil War and that such a provision can not possibly apply to the present case. It is perfectly true that the entire fourteenth amendment was the child of the Civil War and that its main purpose was the security and protection of the political and civil rights of the African race. It is equally true, however, that its provisions are for all time, and are as the United States Supreme Court well said in the case of Yick Wo *v.* Hopkins, "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality." (Yick Wo *v.* Hopkins, 118 U. S., 369.) It is inconceivable that the House of Representatives, which without such an express provision in the Constitution repeatedly asserted its right to exclude Members-elect for disloyalty, should ignore this plain prohibition which has been contained in the fundamental law of the Nation for more than half a century.

57. The case of Victor L. Berger, of Wisconsin, continued.

As to the meaning of the words "aid or comfort" as used in the fourteenth amendment to the Constitution.

As to the meaning of the words "freedom of speech" as used in the first amendment to the Constitution.

A Member-elect, who had not taken the oath, was excluded from the House for disloyalty.

Interpretations of the words "aid and comfort" as used in the fourteenth amendment are reviewed:

On the question as to the meaning of the words "aid or comfort" as used in the fourteenth amendment, it was held in the case of McKee *v.* Young, in the Fortieth Congress, to which reference has already been made, that "aid and comfort may be given to an enemy, by words of encouragement, or the expression of an opinion from one occupying an influential position."

In the case of Smith *v.* Brown, in the same Congress, the only evidence relied upon to support the charge of disloyalty was a letter written by the contestee to a newspaper.

Interpretations of the meaning of the words "freedom of speech" as used in the first amendment are also reviewed:

It was argued at great length, both by Mr. Berger and his counsel, that his conviction at Chicago and any attempt to deprive him of his seat in Congress would be a violation of the freedom of speech and the press guaranteed by the first amendment to the Constitution of the United States.

In the case of Abraham L. Sugarman *v.* United States (249 U. S., 182) Mr. Justice Brandeis, in delivering the unanimous opinion of the court, said:

"But 'freedom of speech' does not mean that a man may say whatever he pleases without the possibility of being called to account for it."

In the case of Charles P. Schenck et al. *v.* United States (249 U. S., 47), which was a case of conspiracy in which the testimony was very similar and in some respects almost identical to that in the present case, Mr. Justice Holmes in delivering the unanimous opinion of the court said:

"But, it is said, suppose that that was the tendency of this circular, it is protected by the first amendment to the Constitution. Two of the strongest expressions are said to be quoted, respectively, from well-known public men."

* * * * * * * * *

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."

* * * * * * * * *

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

* * * * * * * * *

"It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in section 4, punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."

In the case of Eugene V. Debs *v.* The United States of America (249 U. S., 211), in which case the defendant Debs had been convicted and sentenced under the espionage act for a speech made by him at Canton, Ohio, on June 16, 1918, Mr. Justice Holmes in delivering the opinion of the court said:

"The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do. * * *

"The defendant addressed the jury himself, and while contending that his speech did not warrant the charges, said: 'I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone.' The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."

* * * * * * * * *

"There was introduced also an 'antiwar proclamation and program,' adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance."

* * * * * * * * *

"This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it 'was instigated by the predatory capitalists in the United States.' It alleged that the war of the United States against Germany could not 'be justified even on the plea that it is a war in defense of American rights or American honor.' It said, 'We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage.' Its first recommendation was 'continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.' Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect."

Summarizing the conclusion of the committee on the authority of the House in the exclusion of a Member-elect the majority report continues:

Counsel for Representative-elect Berger spent considerable time both at the outset of these proceedings and throughout the hearings in arguing the proposition that the House of Representatives has no constitutional right to exclude a member-elect, even if guilty of treason or other crime, if he presents himself to the House with a certificate from the Governor of his State, showing that he has been duly elected; and that the only course open to the House is to permit the member in question to be sworn in as a member of the House and then to expel him by a two-thirds vote. As has already been stated, counsel also contended that the prohibition contained in section 3 of the fourteenth amendment to the Constitution is no longer applicable.

As has already been shown in this report, both of these contentions are unsound and are not supported either by principle or by precedent. In the first place, the House of Representatives has always insisted upon its right to exclude members-elect and has also consistently refused to expel a member once he has been sworn in for any offense committed by him previous to his becoming a member, on the ground that the constitutional power of expulsion is limited in its application to the conduct of members of the House during their term of office. In the second place, as has already been pointed out, the contention that section 3 of the fourteenth amendment to the Constitution is no longer applicable, is not worthy of serious consideration.

In conclusion the majority report holds:

When the attention of counsel for Representative-elect Berger was called to those recent decisions of the Supreme Court of the United States, he criticized them as being contrary to all the fundamental principles of Anglo-Saxon liberty.

Your committee is convinced that the members of the House of Representatives are bound by their oaths to support the Constitution of the United States which declares that instrument and all acts of Congress passed in pursuance thereof to be the supreme law of the land. Inasmuch, therefore, as the espionage act has been declared by the Supreme Court of the United

States to be in pursuance of the Constitution, no question can now be raised by law-abiding citizens as to its full force and virtue. The essential purpose of this act was to prevent persons from obstructing and embarrassing the Government in the prosecution of the war and all the evidence in this case conclusively proves that Victor L. Berger from the time of the outbreak of the war until his indictment by the Federal grand jury continually did wilfully hinder, obstruct, and embarrass the Government of the United States and thus gave aid and comfort to its enemies, and in the opinion of your committee is unfit and ineligible to sit as a member of our highest lawmaking body. That he should be permitted, after his treasonable conduct, to occupy a seat in the American House of Representatives, is inconceivable. While there has in the past been some opposition on the part of a small minority to the well-established practice of the House of Representatives in excluding unfit persons from membership on the ground that the House has no right to add to the qualifications prescribed in the Constitution, in the present case it is perfectly plain that under the Constitution itself, if the House is satisfied that Representative-elect Berger did give aid or comfort to the enemies of the United States, he is ineligible to a seat in this House, and it is not only the right but the constitutional duty of the House to exclude him. Your committee, therefore, recommends the adoption of the following resolution:

"*Resolved*, That under the facts and circumstances of this case, Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative."

The report is concurred in by all members of the committee with the exception of Mr. William A. Rodenberg, of Illinois, who submits separate views in which, without taking issue with the committee as to the merits of the case, he advocates the suspension of action on the question involved until the court of appeals had passed upon the appeal at that time pending before it.

He did not, however, offer resolutions, and when the case came up in the House, November 10, 1919,[1] the resolution recommended by the majority of the committee was, after exhaustive debate, agreed to by the House, yeas 311, nays 1.

58. The Wisconsin election case of Carney v. Berger in the Sixty-sixth Congress.

A Member-elect found to have obstructed the Government in the prosecution of war, and to have given aid and comfort to its enemies, was declared ineligible to membership in the House.

The opinion of one Member of the Elections Committee, not necessarily approved by the House, is insufficient to establish a precedent.

In judging elections, qualifications, and returns of Representatives in Congress, the House does not consider itself bound by constructions placed upon State laws by the courts of the State.

Disqualification of the Member-elect does not authorize the seating of a contestant not found to be elected.

On October 24, 1919,[2] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee in the Wisconsin case of Joseph P. Carney *v.* Victor L. Berger.

At this election Victor L. Berger, the contestee, received 17,920 votes; Joseph P. Carney, the contestant, received 12,450 votes; and William H. Stafford received 10,678 votes.

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[1] Journal, p. 571; Record, p. 8219.

[2] First session Sixty-sixth Congress; House report No. 414; Record, p. 7475.

No question was raised as to the regularity of the election or the correctness of the election returns. The only question involved was the eligibility of the Member-elect and the seating of the candidate receiving the next highest number of votes in event of his being declared ineligible.

The case was fully stated in the report of the special committee appointed to investigate the eligibility of Victor L. Berger to a seat in the House, and the committee concurs in the opinions expressed in that report as follows:

In regard to the first question, your committee concurs with the opinion of the special committee appointed under House resolution No. 6, that Victor L. Berger, the contestee, because of his disloyalty, is not entitled to the seat to which he was elected, but that in accordance with the unbroken precedents of the House, he should be excluded from membership; and further, that having previously taken an oath as a Member of Congress to support the Constitution of the United States, and having subsequently given aid and comfort to the enemies of the United States during the World War, he is absolutely ineligible to membership in the House of Representatives under section 3 of the fourteenth amendment to the Constitution of the United States.

This question having been disposed of, the only question remaining is whether the contestant, who received the next highest number of votes, is entitled to the seat.

The committee decide:

The only congressional precedent cited by counsel for the contentant is the case of Wallace *v.* Simpson in the Forty-first Congress. In this case neither the contestant nor the contestee were sworn in at the convening of the House of Representatives. The matter was referred to the Committee on Elections and a subcommittee of that committee unanimously reported in favor of the contestant. This report however was based on three grounds:

First. That the ineligibility of the contestee involved the election of the contestant.

Second. That the election was void in six of the nine counties and the contestant had a majority in those counties.

Third. That if no counties were rejected, enough voters were prevented from voting by violence and intimidation to have given the majority in the district to the contestant if they had voted.

The first proposition, which is the one on which counsel for the contestant in the present case relies, was agreed to only by Mr. Cassna, the chairman of the committee, who drew the report; Mr. Hale agreed to the second and third propositions; and Mr. Randall to the third only. Under a rule of the House at that time a subcommittee was authorized to report directly to the House, and in this case the subcommittee recommended that the contestant be seated and the House accepted the report. (Rowell's Digest of Contested Election Cases, 1790–1901, p. 245.)

It is plainly evident, however, that the proposition that the ineligibility of the contestee involved the election of the contestant was simply the opinion of one member of the committee and did not establish a precedent for the House of Representatives. (Rowell's Digest of Contested Election Cases, 1790–1901, p. 220.)

Various other cases cited in support of the contestant's contention are discussed by the committee and held not sufficiently germane to be considered as precedents.

In discussing the Wisconsin case of Bancroft *v.* Frear so cited, the committee further declare:

It is contended, however, by counsel for the contestant in the present case that Congress is bound by the laws of the States and inasmuch as the case of Bancroft *v.* Fear is now the law in the State of Wisconsin, that the House of Representatives is bound thereby, and that Joseph P. Carney; the Democratic contestant, is therefore entitled to a seat in the House. Such, however, in the opinion of your committee, is *not* the law.

In summing up the case the committee conclude:

Your committee, upon all the law and the evidence, is of the opinion that, first, Victor L. Berger, the contestee, is not entitled to the seat to which he was elected; and, second, that Joseph P. Carney, the Democratic contestant, who received the next highest number of votes, is not entitled to the seat. Inasmuch as the special committee appointed under authority of House resolution No. 6 has already recommended to the House a resolution declaring the contestee ineligible, it is not necessary for your Committee on Elections No. 1 to make a similar recommendation. The committee, however, does recommend the adoption of the following resolutions:

"*Resolved*, That Joseph P. Carney, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of Wisconsin, is not entitled to a seat therein as such Representative.

"*Resolved*, That the Speaker be directed to notify the Governor of Wisconsin that a vacancy exists in the representation in this House from the fifth congressional district of Wisconsin."

The case was considered in the House on November 10, 1919,[1] immediately after the disposition of the case of Victor L. Berger. After brief debate the resolutions recommended by the committee were agreed to, and the seat was vacated.

59. The Wisconsin election case of Bodenstab v. Berger in the Sixty-sixth Congress.

Two committees of the House having adjudged a Member-elect to be ineligible to membership in the House of Representatives, and the House having twice refused to seat him, the committee a third time declared him to be ineligible, but did not consider it necessary to recommend a resolution to that effect.

The House, after declaring a Member-elect ineligible, refused to seat the candidate receiving the next highest number of votes.

The House declines to seat a candidate receiving less than a plurality of the votes cast in the district.

The English law under which a minority candidate succeeds to a vacancy resulting from the disqualification of the majority candidate is not applicable under the Constitution.

On February 5, 1921,[2] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the majority of the committee in the Wisconsin case of Henry H. Bodenstab *v.* Victor L. Berger.

The contestee in this case was a candidate in a former election and received a majority of all the votes cast in the district in that election. When he appeared to take the oath, objection was made to his being sworn in and a special committee was appointed to investigate his eligibility to a seat in the House. The committee reported adversely, and on November 10, 1919, the House by a vote of 311 to 1 declared he was ineligible.

On the same day in the House, in deciding the case of Carney *v.* Berger, again declared him to be ineligible and vacated the seat.

Subsequently the Governor of Wisconsin called a special election to fill the vacancy thus created. At this election Victor L. Berger was again a candidate and received 24,350 votes, and Henry H. Bodenstab, the contestant, received 19,566

[1] Journal, p. 571; Record, p. 8262.

[2] Third session Sixty-sixth Congress, House report 1300; Record, p. 2685.

votes. No question was raised as to the regularity of the election or the correctness of the election returns, but on January 10, 1920, when the contestee again appeared to take the oath of office, the House by a vote of 330 yeas to 6 nays agreed to the following resolution:

Whereas Victor L. Berger, at the special session of the Sixty-sixth Congress, presented his credentials as a Representative elect to said Congress from the fifth congressional district of the State of Wisconsin; and

Whereas on November 10, 1919, the House of Representatives, by a vote of 311 to 1, adopted a resolution declaring that "Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative," by reason of the fact that he had violated a law of the United States, and, having previously taken an oath as a Member of Congress to support the Constitution of the United States, had given aid and comfort to the enemies of the United States, and for other good and sufficient reasons; and

Whereas the said Victor L. Berger now presents his credentials to fill the vacancy caused by his own ineligibility; and

Whereas the same facts exist now which the House determined made the said Victor L. Berger ineligible to a seat in said House as a Representative from said district: Now, therefore, be it

"*Resolved*, That by reason of the facts herein stated, and by reason of the action of the House heretofore taken, the said Victor L. Berger is hereby declared not entitled to a seat in the Sixty-sixth Congress as a Representative from the said fifth district of the State of Wisconsin, and the House declines to permit him to take the oath and qualify as such Representative."

As the pleadings required by statute had not at that time been completed, no action was taken on the contest instituted by the contestant.

Subsequently when testimony and briefs had been submitted the committee reported:

Inasmuch as two committees of the House of Representatives have twice reported that Victor L. Berger, the contestee, is not eligible to membership in the House of Representatives, and inasmuch as the House of Representatives itself has twice, by an overwhelming vote, refused to seat the said Victor L. Berger, the contestee, on the ground that he is ineligible to membership therein, and inasmuch as there is no additional testimony in this case, your committee finds that Victor L. Berger, the contestee, is ineligible to membership in the House of Representatives, but recommends no resolution, for the reason that the House of Representatives has already finally determined that question so far as the present Congress is concerned.

This phase of the case having been disposed of the only question remaining to be considered was whether the contestant was entitled to the seat.

At the time of the regular election held November 5, 1918, the contestee, Victor L. Berger, had already been indicted for violation of the espionage act. At the time of the special election on December 19, 1919, he had been convicted of the crime for which indicted, and sentenced to imprisonment in the Federal penitentiary. Moreover, the House of Representatives had by resolution declared him ineligible to a seat in the House. It is evident, therefore, that those who voted for him at the special election must have had ample notice at the time of the fact that he had been adjudged ineligible.

For this reason the minority views, submitted by Mr. Clifford E. Randall, of Wisconsin, argue that the votes cast for contestee are void and that as the con-

testant received a majority of the votes cast for an eligible candidate, he is entitled to be seated.

In support of that doctrine he cites numerous cases, including that of Bancroft *v.* Frear decided by the Supreme Court of Wisconsin. (Vol. 144, p. 79, Wisconsin Reports.)

The majority, however, hold this position untenable, and say that while this is the prevailing doctrine in Great Britain, it has never been recognized by the United States House of Representatives.

The majority report continues:

> The committee found that precisely the same question was raised in the contested-election case of Maxwell *v.* Cannon in the Forty-third Congress; in the case of Campbell *v.* Cannon, in the Forty-seventh Congress; and in the case of Lowry *v.* White, in the Fiftieth Congress; in all of which the Committee on Elections of the House of Representatives rejected the doctrine that where the candidate who received the highest number of votes is ineligible, the candidate receiving the next highest number of votes is entitled to the office.
>
> In the previous case of Carney *v.* Berger, your committee also considered very carefully the general question of whether Congress is bound by the law of the State in which the contest arises.
>
> After an exhaustive examination of the authorities, your committee came to the unanimous conclusion that where the law of a State in a matter of this kind is contrary to the unbroken precedents of the House of Representatives in election cases the congressional precedent must prevail, anything in the laws of the State or decisions of its supreme court to the contrary notwithstanding.
>
> While it is true that in the present case the voters of the fifth congressional district of Wisconsin can fairly be said to have had constructive notice of the fact that Victor L. Berger, the contestee, was ineligible to membership in the House of Representatives, which circumstances was lacking in the case of Carney *v.* Berger, nevertheless this additional fact offers no reason why you committee and the House of Representatives should allow a decision of the Supreme Court of Wisconsin or of any other State to override an unbroken line of congressional precedents and establish a new rule in determining contested-election cases in the Congress of the United States.

The majority then discuss the case of McKee *v.* Young, cited as a precedent for the seating of the contestant, failing to find any parallel between that case and the present case, and quoting at length from the statement of the Committee on Elections in its report on the case of Smith *v.* Brown in the Fortieth Congress in opposition to the English rule.

In summing up the law and the evidence the majority of the committee conclude that while Victor L. Berger is not entitled to the seat and has been so adjudged by resolution of the House, neither is Henry H. Bodenstab entitled to it, and accordingly recommend the following resolution:

> *Resolved*, That Henry H. Bodenstab, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of Wisconsin, is not entitled to a seat therein as such Representative.

The minority concur in the findings of fact as stated by the majority report, but differ sharply in their views as to the law applicable to the case.

The English rule, under which the candidate having the next highest number of votes is seated when the majority candidate is disqualified, is stressed, and the following distinction drawn between cases relied upon by the majority and the case under discussion:

The precise question involved in this case has never been before the House of Representatives. The majority opinion refers to, relies upon, and quotes with approval several House decisions in election cases which are supposed to be inconsistent with the principles of law hereinbefore stated. Examination of these cases demonstrates clearly that in none of them was it established that the electors had knowledge of the ineligibility of the candidate voted for.

Each case is discussed separately and the lack of knowledge of the candidate's ineligibility on the part of the voters at the time of the election is pointed out.

The minority conclude with the recommendation of a resolution declaring Henry H. Bodenstab elected and entitled to a seat in the House of Representatives.

The report was briefly debated in the House on February 25, 1921,[1] and the resolution of the minority declaring the contestant elected was disagreed to. The resolution recommended by the majority was then agreed to, and the seat remained vacant.

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[1] Journal, p. 248; Record, p. 3883.

C. Cases where oath was not administered and case was referred to a committee for examination and report; member-elect eventually was not sworn in.

III. Disloyalty

SMITH V. BROWN, KENTUCKY; FORTIETH CONGRESS, FIRST SESSION - SECOND SESSION, 1867-68; DEMOCRAT?; THE HOUSE HAD 143 REPUBLICANS, 49 DEMOCRATS, 1 OTHER; I HINDS; §§449-450

On July 3, 1867, the credentials of Mr. John Young Brown, of Kentucky, along with other Members-elect of the Kentucky delegation, were referred to the Committee on Elections.

On January 21, 1868, (40th Cong., 2nd Sess., H. Rept. 11) the committee presented its report in the case of Smith v. Brown. The first part of the report dealt with the question of whether Mr. Brown was disqualified from sitting as a Member on account of his having been guilty of acts of disloyalty to the Federal Government or of having given aid or comfort to its enemies.

The majority of the committee recommended adoption of a resolution that Mr. Brown, having given aid and comfort to the enemies of the United States, was not entitled to take the oath and sit as a Member.

This portion of the report was debated on January 31 and February 3, 1868, (Globe, 40th Cong., 2nd Sess., pp. 891, 899, 901, 916, 937).

The report of the debate in Hinds is as follows:

> In opposition to the action recommended by the majority of the committee it was urged that in the compact known as the Constitution it was agreed that no State should elect any person who should not have three specified qualifications of age, citizenship, and inhabitancy. Either House might judge the elections, returns, and qualifications of its own members and might expel. Subject to these limitations the right and power of the States over their Representatives was exclusive and complete. The attempt in the Act of July 2, ('iron-bound oath'), to impose another qualification was in direct conflict with the terms of the original pact. The imposition of additional limitations not being among the powers granted to the Congress, it must be unconstitutional and void. But even supposing the Act of 1862 to be constitutional, it was not competent for the House to inquire whether a member might take the oath. That was a question for him to determine for himself. It was further urged although not as vital, that even

under the terms of the Act of 1862 the oath might not be rightfully required, since there was a broad distinction between a Member of Congress and the officer referred to in that act. Further, the law of the oath was unconstitutional in that it was ex post facto and assumed to punish for alleged offenses committed before its enactment, and also to punish without legal trial and conviction. In the case of ex parte Garland the Supreme Court had held that oath unconstitutional when applied to lawyers. The oath was also unconstitutional because the Constitution prescribed only an oath 'to support this constitution.' Under the legal principle 'expression unius exclusion alterius' it was to be presumed that the Constitution meant what was written and nothing more. The same doctrine would indicate that in enumerating the three qualifications the Constitution intended that there should be no more. In support of this contention, Justice Story was quoted. It was true that the House was the judge of the qualifications of its own Members but this did not mean that it might create new qualifications. It must sit in a judicial and not a legislative capacity, and decide only whether the Member had the three enumerated qualifications. This argument as to the inability of the House to add qualifications by itself was admitted to be sound by the chairman of the Elections Committee (Mr. Harry L. Dawes, of Massachusetts, Globe, supra, 915) who presented the report against Mr. Brown, but he of course held that the Congress might by the law of the oath establish the additional qualification of loyalty. (Note: the Elections Committee was composed of 6 Republicans, 2 Democrats, and 1 Radical.)

In support of the resolution of exclusion it was argued that the Government might go behind the qualifications enumerated in the Constitution. It was true that only three qualifications were specified, but did not this mean that no man should serve who had not at least these three qualifications? It had been held that the States might not impose other qualifications, but it did not necessarily follow that

the Congress, with the approval of the President, i.e. the Government, might not prescribe other qualifications. It was inherently implied in every constitutional provision under which the House had its existence that no man should be qualified to sit as a Member who had not the indispensable qualification of loyalty to the Government. The laws of human society authorized a government to resort to all means to preserve itself. In McCulloch v. Maryland, Chief Justice Marshall had set forth views sustaining the argument that Congress had full powers of preservation of itself. The Congress of 1862 had full power to adopt the form of oath in question in this case as a consequence. It was further urged that if under the Constitution no qualifications except those enumerated could be required, then the great leaders of the recent rebellion might be elected to the House and seated. Even expulsion might not be a remedy, since if a man had a right to take a seat, he had a right to hold it. By laws passed in 1793 and 1853, disqualifying persons guilty of certain acts from holding any office of honor, trust, or profit under the United States, Congress had asserted its right to prescribe additional qualifications. It could not be said that exclusion from the House in the pending case was an ex post facto punishment, for a disqualification from holding office was not an increase of penalty.

In rebuttal, the minority argued that the case of McCulloch v. Maryland had no application to the pending case. Also, the effect of the Acts of 1793 and 1853 was denied on the ground that a Member of Congress was not an officer within the meaning of those laws.

On February 13, 1868, (Globe, supra, p. 1161) the House rejected a substitute resolution that Mr. Brown had not given aid and encouragement to enemies of the United States and that he had received a majority of votes in his district and was entitled to be sworn in

(43 - 38)

The resolution of the committee majority, excluding Mr. Brown, was then agreed to.

(Note: Mr. Brown was elected to the 43rd and 44th Congresses, March 1873 to March 1877.)

McKEE v. YOUNG, KENTUCKY; 40TH CONGRESS, 1ST AND 2ND SESSIONS, 1867-1868; DEMOCRAT; THE HOUSE HAD 143 REPUBLICANS, 49 DEMOCRATS, 1 OTHER; I HINDS; §451

This was a loyalty case under the loyalty oath act of July 2, 1862, similar to Smith v. Brown (supra). Mr. Young had not been sworn in, and a majority of the Committee on Elections reported that the evidence sustained that Mr. Young voluntarily gave aid, countenance, counsel and encouragement to persons engaged in armed hostility to the Government of the United States (H. Rept. 29, March 23, 1868). A minority report was filed arguing against the imposition of additional qualifications.

After debate on June 20 and 22, covering substantially the same ground as in the Brown case, and in which it was disclosed that Mr. Young had not been regarded as a Union man but had expressed himself in favor of the Conferedate cause, a substitute resolution to administer the oath to him was defeated, 30 to 96, and the resolution of the majority declaring him not entitled to take a seat was adopted.

IV. Misuse of funds; conduct tending to bring the House of Representatives into disrepute

ADAM CLAYTON POWELL, NEW YORK: 90TH CONGRESS, 1ST SESSION, MARCH, 1967; 113 CONGRESSIONAL RECORD, 5037-38; DEMOCRAT; THE HOUSE HAD 248 DEMOCRATS AND 187 REPUBLICANS

Representative-elect Adam Clayton Powell had been elected to the House of Representatives in 1944, from the State of New York, and had been re-elected biennially through the election of 1966.

"During the 89th Congress open and widespread criticism developed with respect to the conduct of Representative Adam Clayton Powell, of New York. This criticism emanated both from within the House of Representatives and the public, and related primarily to Representative Powell's contumacious conduct towards the courts of the State of New York and his alleged official misconduct in the management of his congressional office and his office as chairman of the Committee on Education and Labor. There were charges Representative Powell was misusing travel funds and was continuing to employ his wife on his clerk-hire payroll while she was living in San Juan, P. R., in violation of Public Law 89-90, and apparently performing few, if any, official duties." (House Report No. 27, 90th Congress. 1st session, "In Re Adam Clayton Powell; Report of the Select Committee Pursuant to H. Res. 1," 1967, p. 1).

The allegation of Mr. Powell's contumacious conduct towards the courts in New York State which tended to bring the House into disrepute and reflect discredit upon its members, involved the attempts of a lady in New York to collect from Mr. Powell a verdict in a libel action successfully brought by her against Mr. Powell in New York in 1963.

The situation was described in the Report of the House Select Committee (supra, pp. 8-13) as follows:

B. BEHAVIOR OF ADAM CLAYTON POWELL

1. With respect to the courts of New York

Since October 28, 1960, Mr. Powell has been involved in complex and protracted litigation in New York State involving two court proceedings, one a libel case and the other a fraudulent transfer of assets case, out of which an extensive series of civil and criminal contempt proceedings have developed because of Mr. Powell's disobedience to court processes and to court orders emanating from those two cases.[13]

Early in 1960 Mr. Powell made an accusation on the floor of Congress that one of his constituents, Mrs. Esther James, was a "bag woman for the New York City Police Department." He repeated it a month later on a television program. Mrs. James sued Mr. Powell for libel and in April 1963 a jury awarded her a verdict of $211,739.35. Attorneys for Mrs. James then commenced proceedings to secure satisfaction of this judgment which was affirmed on appeal although reduced to $46,500—$11,500 compensatory damages and $35,000 punitive damages. A further appeal to the New York Court of Appeals, the highest court in New York State, resulted in an affirmance and the U.S. Supreme Court denied certiorari on January 18, 1965. Accordingly, all appeals have been exhausted in this proceeding and judgment has been final for about 2 years.

Mrs. James brought a second case in April 1964, also in New York City, charging that in April 1963 (after the libel judgment was recorded) Mr. Powell and his wife fraudulently transferred a piece of property valued at $85,000 in Puerto Rico to her uncle and aunt, who were also named as defendants, in order to frustrate satisfaction of the libel judgment. The Powells failed to file an answer and in January 1965 judgment was entered and an inquest on damages was ordered. In February 1965, a jury awarded Mrs. James damages of $350,000

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[13] It should be parenthetically noted that there were some other tangential proceedings surrounding these two proceedings of litigation which are detailed in Goldfarb Exhibit 1.

in this second case. The trial judge reduced the verdict to $210,000. This judgment was vacated because the Powells submitted evidence they were not living at 120 West 138th Street, New York City, at the time service by mail was effected at that address. The Powells then filed an answer to the complaint and made a motion to dismiss the complaint which was denied. Mr. Powell failed to respond to notices of examination before trial and was formally ordered by the court to appear on November 24, 1965, a date agreed to by him in writing, and a date when Congress was not in session. He failed to appear on that date and the court entered judgment for the plaintiff and ordered an inquest on the amount of damages. At the inquest the court found Mr. Powell liable to Mrs. James for $75,000 in compensatory damages and $500,000 punitive damages. The Appellate Division upheld the judgment but reduced the compensatory damages to $55,785.76 (because Mrs. James had been able to collect some funds on the unpaid libel judgment) and reduced the punitive damages to $100,000. This case is currently being appealed by Mr. Powell to the Court of Appeals, the highest court in New York State, so judgment therein is not final.

In an attempt to satisfy the judgment on the libel action, Mrs. James secured an order in August 1965 from the New York Supreme Court which attached over the objection of Mr. Powell the banked funds of two committees known as Harlem Justice for Powell Committee and Powell Fund Committee. She received two checks totaling $19,115.54 pursuant to this order. After the appointment of this Select Committee, Jubilee Industries, Inc., a record company which distributed a record recently made by Mr. Powell, voluntarily paid Mrs. James $32,460 on January 31, 1967, to reduce the outstanding libel judgment and, according to the New York Times, on February 17, 1967, Mr. Powell's attorney paid Mrs. James an additional $3,447 plus another $1,000 for court costs. Apparently by the payment of these sums the judgment in the libel action has now been satisfied.

During all this litigation the courts have found Mr. Powell in contempt of court a number of times. As of the date of the hearing there were pending against Mr. Powell four outstanding arrest orders, one arising out of an order holding him in criminal contempt and three arising out of orders holding him in civil contempt. Generally, a person can purge himself of a civil contempt of court by satisfaction of the judgment or submission to examination on assets, but cannot purge himself of criminal contempt of court.

The first decision holding that Mr. Powell should be arrested for civil contempt of court occurred on May 8, 1964, after he failed to appear for examination on a date ordered by a court in accordance with the terms of a stipulation he had signed.

The second decision holding that Mr. Powell should be arrested for civil contempt of court occurred on October 14, 1966, after Mr. Powell failed to honor an order of the court either to pay the libel judgment or purge himself by appearing for examination as to his assets on October 7, 1966.

The third decision holding that Mr. Powell should be arrested for civil contempt of court occurred on December 14, 1966, after Mr. Powell failed to appear for examination on December 9, 1966, as ordered by the Court of Appeals in accordance with a stipulation signed by his attorney on November 1, 1966.

The decision holding Mr. Powell in criminal contempt was issued on November 4, 1966, because a jury had found (1) that on November 24, 1965, he willfully failed to appear, as ordered by a court,[14] for examination before trial; (2) that on May 1, 1964, he willfully failed to appear, as ordered by a court,[15] for examination in proceedings supplementary to judgment and execution. The court noted that Mr. Powell had not offered to purge himself and that there had been "no indication of regret, contrition, or repentance." The sentence for criminal contempt was 30 days in jail and a $250 fine on both counts. An arrest order was issued pursuant to this decision. It appears that the orders are on appeal and thus not final.

The records in both cases show that the courts of New York have been very indulgent in granting Mr. Powell adjournments and opportunities to avoid the consequences of his acts. It also shows there were numerous instances when Mr. Powell did not honor subpenas and court orders to appear and to submit to the jurisdiction of the courts. On at least two occasions, Mr. Powell's failures to appear violated written stipulations which he had signed agreeing to appear on set dates. On some of these occasions, Mr. Powell based his refusals to appear on the ground that he had congressional immunity as he was attending sessions of Congress. In many instances various judges granted adjournment after adjournment to accommodate him only to have Mr. Powell subsequently fail to appear on the reset dates. In two instances, the records of Congress show that the House of Representatives was not in session on the dates he dishonored a court order, *i.e.*, November 24, 1965, and December 9, 1966.[16]

On November 4, 1966, New York Supreme Court Justice Matthew Levy expressed the difficult task Mr. Powell's behavior posed for the courts of New York:

> It is however, not an easy task to arrive at a conclusion as to the punishment for criminal contempt of court to be meted out to a minister, a Congressman, a leader of men, a man, indeed, of many natural gifts, and he should be a man in relationship to the law that one would look up to, to respect. All of you may rest assured that what I have determined upon is a conclusion that has not been lightly reached.
>
> I am regretful that the defendant, either himself or through his counsel, is unwilling to express any views in that regard, because that expression might be helpful to me, but silence at this time, self-imposed by the defendant once again, his nonparticipation, may be, and must be, ignored, since I shall make my decision presently * * *

Mr. Justice Levy went on to summarize what other members of his court and the appellate court had been forced to conclude with respect to Mr. Powell's actions:

> Now, as to punishment, I have culled, from the record of the massive files in this matter, the official comments made

[14] Mr. Powell had signed a stipulation on Oct. 9, 1965, agreeing to appear on Nov. 24, 1965, a date subsequent to the adjournment of the 1 st session of the 89th Cong. Airline and immigration records indicate he went to Bimini on Nov. 15, 1965. There is no indication he returned prior to Nov. 24, 1965.

[15] On Dec. 31, 1963, Mr. Powell had signed a stipulation adjourning a court order of contempt requiring him to appear on Jan. 3, 1964, and agreeing to appear on a date fixed by the court.

[16] "They [Senators and Representatives] shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their *attendance* at the session of their respective Houses and in going to and returning from the same." U.S. Const., art. I, sec. 6 (emphasis added).

by several of my colleagues here and in the Appellate Division on the conduct of this defendant. I think it is of moment to note them on the record one by one.

In May of 1964, the court said:

"The conduct of defendant in this matter, in my judgment, has been so flagrantly contemptuous of the authority and dignity of this court as to promote the tragic disrespect for the judicial process as a whole. No man should be allowed to continue in this fashion and it is time for defendant to answer for it."

In December of 1965, the court said:

"* * * I am a little bit shocked about this situation. I know there were many editorials published in the newspapers about Mr. Powell's monstrous behavior, and this is another example. Frankly, as I said before, if I had occasion to pass upon this, I think a sentence in jail would do more good than the fine, and under the circumstances I have in mind something which may possibly deter him from such behavior in the future.

"It seems to me that the blatant cynicism on the part of Mr. Powell, his disregard for the law, for the ministry and for justice and decency, as far as I can see, is monstrous defiance of everything that is decent in this community, sets a very bad example for the youth of this city and this country. * * * The blatant, cynical disregard for the law on the part of a U.S. Congressman is detrimental to the law, to the ministry, and to democracy.

"This man is supposed to be a Member of the Congress, which makes laws, yet he seems to show rank and monstrous defiance to the law. I don't understand it at all." * * *

The Appellate Division, in June of 1966, in sustaining a judgment, though in a lesser amount, for the fraudulent transfer of a defendant's real estate in Puerto Rico, said: "* * * that transfer, deliberately made by defendant Adam Powell, a Member of Congress, to defeat enforcement of a judgment obtained 2 weeks earlier, fully justifies substantial punitive damages against him."

Another colleague, at Special Term, said in August 1966:

"Considering the disdainful and demeaning and despising attitude of this judgment debtor toward the authority and dignity of the court, as reflected by the voluminous files of this court which include several civil adjudications of contempt, on a proper and satisfactory jurisdictional basis there is no doubt nor would there be any hesitancy to adjudge the alleged misconduct criminal."

Also at Special Term, in September of 1966, the court said:

"I conclude that this misconduct as demonstrated, in charity to the defendant, may best be characterized as the antics of a mischievous delinquent.

"Because stigmatization and anathematization does not suffice, in my judgment, it is essential to satisfy the rights and the interests of the public in an appreciation of a fair and equal administration of justice."

In October 1966, the court said:

"The hearing was unique in that it evoked the corporeal presence of the judgment debtor for the first time in the course of the protracted proceedings in both this action and the companion libel litigation. This marked departure from his hitherto elusiveness, was not, unfortunately, accompanied by a similar departure from his policy of ignoring, evading or abusing legal procedures in a campaign of relentless defiance designed to frustrate and impede the judgment creditor in the lawful collection of her judgment. * * * It was merely another ploy in the seemingly endless series of maneuvers and dilatory tactics by which the judgment debtor manifests his distaste and disrespect for our judicial processes."

In October 1966, another justice of this court said:

"The judgment debtor has again demonstrated his disdain for the processes of the court by his failure to comply with the provisions of the order of October 3, 1966. * * * American justice is dependent on the equal application of the law and its observance by persons in every echelon of our society. The redress of a wrong involves a deliberate pursuit of one's rights. Justice proceeds slowly but surely and will not be denied."

In its most recent decision, the Appellate Division rendered an opinion on October 25, 1966, in which the court said:

"* * * As the long and ugly record in this matter shows, this failure to obey is consistent with the debtor's cynical refusal to honor his own promises together with a total disregard of any and all process that has been served upon him. * * *"

And the court referred to the defendant's conduct as a "sorry spectacle to be terminated by definite action."

Now, gentlemen, I have iterated what seemed to many to be the sad result, and, certainly seems so to me, of a broken phonograph record of plea to and condemnation of the defendant.

The proof is overwhelming that the defendant has flamboyantly flaunted his willful flouting of the lawful mandates of the court to such an extent, indeed, that I was compelled to add to that record, in my recent opinion in this matter, the comment of the "attendant deleterious and corroding impact upon the judicial system as a whole and its serious consequential effect upon the general maintenance of law and order in our community." What the defendant presumes to do with impunity cannot go unpunished. Else the average person may rightly assume that he may do the same, and feel that when not permitted by the courts thus to act, there is discrimination against the less powerful persons, who rely, and justly rely, upon the courts for the due and impartial administration of justice.

For a Member of this House to behave in such fashion as to cause the courts to describe his course of conduct as "flagrantly contemptuous," as promoting "the tragic disrespect for the judicial process as a whole," as displaying "blatant cynical disregard for the law on the

> part of a United States Congressman [which] is detrimental to the law, the ministry and to democracy," and as "a very bad example for the youth of this city and this country," clearly brings great disrespect on the House of Representatives.

The second allegation against Mr. Powell related to charges of his misuse of Government funds while he was chairman of the House Education and Labor Committee during the 87th through 89th Congress, and misuse of his own staff funds.

An investigation of the funds question was carried out by the Special Subcommittee on Contracts of the Committee on House Administration in the last months of the 89th Congress. The Special Subcommittee issued its findings in House Report 2349, 89th Congress, 2nd Session, 1966.

A description of its findings and conclusions was set forth on pages 13-22 of the Select Committee Report , 90th Congress, supra, as follows: (The Special Subcommittee is referred to in the Select Committee Report as the "Hays Subcommittee"):

2. As chairman of the Committee on Education and Labor

A major subject of this Committee's investigation was alleged misuse of Government funds by Mr. Powell in his capacity as chairman of the House Education and Labor Committee, during the 87th through 89th Congresses. Particular attention was given to evidence of widespread use of committee funds to pay for personal travel by Mr. Powell and others.

The following is a discussion of the record before the Hays subcommittee and this committee relating to improper expenditures by the Committee on Education and Labor under the chairmanship of Mr. Powell.

(a) Proceedings before the Hays subcommittee

During the 89th Congress, the Hays subcommittee conducted an investigation, limited to the 89th Congress, into certain expenditures by the House Committee on Education and Labor.

The pertinent conclusions of the subcommittee were as follows (Report, pp. 6 and 7):

> 1. Testimony indicates that Representative Powell used an assumed name on many airline flights purchased with committee credit cards thus deceiving the approving authority as to the number of trips made by him as an individual.
>
> 2. Testimony indicates that Corrine A. Huff, a staff employee of the Committee on Education and Labor, prior to June 30, 1966 (on July 1, 1966, Miss Huff was transferred to Representative Powell's clerk-hire payroll), made many trips under an assumed name on many airline flights purchased with committee credit cards thus deceiving the approving authority as to the number of trips made by her as an individual.
>
> 3. Representative Powell placed on the staff of the Committee on Education and Labor one Sylvia J. Givens, who had been hired for the express purpose of doing domestic work for Representative Powell when he traveled, as well as for performing the clerical work in his committee offices.
>
> 4. After the initiation of this investigation, Representative Powell paid to Eastern Air Lines the cost of travel of himself, Miss Huff, Miss Givens, and Mr. and Mrs. Stone, which had been purchased with committee airline credit cards for transportation to Miami en route to Bimini, British West Indies, except that Representative Powell did not pay the cost of a return trip for Sylvia J. Givens from Miami to Washington, which travel has been charged to and paid for from the contingent funds allocated to the Committee on Education and Labor.
>
> 5. The deceptive practice of using the names of staff employees on airline tickets which were not used by the named employees appears to be a scheme devised to conceal the actual travel of Representative Powell, Miss Huff, and

others, in some instances at least, so as to prevent questions being raised by the Committee on House Administration as to the official character of the travel performed.

6. Representative Powell favored at least one member of his staff with personal vacation trips, the transportation of which was procured through the use of airline credit cards of the committee and the cost of said transportation for vacation purposes was charged to and paid for from the contingent funds allocated to the Committee on Education and Labor.

7. Persons having no official connection with the Congress have been provided with transportation by Representative Powell and the travel purchased by air travel credit cards of the Committee on Education and Labor. Said transportation costs have been charged to and paid from the contingent funds allocated to the Committee on Education and Labor.

8. The failure of a number of staff employees of the Committee on Education and Labor to submit vouchers for transportation expenses or subsistence on many trips performed by them, allegedly upon official business, raised a serious question before this special subcommittee as to whether such travel was actually on official business or was for purely personal reasons. The absence of expense vouchers is highly unusual in view of the general practice of Government employees, including employees of the Congress, to claim travel expenses, including transportation and subsistence, when traveling in an official capacity.

9. All vouchers for payment of travel costs of the Committee on Education and Labor bore the signature "Adam C. Powell," certifying said vouchers to the Committee on House Administration for payment from the contingent fund.

While it is beyond the scope of this report to review in detail the evidence developed by the Hays subcommittee, this Committee deems it pertinent to summarize portions of that evidence which relate specifically to conduct by Member-elect Powell.

1. The record before the subcommittee disclosed several instances in which Mr. Powell, as chairman of the House Education and Labor Committee, authorized or directed the expenditure of committee funds for private and nonofficial purposes. On or about August 1, 1966, Mr. Powell and Miss Corrine Huff each interviewed Sylvia J. Givens with regard to employment by the committee. They specifically advised Miss Givens that part of her duties would be work as a domestic for Mr. Powell. Mr. Powell authorized the hiring of Miss Givens by the committee as an assistant clerk, and a few days thereafter requested that she prepare to travel to the Bahamas with him on Sunday, August 7. Miss Givens accompanied Mr. Powell and Miss Huff to Mr. Powell's house in Bimini where for almost 2 weeks she served as a domestic performing cooking and cleaning chores after which she returned to Washington. Miss Givens remained on the committee payroll until September 6, when she was discharged. She received from the committee her full monthly gross salary of $350.74 for August and was paid nothing by Mr. Powell for her services in Bimini.[17]

[17] Miss Givens was given $100 by Mr. Powell "to buy," as she testified, "uniforms for the domestic work I was to do" (Hays subcommittee, hearings, p. 10).

On Sunday, March 28, 1965, Mr. Powell directed Louise M. Dargans, then chief clerk of the committee, to purchase on her committee air travel card four airline tickets, from Washington to New York City, in the names of committee staff members but for the use of other persons having no apparent connection with the committee or its official business. The persons who were to use the tickets were Adam C. Powell III, Mr. Powell's 20-year-old son, Pearl Swangin, and Jack Duncan, both personal friends of Mr. Powell, and Lillian Upshur, an employee in Mr. Powell's congressional office. These individuals were present with Mr. Powell on the day in question at a social gathering in Washington. Miss Dargans, acting on Mr. Powell's express instructions, accompanied Mr. Powell III, Miss Swangin, Mr. Duncan, and Miss Upshur to the airport where she discovered that tickets for the Eastern Air Lines shuttle flight could only be purchased in flight. She thereupon gave her committee air travel card to Miss Upshur and later so reported to Mr. Powell. The committee subsequently received and paid for four shuttle tickets to New York purchased on March 28, 1965, and signed for in the names of committee staff members. Each of these committee staff members has denied making the flight (Hays subcommittee hearings, pp. 71–75, 97–99, 138, 166, 218, 223).

During 1965 and 1966, Mrs. Emma Swann, a receptionist on the staff of the committee, whose duties did not require official travel, was given by Mr. Powell, or at his direction, on at least three separate occasions, round trip tickets to Miami paid for by the committee. These trips were in the nature of vacation trips during which, according to Mrs. Swann's testimony, she shopped and went sightseeing in Miami. Mr. Powell not only arranged for Mrs. Swann's airline tickets but also authorized her to be absent from her official duties for several days in connection with each trip (Hays subcommittee hearings, pp. 278–283, 287).

2. On two occasions during 1966, Mr. Powell made refunds to the committee for airline tickets previously purchased on committee air travel cards under circumstances indicating that his purpose may have been to conceal his use of committee funds for personal travel.

One such refund was made on or about October 28, 1966, several weeks after the Hays subcommittee investigation had begun and covered travel performed the preceding August, for which the committee had received a bill as early as September 21, 1966. The travel in question was performed by Mr. Powell, Miss Huff, C. Sumner Stone, special assistant to the chairman, Mrs. Stone, and Sylvia J. Givens between Washington, New York City, and Miami. The flights were part of a vacation trip to Bimini for Mr. Powell, Miss Huff, and Mr. and Mrs. Stone. With regard to Miss Givens, the refund covered only part of her travel. No refund was made with respect to her return flight from Miami to Washington which was purchased on Mr. Powell's committee air travel card. (Hays subcommittee hearings, pp. 6–9, 13, 22–23, 85–89, 101, 107–109, 123–131, 139; Report, p. 6.)

A second refund covered airline tickets for Mr. Powell and Miss Huff between Washington and Oklahoma City purchased in July 1966, on a committee air travel card. Subsequently, Mr. Powell gave Miss Dargans, the committee's chief clerk, his check and that of Miss Huff, each in the amount of $197.15 as reimbursement for the cost of these tickets. Although Mr. Powell's and Miss Huff's checks

were both dated July 29, 1966, bank markings on at least one of the checks indicate it was not negotiated until about November 9, 1966—over a month after the Hays subcommittee investigation had begun. (Hays subcommittee hearings, pp. 23–24, 87, 90, 109.)

3. The record before the Hays subcommittee disclosed repeated instances of airline travel by Mr. Powell and Miss Huff paid for by the Committee on Education and Labor but as to which (*a*) no subsistence was claimed and (*b*) the travel was under the assumed names of committee staff personnel. The clear inference to be drawn from these facts—later confirmed by evidence adduced before this Committee—is that much, if not all, of the travel in question, although paid for by the committee, was personal in nature.

C. Sumner Stone, special assistant to Mr. Powell as chairman of the Education and Labor Committee during most of the 89th Congress, testified that from time to time Mr. Powell directed him to purchase airline tickets with his committee air travel card in his own name and in the names of Cleomine Lewis, Odell Clark, Emma Swann, and John Warren—all committee staff members. Stone stated that in most instances the tickets were not utilized by the persons named but rather by Mr. Powell and Miss Huff. He testified (Hays subcommittee hearings, p. 120):

> Q. What names would the chairman order you to put in from time to time?
> A. My name, Lewis, Clark, Swann, Warren. Those are the only ones.
> Q. Would he order you specifically to put those names in when he asked to pick up tickets for him?
> A. Yes, sir.
> Q. Did the persons or the parties whose names appeared on the ticket perform the travel?
> A. Not very frequently; no, they didn't.
> Q. Who would be actually performing the travel on those tickets?
> A. The chairman.
> Q. Who else with the chairman?
> A. Miss Huff.
> Q. Who else?
> A. That is all.

Stone also testified that Miss Huff customarily traveled under the names of Swann and Lewis (p. 122):

> Q. Didn't Miss Huff travel under the name of Swann?
> A. Yes, sir.
> Q. How often would she travel under the name of Swann?
> A. I don't know. I don't know how many times.
> Q. It was customary for her to travel under an assumed name; is that correct?
> A. That is right.
> Q. Who would decide what name she was going to travel under on a particular trip?
> A. The chairman.
> Q. Did she also travel under the name of Lewis?
> A. Yes, sir.

In early 1966, Mr. Powell directed Stone to purchase 20 or more airline tickets at one time in the names of Swann, Clark, Lewis, and Stone. A variety of points of origination and destination were involved including Washington-Miami and New York City-Miami. Stone delivered the tickets to Mr. Powell, but he did not know whether or how Mr. Powell used them. (Hays subcommittee hearings, pp. 121–122, 144.)

(b) Additional evidence adduced before this Committee

This Committee's investigation of air travel expenditures by the House Education and Labor Committee has expanded upon the record made before the Hays subcommittee in two principal respects. First, the examination includes not only the 89th Congress, but also the 87th and 88th Congresses—i.e., the entire period during which Mr. Powell was chairman of the committee. Second, by analysis of immigration records and records of certain air taxi operators, this Committee has been able to establish that many airline flights to and from Miami by Mr. Powell, Miss Huff, and staff members, which flights were charged to the Education and Labor Committee, were in fact destined for, or originated at, Bimini in the Bahamas and, therefore, did not, in all likelihood, involve official committee business. It may be noted that this Committee's efforts to ascertain the complete facts regarding the travel in question were hampered by the refusal of Mr. Powell to answer questions on the subject, by Miss Huff's refusal to respond to a subpena served upon her, and by the Committee's inability to find and serve a subpena upon Mrs. Swann.

With regard to the 87th and 88th Congresses, the Committee's investigation was hampered by the fact that the airlines do not retain flight tickets for more than 2 years after their use. Nonetheless, the Committee found that, during those Congresses, the Education and Labor Committee was charged $8,055.57 for 105 airline tickets for which no related claim for subsistence or other expenses was made. The significance of a failure to claim subsistence in connection with official travel was explained by Robert D. Gray, the Committee's chief auditor (on loan from GAO):

> Mr. GRAY. The travel regulations of the House provide for any member or employee of the committee who is traveling on official business to make claim for reimbursement for subsistence and other expenses related to that travel and it has been my experience that it would be highly unusual for an employee traveling on official business not to claim reimbursement of his subsistence and taxi and other expenses that were related to that travel.
>
> Mr. PATTERSON. You mean that if travel is chargeable, per diem is also chargeable?
>
> Mr. GRAY. That is right, sir.

With regard to the 89th Congress the Committee discovered a total of 346 airline trips for which the Committee on Education and Labor paid $12,576.82 and concerning which no claims for subsistence were made. Of these, 82 trips amounting to $6,490.63 were made to or from Miami. In view of the unusual volume of Miami travel the Committee made a detailed analysis of flights to and from Miami. Although this analysis was necessarily incomplete, it showed (*a*) that

a substantial number of these flights were destined for or originated at Bimini; (*b*) that on a substantial number of the flights Mr. Powell or other committee staff members traveled under assumed names; and (*c*) that in several instances tickets paid for by the Education and Labor Committee clearly were used by a person not on the committee's staff and having no apparent connection with its official business.

By way of illustration, the analysis of Miami travel shows that on March 11, 1966, persons traveling on tickets in the names of Emma Swann, Cleomine Lewis, and Odell Clark, all committee staff members, arrived in Miami at 12:45 p.m. At 2:45 p.m. on the same day Mr. Powell, Miss Huff, Francis C. Swann (not on the committee's staff), and Robert J. Reed (not on the committee's staff) departed for Bimini. On March 19 these four persons returned to Miami and on the same day two persons departed from Miami using tickets in the names of Clark and Lewis. Similarly, on January 23, 1966, persons traveling in the names of Odell Clark, Carol T. Aldrich, Adam C. Powell, Cleomine Lewis, and Emma Swann arrived in Miami at 7:40 p.m. and at 9:00 a.m. the next morning, Mr. Powell, Miss Huff, Miss Aldrich, Adam C. Powell III (not on the committee's staff), and Francis Swann (not on the committee's staff) departed for Bimini.

The Hays subcommittee found that Mr. Powell, as chairman of the Committee on Education and Labor, certified for payment from the contingent fund of the House, vouchers covering payment of travel for members of the staff of the Committee on Education and Labor. Clearly, portions of such travel were not official.

In addition, the Select Committee ascertained from the Department of State that, as chairman of the Committee on Education and Labor, Mr. Powell received from the State Department in 1961, 1962, 1963, and 1964 reports as to the amount of expenditures of foreign exchange currency in U.S. funds he made while abroad during these years, as well as similar expenditures made by Miss Corrine Huff and Miss Tamara Wall in 1962. Subsequently, as chairman of the Committee of Education and Labor, Mr. Powell filed with the Committee on House Administration reports listing substantially lower sums for these expenditures which were then published in the Congressional Record. The amounts received and the amounts reported are as follows:

Year	Amounts received by Adam Clayton Powell	Amounts reported by Adam Clayton Powell
1961	$5,777.21	$3,233.27
1962	4,200.04	1,544.09
1963	1,030.60	721.21
1964	2,457.59	1,353.71
	Amounts received by Tamara Wall	
1962	3,528.30	1,653.00
	Amounts received by Corrine Huff	
1962	2,998.38	1,741.50

Such acts by Mr. Powell as chairman of a committee are in violation of rule IX of the Rules of the House in that they affect the rights of the House collectively, its safety, dignity, and the integrity of its proceedings.

3. As a Member of the House of Representatives

(*a*) *Y. Marjorie Flores (Mrs. Adam C. Powell).*—Both this committee and the Subcommittee on Contracts made inquiry into the payment of salary checks to Y. Marjorie Flores (Mrs. Adam C. Powell) as a member of Mr. Powell's congressional staff to determine (1) whether she was performing her official duties (if any) in Washington, D.C., or New York, as required by law,[18] and (2) the extent to which she was performing any official duties at all. This Committee found that although she remained on Mr. Powell's clerk-hire payroll until December 1966 Mrs. Powell had performed no official duties whatever since the summer of 1965 and had not performed any official services in Washington or New York since 1961. The evidence also showed that Mr. Powell had for several years deposited in his own bank account salary checks issued to Mrs. Powell.

In response to subpena, Mrs. Powell appeared to testify before this Committee on February 16, 1967, accompanied by counsel. Mrs. Powell testified that she first began to work for Representative Powell on his congressional staff in Washington in 1958. She remained on his clerk-hire payroll continuously through December 1966, at which time her annual salary was $20,578.44. In December 1960 she and Mr. Powell were married in San Juan, and for a while thereafter they made their home in Washington, D.C. Since 1961, however, she has resided in San Juan. Mrs. Powell testified that prior to her appearance before this Committee she had been in Washington only twice since 1961—once for about a week, the other time for about 3 days. On one of these visits, around the summer of 1964, she spent approximately a month with friends on Long Island, N.Y., but did not do any work in connection with Mr. Powell's congressional office.

Mrs. Powell testified that after she returned to San Juan in 1961 she received mail forwarded from Mr. Powell's congressional office requiring translation from Spanish to English. During the 87th Congress the volume of such mail was sufficient to keep her busy about 5 to 6 hours a day. However, during the 88th Congress the volume of mail received by Mrs. Powell became less and less, as indicated by the following testimony:

> Mr. GEOGHEGAN. Could you give us some idea as to how much work in terms of time required to perform this service you were doing during the 88th Congress? That is the period generally speaking of 1963 and 1964.
>
> Mrs. POWELL. 1963–64—about 1963 is the time I started getting less work from his office in Washington and I would say it probably wouldn't amount to more than 2 hours a day.
>
> Mr. GEOGHEGAN. Did the amount of work actually trickle off to almost nothing?
>
> Mrs. POWELL. Yes.
>
> Mr. GEOGHEGAN. When did that occur?
>
> Mrs. POWELL. About the summer of 1965, June, July, something like that.

[18] Public Law 89-90, sec. 103; see H. Res. 294, 88th Cong.; H. Res. 7, 89th Cong.

Mrs. Powell testified that subsequent to her marriage in 1960 and until November 1966, with possibly a few exceptions, she did not receive the salary checks made payable to her as a member of Mr. Powell's congressional office staff. Upon being shown photocopies of payroll checks issued in her name from January 1965 to about August 1966, she stated that none of the endorsements were in her handwriting.[19] And she testified:

> Mr. GEOGHEGAN. Mrs. Powell, did you at any time in writing or verbally authorize Mr. Powell to receive your checks, endorse them and keep them?
> Mrs. POWELL. No.

In November 1966, Mrs. Powell sent written instructions addressed to the House disbursing office to mail her salary checks to her in San Juan and thereafter she received two checks prior to her removal from Mr. Powell's clerk-hire payroll. Her testimony in this regard was:

> Mrs. POWELL. Well, I had been trying to get Adam to either bring me back to Washington to work, or get me off the payroll, which to me was a very embarrassing situation back home with the papers and everything, and I just could never—most of the time I wouldn't even get an answer. I figured that by my doing this, he would get me out of the payroll right away, which I think he probably would have done if the Committee hadn't decided it, or bring me back to Washington. I wanted either thing done, and that is why I got those checks, aside from that, I had a lot of bills that were his bills, but the pressure was on me because I am the one who is back there, and I thought I could pay some of them.

The Committee concludes from the foregoing evidence that Mrs. Powell has not performed any official duties whatever since at least the summer of 1965 and has not performed any official duties in Washington or New York since 1961. Accordingly, Mr. Powell has improperly maintained Mrs. Powell on his clerk-hire payroll from August 14, 1964, when House Resolution 294 was adopted[20] until December 1966, resulting in improper payments in the amount of $44,188.61.

(*b*) *Noncooperation with House committees.*—A factor considered by this Committee in making its recommendations was Mr. Powell's behavior both before the Hays subcommittee and before this Committee. Although charges of serious misconduct on his part were being considered by both committees, Mr. Powell refused in each case to respond to the charges or otherwise assist the Committee in its inquiry, and, in the case of the Hays subcommittee he failed even to appear.

On December 9, 1966, the Hays subcommittee "respectfully requested" Mr. Powell to appear at a hearing scheduled for December

[19] Louise M. Dargans (then chief clerk of the Committee on Education and Labor) testified before the Hays subcommittee that at Mr. Powell's direction she has signed Miss Flores' and Mr. Powell's names to each of those paychecks except three and deposited them to Mr. Powell's account. Miss Dargans had a power of attorney authorizing her to sign Mr. Powell's name but had no authorization from Mrs. Powell. The endorsements on the three checks which Miss Dargans didn't sign appeared to her to be in Mr. Powell's handwriting (Hays subcommittee hearings, pp. 25-34, 92-94, 297, 302-304; Report, "Individual Pay Cards," after p. 86).

[20] Sec. 2 of H. Res. 294, 88th Cong., provides: "No person shall be paid from any clerk-hire allowance if such person does not perform the services for which he receives such compensation in the offices of such Member * * * in Washington, District of Columbia, or in the State or the district which such Member * * * represents."
This provision was readopted in the 89th Cong. by resolution, H. Res. 7, and then by statute, Public Law 89-90, sec. 103, 79 Stat. 281 (1965).

21, 1966. Mr. Powell, in a letter dated December 17 to Representative Hays replied that he would appear only if the subcommittee agreed to certain "conditions," as follows:

> I, therefore, am unhappily constrained to request that, in the interest of fairplay, the following conditions be established for my appearance before your subcommittee:
>
> (1) The investigation include a comparative analysis of the travel vouchers of staff members of other full committees and subcommittees, including your own. I am prepared to provide immediate additional investigators and secretarial staff to assist your staff.
>
> (2) The investigation include a comparable analysis of the travel undertaken by all other committee and subcommittee chairmen.
>
> (3) That I be permitted to read into the record the following articles and series of articles:
>
> (*a*) The Life magazine article of June 6, 1960, by Walter Pincus and Don Oberdorfer, "How Congressmen Live High Off the Public."
>
> (*b*) The Congressional Quarterly article of March 4, 1966, on congressional foreign travel "Nearly Half of Congress Takes U.S. Paid Trips."
>
> (*c*) The series of articles by Vance Trimble on congressional payrolls beginning January 5, 1959, through December 1, 1959.
>
> (4) That my accompanying counsel be permitted the privilege of cross-examination of certain Congressmen whose travel and activities relate directly to the Education and Labor Committee. I shall submit the list of names to you privately for your prior approval.
>
> (5) That no staff members of the Education and Labor Committee be required to testify before your subcommittee until conditions Nos. 1 and 2 have been fulfilled.

Mr. Powell also stated: "I feel deeply that the conspiratorial tarnishment of my name must be militantly fought and whatever possible measures to protect my name be undertaken." When the subcommittee did not accept Mr. Powell's "conditions," he failed to appear.

Although Mr. Powell appeared before this Committee, he refused to testify concerning the various allegations of misconduct on his part. Mr. Powell thus refused to answer any questions concerning his contempts of the New York courts, his alleged misuse of Government funds as chairman of the Committee on Education and Labor, and the clerk-hire status of Y. Marjorie Flores. Acting on the advice of counsel Mr. Powell stated he only would answer questions relating to the constitutionally enumerated qualifications of age, citizenship, and inhabitancy.[21] This Select Committee respects Mr. Powell's rights to rely on the advice of counsel. Nonetheless, it is clear that Mr. Powell, had he so desired, could have answered fully the Committee's questions and thereby assisted the Committee in its assigned duties while at the

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[21] Even his answers to questions relating to inhabitancy were, in the Committee's view, less than candid. Mr. Powell also refused to answer any questions relating to residences maintained by him outside of New York.

same time reserving and maintaining the legal objections raised by his counsel.

We conclude that Mr. Powell has not only failed to assist this Committee and the Hays subcommittee in their inquiries but also that he has, in his own words to the Hays subcommittee, "militantly fought" the efforts of both committees to ascertain the true facts concerning the charges against him.[22]

[22] The Committee notes that Corrine Huff, a member of Mr. Powell's staff, failed to respond to a Committee subpena served on her in Bimini, where Mr. Powell has a home, and where she evidently remained throughout the period of the Committee's investigation.

When the 90th Congress convened on January 10, 1967, Representative-elect Van Deerlin, of California objected to the administration of the oath to Mr. Powell (113 Congressional Record, 14, January 10, 1967):

> 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.

After the oath has been administered by the Speaker to the other Members-elect (except Mr. Benjamin Blackburn, of Georgia, who was asked to step aside but to whom the oath was given by resolution of the

House following the debate on Mr. Powell), Mr. Udall, of Arizona submitted the following resolution:

H. Res. 1

> Resolved, that the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from New York, Mr. Adam Clayton Powell.
>
> Resolved, that the question of the final right of Adam Clayton Powell to a seat in the ninetieth Congress be referred to a select committee, composed of seven members, to be appointed by the Speaker, and said committee shall have the power to send for persons and papers and examine witnesses on oath in relation to the subject matter of this resolution; and said committee shall be required to report its conclusions and recommendations to the House within sixty days from the date the members are appointed.

The motion for the previous question on the resolution was defeated, 126-305 (113 Congressional Record, 24, January 10, 1967), and a substitute amendment was offered by Representative Gerald Ford, of Michigan (ibid);

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 subpena 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. Subpenas 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."

This substitute amendment was adopted and the resolution as amended was passed by a vote of 363-65 (113 Congressional Record, 26-27, January 10, 1967).

On January 19, 1967, Speaker McCormack appointed the following members to the Special Committee: Mr. Celler, of New York, Chairman, Mr. Corman, of California, Mr. Pepper, of Florida, Mr. Conyers, of Michigan, Mr. Jacobs, of Indiana, Mr. Moore, of West Virginia, Mr. Teague, of California, Mr. MacGregor, of Minnesota, and Mr. Thomson, of Wisconsin (113 Congressional Record, 1037).

The Special Committee determined that it would inquire into--

1. Mr. Powell's age, citizenship, and inhabitancy (Constitution, Article I, section 2, clause 2).

2. The status of legal proceedings to which Mr. Powell was a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which he had been held in contempt of court, and

3. Matters of Mr. Powell's alleged official misconduct since January 3, 1961 (87th Congress), (Report of Special Committee, supra, pp. 5-6).

Hearings were held by the Special Committee on February 8, 14, 16, 1967. Mr. Powell attended the first day of hearings but declined to testify beyond matters relating to his age, citizenship and residence in New York (Report of Special Committee, supra, p. 6).

(On January 31, 1967, Mr. Powell completed payment on the original libel award plus interest, plus court costs. Still outstanding, however, was the suit against Mr. Powell for fraudulently transferring property in Puerto Rico to his wife's uncle and aunt in order to frustrate satisfaction of the libel judgment, plus two orders of civil contempt and one of criminal contempt).

In its Report, issued on February 23, 1967, the Special Committee stated that censure could be inflicted upon a Member for acts occurring during a prior Congress (Report, supra, p. 29), and, that there could be a possibility that the Judicial Branch could step into the situation unless the House imposed penalties upon Mr. Powell of censure and a fine, matters that "were immune to judicial review", (Report, supra, pp. 30-31).

The Special Committee made its finding that the conduct and behavior of Mr. Powell "reflected adversely on the integrity and reputation of the House and its Members," and recommended the seating of Mr. Powell, the administration of censure on him, a fine of $40,000, and commencement of his seniority as of the day he would take the oath as a member of the 90th Congress (See, Report, supra, pp. 32-34):

CONCLUSIONS AND RECOMMENDATIONS

On the basis of the factual record before it, this Select Committee concludes that Member-elect Adam Clayton Powell meets the qualifications of age, citizenship, and inhabitancy and holds a certificate of election from the State of New York. This Committee concludes, however, that the following conduct and behavior of Adam Clayton Powell has reflected adversely on the integrity and reputation of the House and its Members:

First, Adam Clayton Powell has repeatedly ignored 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 New York courts 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.

Second, 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 New York, as required by law.

Third, as chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of House funds for private purposes.

Fourth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member.[33]

Simultaneously with the filing of this report and the hearings in connection therewith, the Select Committee is forwarding copies of its hearings, records, and report to the Department of Justice for prompt and appropriate action, with the request that the House be kept advised in the matter.

[33] The Committee notes that much of the foregoing conduct occurred or first became public knowledge subsequent to the 1966 elections and thus could not have been considered by the voters of Mr. Powell's district.

This Committee recommends that—

1. Adam Clayton Powell be permitted to take the oath and be seated as a Member of the House of Representatives.

2. Adam Clayton Powell by reason of his gross misconduct be censured and condemned by the House of Representatives.

3. Adam Clayton Powell, as punishment, pay the Clerk of the House, to be disposed of by him according to law, $40,000; that the Sergeant at Arms of the House be directed to deduct $1,000 per month from the salary otherwise due Mr. Powell and pay the same to the Clerk, said deductions to continue until said sum of $40,000 is fully paid; and that said sums received by the Clerk shall offset any civil liability of Mr. Powell to the United States of America with respect to the matters referred to in paragraphs Second and Third above.

4. The seniority of 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. The House direct the Clerk of the House of Representatives to forthwith terminate salary payments to Corrine Huff whose name appears on the clerk-hire payroll of Representative Adam Clayton Powell.

6. The House make a study in depth to determine whether or not existing procedural and substantive rules are adequate in cases involving charges of breach of public trust which have been lodged against any Member.

7. The Committee on House Administration, which currently is undertaking a revision of its auditing procedures, be directed by the House to file annually a report of audit of expenditures by each committee of the House and the clerk-hire payroll of each Member.

The Select Committee has given long, serious and, we believe, mature consideration to the profound responsibility imposed on it, realizing that there is no more important vote a Member can cast during his service in the House than one affecting the right of a Member to a seat he has held for 22 years and to which he has been reelected by a large majority of his constituency. During their deliberations the members of the Committee carefully considered many views and ideas before a decision was reached. Representative Pepper feels strongly that Mr. Powell should not be a Member of the House. Representative Conyers believes that punishment of Mr. Powell beyond severe censure is inappropriate. Other differences of opinion were expressed as to the punishment the House should order, and the ultimate recommendations we make represent the consensus of the Committee. We recommend the adoption of the following resolution:

Whereas the Select Committee appointed pursuant to House Resolution 1 (90th Cong.) 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 toward 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 18th 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, $40,000. The Sergeant-at-Arms of the House is directed to deduct $1,000 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 $40,000 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 3 and 4 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 18th 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.

Respectfully submitted.

EMANUEL CELLER, *Chairman.*
JAMES C. CORMAN.
CLAUDE PEPPER.
JOHN CONYERS, JR.
ANDREW JACOBS, JR.
ARCH A. MOORE, JR.
CHARLES M. TEAGUE.
CLARK MACGREGOR.
VERNON W. THOMSON.

On March 1, 1967, House Resolution 278, a privileged resolution, was called up for consideration, (113 Congressional Record, 4997). It read as follows:

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 in the House as to whether Mr. Powell's conduct warranted exclusion, that is, exclusion for reasons other than age, citizenship and inhabitancy, (involving the creation of additional qualifications) rather than censure and a reference to exclusion precedents, the House voted down the motion for the previous question on the resolution, 202-222 (113 Congressional Record, 5020, March 1, 1967).

A substitute amendment to exclude Mr. Powell was then submitted by Rep. Curtis, of Missouri, (113 Congressional Record, 5020, supra):

> 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."

The motion on the previous question on the substitute amendment by Rep. Curtis was adopted 263-161 (113 Congressional Record, 5036, March 1, 1967). A point of order by Rep. Burton, of California, that the substitute, if adopted, would forbid Mr. Powell from serving in the Senate during the 90th Congress, a power beyond that of the House to vote; and that it would forbid a later seating of Mr. Powell if he were elected to fill the vacancy caused by his exclusion, another power beyond that of the House to vote, was rejected by the Chair as having been made too late in the proceedings (supra, p. 5037).

The substitute amendment was adopted, 248-176 (supra, p. 5037), and the resolution as amended, was adopted, 307-116 (supra, pp. 5037-38).

Finally, a motion for the previous question on the preamble to the resolution, offered by Representative Curtis, was adopted, 310-9 (supra, p. 5039), and the preamble was agreed to (ibid.).

On March 8, 1967, following his exclusion, Mr. Powell instituted an action in the United States District Court for the District of Columbia against the Speaker, and six other members of the House plus the Clerk of the House, the Sergeant-at-Arms and the Doorkeeper, attempting to invoke the authority of the judicial branch to determine the limitations, if any, on qualifications of Members-Elect that the House can consider in excluding a Member-Elect, and to require that Mr. Powell be sworn in as a Member of the House.

In a decision respecting the jurisdiction of the federal courts over such matters, Judge Hart of the U.S. District Court dismissed the suit on April 7, 1967 (Powell v. McCormack, 266 F. Supp. 354). He denied an application by Mr. Powell for the convening of a three-judge court to consider the issues. Under the concepts of political question and separation of powers, the judge dismissed the suit.

The United States Court of Appeals in the District of Columbia, after a hearing, denied a motion by Mr. Powell for summary reversal of the district court judgment. Mr. Powell then petitioned to the United States Supreme Court for a writ of certiorari prior to judgment in the action by the Court of Appeals. That petition was denied by the Supreme Court on May 29, 1967 (Powell v. McCormack, 387 U.S. 933).

The parties then subsequently filed briefs before the Court of Appeals.

Meanwhile, in a special election held to fill the vacancy from the New York district created by the exclusion of Mr. Powell, he was re-elected on April 11, 1967. He did not, however, thereafter present himself to the House for admittance.

On February 28, 1968, the Court of Appeals rendered a decision affirming that of the district court (Powell v. McCormack, 395 F. 2d 577). It held that the claim of Mr. Powell as Member-Elect was one "arising under the Constitution" within the meaning of cases and controversies; that the statute giving federal district courts original jurisdiction of all civil actions arising under the Constitution (28 U.S.C. §1331 (a)) was a grant of jurisdiction to entertain the action; but that the issues were non-justiciable, and that the exclusion resolution was not an "Act of Congress" within the statute providing for a three-judge district court to hear an application for an injunction restraining an Act of Congress alleged to be repugnant to the Constitution.

On May 28, 1968, Mr. Powell appealed this decision to the United States Supreme Court.

On November 18, 1968, the Supreme Court granted review of the decision. The questions raised were: (1) Is Adam Clayton Powell's suit justiciable?; (2) Does the refusal by the House of Representatives to seat a duly elected representative who meets all the constitutional requirements for membership violate Article I, Clauses 2 and 5, of the

Constitution?; (3) Does such a refusal violate his rights and those of his constituents guaranteed to them by the 13th, 14th, and 15th Amendments?; and (4) Does such a refusal violate the Constitution prohibition against bills of attainder? (37 U.S. Law Week p. 3181).

The Supreme Court rendered its decision on June 16, 1969 (Powell v. McCormack, 395 U.S. 486 (1969)). The 90th Congress had terminated and respondents raised the issue of mootness. The Court, however, ruled that except for the first two months of the 90th Congress when Mr. Powell had been paid a salary pursuant to the terms of H. R. 1, he had not been paid the remainder by virtue of an alleged unconstitutional House resolution. That claim was still unresolved and was hotly contested by adverse parties. A declaratory judgment had been requested by Mr. Powell and the Court held that it could grant declaratory relief even though it might choose not to issue an injunction or mandamus (supra, pp. 498-99). The Court, relying on Bond v. Floyd, 385 U.S. 116 (1966), a case which considered the constitutionality of the exclusion from the Georgia legislature of a duly elected member on the grounds of disloyalty and in which the salary claim question was deemed to interdict a plea of mootness, held that the controversy in Powell remained open because of the salary claim.

The Court next considered respondents' claim that Article I, section 6 ("...for any Speech or Debate in either House, they ((Senators and Representatives)) shall not be questioned in any other place") was a bar to the action. The Court reviewed prior decisions on the immunity

clause and stated that, "Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. In insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." (supra, p. 503). It also reiterated the view of the scope of the clause as set forth by the Court in Kilburn v. Thompson, 103 U.S. 168 (1881), that its protection included more than "words spoken in debate" (supra, p. 502). "Committee reports, resolutions, and the act of voting are equally covered," it declared, "as are 'things generally done in a session of the House by one of its members in relation to the business before it,'" citing Kilburn v. Thompson, supra, p. 502.

It continued, however, to state that although an action against a Congressman may be barred by the immunity clause, legislative employees who participate in an unconstitutional activity even though expressly ordered by the House, are responsible for their acts and judicial review of the constitutionality of the underlying legislative decision is not barred in such a situation (supra, p. 504). Dismissing distinctions which respondents raised as to differing occasions for actions by legislative employees, the Court discussed the immunity doctrine, as follows (supra, pp. 501-506):

III.

Speech or Debate Clause.

Respondents assert that the Speech or Debate Clause of the Constitution, Art. I, § 6,[17] is an absolute bar to petitioners' action. This Court has on four prior occasions—*Dombrowski* v. *Eastland*, 387 U. S. 82 (1967); *United States* v. *Johnson*, 383 U. S. 169 (1966); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951); and *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881)—been called upon to determine if allegedly unconstitutional action taken by legislators or legislative employees is insulated from judicial review by the Speech or Debate Clause. Both parties insist that their respective positions find support in these cases and tender for decision three distinct issues: (1) whether respondents in participating in the exclusion of petitioner Powell were "acting in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, *supra*, at 376; (2) assuming that respondents were so acting, whether the fact that petitioners seek neither damages from any of the respondents nor a criminal prosecution lifts the bar of the clause; [18] and (3) even if this

[17] Article I, § 6, provides: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

[18] Petitioners ask the Court to draw a distinction between declaratory relief sought against members of Congress and either an action for damages or a criminal prosecution, emphasizing that our four previous cases concerned "criminal or civil sanctions of a deterrent nature." Brief for Petitioners 171.

action may not be maintained against a Congressman, whether those respondents who are merely employees of the House may plead the bar of the clause. We find it necessary to treat only the last of these issues.

The Speech or Debate Clause, adopted by the Constitutional Convention without debate or opposition,[19] finds its roots in the conflict between Parliament and the Crown culminating in the Glorious Revolution of 1688 and the English Bill of Rights of 1689.[20] Drawing upon this history, we concluded in *United States* v. *Johnson, supra,* at 181, that the purpose of this clause was "to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary." Although the clause sprang from a fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament,[21] we have held that it would be a "narrow view" to confine the protection of the Speech or Debate Clause to words spoken in debate. Committee reports, resolutions, and the act of voting are equally covered, as are "things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson, supra,* at 204. Furthermore, the clause not only provides a

[19] See 5 Debates on the Federal Constitution 406 (J. Elliot ed. 1876); 2 Records of the Federal Convention of 1787, p. 246 (M. Farrand rev. ed. 1966) (hereinafter cited as Farrand).

[20] The English Bill of Rights contained a provision substantially identical to Art. I, § 6: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2. The English and American colonial history is traced in some detail in Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk U. L. Rev. 1, 3–16 (1968), and Yankwich, The Immunity of Congressional Speech—Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 960, 961–966 (1951).

[21] *United States* v. *Johnson,* 383 U. S. 169, 182–183 (1966).

defense on the merits but also protects a legislator from the burden of defending himself. *Dombrowski* v. *Eastland, supra,* at 85; see *Tenney* v. *Brandhove, supra,* at 377.

Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation. Thus, in *Tenney* v. *Brandhove, supra,* at 373, the Court quoted the writings of James Wilson as illuminating the reason for legislative immunity: "In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." [22]

Legislative immunity does not, of course, bar all judicial review of legislative acts. That issue was settled by implication as early as 1803, see *Marbury* v. *Madison,* 1 Cranch 137, and expressly in *Kilbourn* v. *Thompson,* the first of this Court's cases interpreting the reach of the Speech or Debate Clause. Challenged in *Kilbourn* was the constitutionality of a House Resolution ordering the arrest and imprisonment of a recalcitrant witness who had refused to respond to a subpoena issued by a House investigating committee. While holding that the Speech or Debate Clause barred Kilbourn's action for false imprisonment brought against several members of the House, the Court nevertheless reached the merits of Kilbourn's attack and decided that, since the House had no power to punish for contempt, Kilbourn's imprisonment

[22] 1 The Works of James Wilson 421 (McCloskey ed. 1967).

pursuant to the resolution was unconstitutional. It therefore allowed Kilbourn to bring his false imprisonment action against Thompson, the House's Sergeant at Arms, who had executed the warrant for Kilbourn's arrest.

The Court first articulated in *Kilbourn* and followed in *Dombrowski* v. *Eastland*[23] the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts. Despite the fact that petitioners brought this suit against several House employees—the Sergeant at Arms, the Doorkeeper and the Clerk—as well as several Congressmen, respondents argue that *Kilbourn* and *Dombrowski* are distinguishable. Conceding that in *Kilbourn* the presence of the Sergeant at Arms and in *Dombrowski* the presence of a congressional subcommittee counsel as defendants in the litigation allowed judicial review of the challenged congressional action, respondents urge that both cases concerned an affirmative act performed by the employee outside the House having a direct effect upon a private citizen. Here, they continue, the relief sought relates to actions taken by House agents solely within the House. Alternatively, respondents insist that Kilbourn and Dombrowski prayed for damages while petitioner Powell asks that the Sergeant at Arms disburse funds, an assertedly greater interference with the legislative process. We reject the proffered distinctions.

That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision.

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[23] In *Dombrowski* $500,000 in damages was sought against a Senator and the chief counsel of a Senate Subcommittee chaired by that Senator. Record No. 118, O. T. 1966, pp. 10–11. We affirmed the grant of summary judgment as to the Senator but reversed as to subcommittee counsel.

Kilbourn decisively settles this question, since the Sergeant at Arms was held liable for false imprisonment even though he did nothing more than execute the House resolution that Kilbourn be arrested and imprisoned.[24] Respondents' suggestions thus ask us to distinguish between affirmative acts of House employees and situations in which the House orders its employees not to act or between actions for damages and claims for salary. We can find no basis in either the history of the Speech or Debate Clause or our cases for either distinction. The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee's affirmative action than he would be by a lawsuit questioning the employee's failure to act. Nor is the distraction or hindrance increased because the claim is for salary rather than damages, or because the litigation questions action taken by the employee within rather than without the House. Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves.[25] In *Kilbourn* and *Dombrowski*

[24] The Court in *Kilbourn* quoted extensively from *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 114, 112 Eng. Rep. 1112, 1156 (Q. B. 1839), to refute the assertion that House agents were immune because they were executing orders of the House: "[I]f the Speaker, by authority of the House, order an illegal Act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer." Kilbourn eventually recovered $20,000 against Thompson. See *Kilbourn* v. *Thompson*, MacArth. & M. 401, 432 (Sup. Ct. D. C. 1883).

[25] A Congressman is not by virtue of the Speech or Debate Clause absolved of the responsibility of filing a motion to dismiss and the

we thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. Similarly, this action may be dismissed against the Congressmen since petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell.[26] As was said in *Kilbourn,* in language which time has not dimmed:

> "Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." 103 U. S., at 199.

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trial court must still determine the applicability of the clause to plaintiff's action. See *Tenney* v. *Brandhove,* 341 U. S. 367, 377 (1951).

[26] Given our disposition of this issue, we need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available. Cf. *Kilbourn* v. *Thompson,* 103 U. S. 168, 204–205 (1881).

The Court considered other arguments, viz., that the final vote in the House on the exclusion resolution (H. Res. 278, 90th Congress, 1st Session), being 307-116, it meant that more than two-thirds of those voting favored the resolution and consequently it was an action to expel pursuant to Article I, section 5 which grants each House the authority to expel a member "with the concurrence of two-thirds." The Court rejected this argument upon the basis of the legislative history of H. Res. 278 including the fact that the House knew it was voting to exclude, (which only required a majority vote) and not to expel. It could not be known how the vote would have gone if the membership were cognizant that it was voting on an expulsion resolution (supra, p. 508).

The Court accepted jurisdiction of the case as one "arising under the Constitution" since that formula pertains in a situation where petitioner's claim will be sustained if the Constitution were given one construction and would be defeated if it were given another (supra, p. 574).

The Court held that the issue was justiciable, that is, that the claim presented and the relief sought are of the type which admit of judicial resolution (supra, p. 517), and that it did not raise a political question, i.e., one not justiciable in federal court because of the separation of powers doctrine (ibid).

The Court sustained the first conclusion on the ground that petitioners' sought relief under the Declaratory Judgment Act (28 U.S.C. §2201) which relief can be considered independently of whether other forms of relief are appropriate such as whether the courts can compel the House or officers of the House to perform specific official acts (supra, pp. 517-18).

The Court sustained the second conclusion on the ground that there was not a political question because there was not a textually demonstrable commitment of the issue by the Constitution to a coordinate political department (see for instance, Baker v. Carr, 369 U.S. 186 (1962)). The Constitution, the Court held, only granted authority to the House to judge the qualifications of age, citizenship, and inhabitancy (Article I, section 2, clause 2, Article I, section 5, clause 1), and consequently, any attempt by the House to attach additional qualifications to a Member-elect would be subject to judicial review (supra, pp. 518-519). The Court sustained its conclusion that Article I, section 5, clause 1 only permitted the House to judge the qualifications of age, citizenship and inhabitancy of its members from a review of the constitutional history of the clause including its adoption at the constitutional convention in 1787, statements of Founding Fathers and constitutional experts about it, and statements by committees of the House about its breadth. It held to be aberrations from previous occasions when a member-elect had been excluded on other grounds because such situations had occurred in periods of extreme political passion (supra, pp. 522-548).

Consequently, the Court held that the case had not been mooted, it should be dismissed as against the Congressman but sustained as against their agents, the House officers, that the exclusion in the 90th Congress could not be treated as an expulsion, that the Court had jurisdiction over the subject matter, that the case was justiciable, and that in judging the qualifications of its members, Congress is limited

to the standing qualifications prescribed in the Constitution, and that the respondents having conceded that Mr. Powell had met these, the House was without power to exclude him from its membership (supra, pp. 549-550).

The Court then remanded the case to the District Court to consider forms of equitable relief for the release of Mr. Powell's back pay (supra, p. 550).

The claim for back pay was dismissed by U.S. District Judge George L. Hart, Jr., on May 14, 1971, when Mr. Powell failed to press the matter (see, Guide to the United States Congress, Congressional Quarterly, Incorporated, 1971, p. 300).

Mr. Powell was elected in November, 1968, to the 91st Congress and was asked to step aside at the time of administration of the oath to Members-elect on January 3, 1969, by Mr. Gross, of Iowa (115 Congressional Record, 15). A resolution was then introduced by Representative Celler, of New York (H. Res. 1) authorizing that Mr. Powell be permitted to take the oath (ibid.). After the motion for the previous question was defeated on this resolution (115 Congressional Record, 22-23, January 3, 1969), the following resolution was submitted by Mr. Celler--

H. RES. 2

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 as punishment Adam Clayton Powell be and he hereby is fined the sum of $25,000, said sum to be paid to the Clerk to be disposed of by him according to law. The Sergeant at Arms of the House is directed to deduct $1,150 per month from the salary otherwise due the said Adam Clayton Powell, and pay the same to said Clerk until said $25,000 fine is fully paid.

(3) That as further punishment 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 91st Congress.

(4) That if the said Adam Clayton Powell does not present himself to take the oath of office on or before January 15, 1969, 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.

The motion for the previous question on this resolution was adopted 249-171 (115 Congressional Record, 30, January 3, 1969), and the resolution was adopted, 254-158 (supra, pp. 33-34). Mr Powell was then sworn in (supra, p. 34).

D. Cases where oath was administered and case referred to a committee, but no report was officially issued.

I. Crime

DONNELLY v. WASHBURN, MINNESOTA; 46TH CONGRESS, 2ND SESSION, 1880; II HINDS' § 946; REPUBLICAN; THE HOUSE HAD 150 DEMOCRATS, 128 REPUBLICANS, 14 OTHERS

This contested election case turned, in part, on the question of alleged bribery involving the contestee. The House did not take any action, and no report was officially issued by the Committee on Elections. Two sections of the Committee were authorized to present views.

The views favorable to the sitting Member, Mr. Washburn (who had been sworn in), were presented by a group of five Republican Members of the Committee. They argued that "under no provision of the Constitution of the United States does crime committed by a Member in his election disqualify him from taking and holding his seat."

They also argued that the House is the "exclusive and final judge" of the three "prescribed" constitutional qualifications.

And finally, they asserted that a majority could exclude for failure to "posesss the constitutional qualifications" whether the Member-elect had been sworn in or not.

E. Cases where oath was administered and case referred to a committee, but issue was tabled.

I. Disloyalty

TUCKER v. BOOKER, VIRGINIA; 41ST CONGRESS, 2ND SESSION, 1870; I HINDS' § 461; REPUBLICAN; THE HOUSE HAD 170 REPUBLICANS, 73 DEMOCRATS

At the beginning of the 2nd session of the 41st Congress, the credentials of all Members-elect from Virginia, were referred to the Committee on Elections, and the claimants were not sworn in until the Committee reported.

Charges of disloyalty were made against Mr. Booker, but the Committee reported a recommendation that the oath be administered to him. The Committee had not examined the question of disloyalty, but it became the primary topic of the floor debate. By a vote of 89 to 72, it was determined that Mr. Booker should be sworn in.

On March 22, 1870, the Special Committee on Elections reported in the case of Tucker v. Booker (H. Rept. 41). The grounds of the contest related entirely to the loyalty of Representative Booker. The report recommended that he was entitled to retain his seat as a Member.

The report was debated on July 5 (Globe, pp. 5195-5199) and a preamble was proposed that Representative Booker be disqualified.

Representative Dawes of Massachusetts raised a question as to how Mr. Booker could be excluded, since he had already been admitted and taken the oath. Mr. Dawes did not see how he could be removed except by expulsion. Representative Poland of Vermont seemed to regard the taking of the oath, under the circumstances, as temporary and intimated that a majority vote, in his opinion, might exclude the sitting Member.

The question was circumvented, however, when a motion to lay the whole subject on the table was agreed to, 99 to 24.

Committee Procedure In Cases Of Exclusion

BRIGHAM H. ROBERTS, UTAH; 56TH CONGRESS, 1ST SESSION, 1900; I HINDS' § 475; DEMOCRAT; THE HOUSE HAD 185 REPUBLICANS, 163 DEMOCRATS, 9 OTHERS

The procedure of the special committee in the Roberts case, permitted his presence while it discussed the plan and scope of its inquiry. Mr. Roberts submitted certain motions and supported them by argument, questioning the jurisdiction of the committee and its right to report against his prima facie right to a seat in the House. The determination of these questions was postponed by the committee, to be taken up in the general consideration of the case.

Witnesses appeared before the committee and were examined under oath, in the presence of Mr. Roberts and by him cross-examined, relating to the charge that he was a polygamist. This testimony was printed.

The committee fully heard Mr. Roberts and gave him opportunity to testify if he desired, which he declared he did not wish to do. The meetings of the committee during this examination were open and not secret.

WILLIAM SMITH, SOUTH CAROLINA; 1ST CONGRESS, 1ST SESSION, 1789; I HINDS' § 420

Mr. Smith, whose qualifications were questioned as respects citizenship, was permitted to be present before the Committee on Elections, cross examine, and offer counterproofs.

Instances In Which Expulsion Was Considered But Not Voted By The House

A. Breach of Privilege of the House

I. Personal Injury to a Member

EXPULSION: MATTHEW LYON AND ROGER GRISWOLD, 5TH CONG., 1ST SESS., 1798; II HINDS' §§ 1642, 1643; LYON WAS AN ANTI-FEDERALIST AND DEMOCRAT; GRISWOLD A FEDERALIST; 5TH CONGRESS HAD 51 FEDERALISTS; 54 DEMOCRATS

During the voting on an impeachment resolution, Griswold taunted Lyon as to his army record and Lyon spat in his face. The matter was reported to the House in secret session; it being declared that the matter need not be considered in secret, the House in open session took up a resolution to expel Lyon and it was referred to the Committee on Privileges.

The Committee took testimony and reported to the House which considered the matter in Committee of the Whole, witnesses being examined and cross-examined. Most of the debate apparently centered on whether the House was actually in session at the time of the affray.

First, the House defeated, 52 to 44, a motion that Lyon be censured instead of expelled; it then voted, 52 to 44, to expel, but this being short of the two-thirds required, it failed.

Two days later, during the meeting of the House, Griswold assaulted Lyon with a cane while Lyon was seated; the latter picked up tongs from the fireplace and an affray resulted.

A resolution to expel both men was referred to committee. While the resolution was under consideration the House directed that both men pledge themselves before the Speaker to keep the peace, which they did.

The committee then reported its recommendations that the resolution be disagreed to, which the House did, 73 to 21.

EXPULSION: WILLIAM J. GRAVES, 25TH CONG., 2D SESS., 1838; II HINDS' § 1644; WHIG; 25TH CONGRESS HAD 117 DEMOCRATS; 115 WHIGS

The House authorized a special committee to inquire into the death of one of the Members. The committee investigated and determined the deceased had fallen in a duel with Graves. The Committee was apparently unanimous on the evidence but divided on what further action it should take.

It appeared that the deceased Member had been challenged because of remarks he had made on the floor about the character of a friend of Graves.

The committee majority, after setting out the evidence, concluded the duel to have resulted from a demand, in hostile manner, for an explanation of words spoken in debate, a matter the majority considered to be "the highest offense that could be committed against either of the Houses of Congress." The majority thus recommended the expulsion of Graves and the censuring of the two Members who had acted as seconds.

Two members of the committee thought it had only been directed to gather the evidence and had exceeded its authority in making recommendations. But as to that matter, they agreed that a breach of privilege had been committed by both the principals and the seconds; however, in view of the prevalence of duelling, these two recommended a rule of the House and a statute but no punishment of the men here involved.

Another Member agreed as to the breach of the privilege of the House but thought the punishment too severe.

Debate in the House seemed to turn upon whether the committee had exceeded its authority in making recommendations. In the end, the whole matter was tabled, 103 to 78.

EXPULSION: LOVELL H. ROUSSEAU; 39TH CONG., 1ST SESS., 1866; II HINDS' §§ 1655-1656

After a Member had imputed cowardice to him, Rousseau assaulted him outside the chamber with a cane. Three other Members were present to prevent interference with the assault.

The committee appointed to inquire into the matter reported the imputations of cowardice to be false but that despite the provocation the violence was a contempt of the House and Rousseau ought to be expelled. The minority thought he ought only to be censured because of the provocation.

After extended debate, the House voted.

It first rejected a substitute to censure the Member rather than expel him, 94 to 35.

The recommendation of the minority, essentially recommending censure, was defeated, 69 to 59.

On adoption of the resolution to expel, the vote was 73 to 51 which was short of the two-thirds. A motion was made and adopted to reconsider this vote whereupon the House, 89 to 30, substituted a censure resolution.

Rousseau then announced that he had resigned but the Speaker pronounced the censure anyway.

A. Breach of Privilege of the House

II. Prior conviction for a crime; knowledge of electorate

EXPULSION: MATTHEW LYON, 5TH CONG., 1ST SESS., 1799;
II HINDS' § 1284; DEMOCRAT; 5TH CONGRESS HAD
54 DEMOCRATS; 51 FEDERALISTS

Lyon, prior to his election, had been convicted of violating the Sedition Act. Resolution of expulsion was framed on this ground.

Author of resolution contended that the House had unlimited power of expulsion and could expel a Member for any crime or any cause which, in their discretion, they conceived had rendered him unfit to remain a Member. Opponents argued that his constituents had elected him with full knowledge of the conviction and the House could not, or should not, act.

On the resolution, the vote was 49 to 45 to expel, less than the required two-thirds.

A. Breach of Privilege of the House

III. Matters occurring prior to the Congress considering the question

EXPULSION: ORSAMUS B. MATTESON, 35TH CONG., 1ST SESS., 1858; HINDS' § 1285; WHIG-REPUBLICAN; 35TH CONGRESS HAD 92 REPUBLICANS; 131 DEMOCRATS; 14 OTHERS

In the 34th Congress, Matteson had resigned to escape expulsion. He was elected to the 35th Congress and seated, whereupon a motion of expulsion was offered because of the actions in the 34th.

After argument over whether the House had jurisdiction to expel for an offense committed before the Member was sworn in, the House voted 93 to 87 to refer the resolution to committee. The committee was composed of two Republicans, two Democrats.

The majority report, signed by the two Democrats and one Republican, took the position that the proceedings in the previous Congress constituted no disqualification and no hinderance existed to Matteson's continuing in office. The legislative power to punish Members could not be used in regard to matters having no legal recognition. According to Cushing's Law and Practice of Legislative Assemblies, "Expulsion from a former or from the same legislative assembly cannot be regarded as a personal disqualification, unless specifically provided by law." The last Congress had tried Matteson but he had committed no offense against the present one. The people of his district had known of the charges against him when they elected him.

The minority report argued that the House had the inherent power to protect itself against external and internal corruption, and that under the Constitution the House might expel for whatever reasons might seem necessary to guard against blight, decay or destruction. The power was plenary, restrained by the two-thirds vote in order to prevent tyrannical exercise. The power to expel was not merely the power to inflict punishment. It was the power to remove an obstacle to the progress of legitimate business and secure a wholesome exercise of the House's function. H. Rept. No. 179, 35th Cong., 1st sess.

After debate on the majority recommendation, the whole matter was laid on the table.

EXPULSION: WILLIAM S. KING AND JOHN G. SCHUMAKER, 44TH CONG., 1ST SESS., II HINDS' § 1283; KING WAS A REPUBLICAN; SCHUMAKER WAS A DEMOCRAT

In the 43d Congress, the Ways and Means Committee inquired into alleged bribery during the 42d Congress to procure mail subsidies. King and Schumaker were uncooperative and obstructed the investigation. At the close of the Congress, the Committee sent a copy of its report to the Clerk of the House of the 44th Congress and sent a copy to the United States Attorney in the District of Columbia.

As the matter came up in the 44th, the case was pending in court and a majority of the Judiciary Committee concluded that the House had no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. For such offenses, the Committee thought, the Member was subject to the courts.

The Committee minority on the other hand thought that where the crimes alleged related directly to the attempted corruption of Members of Congress and were consummated in the District of Columbia, if not within the halls of Congress, Congress certainly had jurisdiction, and it did not matter that the case was presently in court. H. Rept. No. 815, 44th Cong., 1st sess.

Apparently, the House never took any action upon the report.

EXPULSION: WILLIAM P. KELLOGG, 48TH CONG., 1ST SESS.; II HINDS' §1287

Kellogg offered a resolution to have a committee investigate charges of wrongdoing on his part, made by non-Members. During the presentation of his resolution, it appeared that the alleged offenses had occurred five years before.

Thereupon the Speaker noted that if the resolution was directed to the charges Kellogg was discussing, it was not in order since the House had no right to punish a Member for any offense committed previous to the time he was elected a Member of the House.

After discussion, the resolution was referred to committee and apparently no further action was taken.

A. Breach of Privilege of the House

IV. Matters occurring prior to the Congress considering the question, but Member who had been convicted of a crime resigned after his petition for certiorari was denied

EXCLUSION OR EXPULSION: JOHN W. LANGLEY, 69th CONG., 1ST SESS., 1926; VI CANNON'S, § 238

Langley was convicted of conspiracy and sentenced to two years. Execution of sentence was stayed pending completion of appeal. While the appeal was pending, Langley was re-elected to the House. When he presented his credentials to the House, they were referred to a special committee, which reported its members unanimously felt the precedents to be that the House could not expel a Member for reprehensible action prior to his election as a Member, not even for conviction for an offense. However, declared the Committee, the House could not permit in its membership a person serving a sentence for a crime. In view of the custom of the House, the committee reported, action should be delayed until the Supreme Court took final action on a petition for certiorari filed by Langley; if the petition was denied, the committee understood that Langley would resign. Mr. Langley, in the meantime, did not participate in the proceedings of the House. H. Rept. No. 30, 69th Cong., 1st sess.

Upon the denial of the petition, Langley tendered his resignation.

A. Breach of Privilege of the House

V. Matters occurring prior to the Congress considering the question, but House deleted preamble of resolution denying that it could expel for such reason

EXPULSION: OAKER AMES AND JAMES BROOKS, 42D CONG., 3D SESS., 1872; II HINDS' § 1286; AMES WAS REPUBLICAN AND BROOKS DEMOCRAT; 42D CONGRESS HAD 139 REPUBLICANS; 104 DEMOCRATS

The Speaker, James G. Blaine, being one against whom charges of corruption had been made, summoned a Member from the minority side and moved for an investigating committee. The minority Member appointed to the committee three Republicans and two Democrats.

The committee reported recommending expulsion for Ames and Brooks for having taken bribes and having sought to influence corruptly other Members of Congress five years before. Discussing the problem that the offenses had not been committed in the present Congress, the committee said:

> The committee have no occasion in this report to discuss the question as to the power or duty of the House in a case where a constituency, with a full knowledge of the objectionable character of a man, have selected him to be their representative. It is hardly a case to be supposed that any constituency, with a full knowledge that a man had been guilty of an offense involving moral turpitude, would elect him. The majority of the committee are not prepared to concede such a man could be forced upon the House, and would not consider the expulsion of such a man any violation of the right of the electors, for while the electors have rights that should be respected, the House as a body has rights also that should be protected and preserved. But that in such case the judgment of the constituency would be entitled to the greatest consideration, and that this should form an important element in its determination, is readily admitted.
>
> It is universally conceded, as we believe, that the House has ample jurisdiction to punish or expel a Member for an offense committed during his term as Member, though committed during a vacation of Congress and in no way connected with his duties as a Member. Upon what principle is it that such a jurisdiction can be maintained? It must be upon one or both of the following: That the offense shows him to be an unworthy and improper man to be a Member, or that his conduct brings odium and reproach upon the body. But suppose the offense has been committed prior to his election, but comes to light afterwards, is the effect upon his own character, or the reproach and disgrace upon the body, if they allow him to remain a Member,

> any the less? We can see no difference in the principle in the two cases, and to attempt any would be to create a purely technical and arbitrary distinction, having no just foundation. In our judgment the time is not at all material, except it be coupled with the further fact that he was reelected with a knowledge on the part of his constituents of what he had been guilty, and in such event we have given our views of the effect. H. Rept. No. 77, 42d Cong., 3d Sess.

The committee also saw a close analogy between the power of impeachment and the power to expel.

> The great purpose of the power of impeachment is to remove an unfit and unworthy incumbent from office, and though a judgment of impeachment may to some extent operate as punishment, that is not its principal object. Members of Congress are not subject to be impeached, but may be expelled, and the principal purpose of expulsion is not as punishment, but to remove a Member whose character and conduct show that he is an unfit man to participate in the deliberations and decisions of the body, and whose presence in it tends to bring the body into contempt and disgrace.
>
> In both cases it is a power of purgation and purification to be exercised for the public safety, and, in the case of expulsion, for the protection and character of the House....The office of the power of expulsion is so much the same as that of the power to impeach that we think it may be safely assumed that whatever would be a good cause of impeachment would also be a good cause of expulsion.
>
> It has never been contended that the power to impeach for any of the causes enumerated was intended to be restricted to those which might occur after appointment to a civil office, so that a civil officer who had secretly committed such offense before his appointment should not be subject upon detection and exposure to be convicted and removed from office. Every consideration of justice and sound policy would seem to require that the public interests be secured, and those chosen to be their guardians be free from the pollution of high crimes, no matter at what time that pollution has attached.

> If this be so in regard to other civil officers, under institutions which rest upon the intelligence and virtue of the people, can it well be claimed that the law-making Representative may be vile and criminal with impunity, provided the evidences of his corruption are found to antedate his election.

Following the report of the committee, but before House action on the recommendations, the majority of the Judiciary Committee issued a report taking the opposite point of view from the special committee on the analogy of impeachment and expulsion and on the power of the House to expel. Impeachment and expulsion were said to be dissimilar and not analogous. Impeachment disqualified the impeached from everafter holding office; the expelled Member might be reelected after expulsion. And it was not thought that either impeachment or expulsion should be invoked for offenses committed before the election. As for the power to expel:

> The plain words of the Constitution seem to us clearly to indicate that the power of expulsion is a protective, not a punitive, provision of the Constitution. . . . [A Member might be expelled] for that behavior which renders him unfit to do his duties as a Member of the House, or that present condition of mind or body which makes it unsafe or improper for the House to have him in it. . . . But your committee are constrained to believe that the power of expelling a Member for some alleged crime, committed, it may be, years before his election, is not within the constitutional prerogative of the House.
>
> . . . [T]he Constitution has given to the House of Representatives no constitutional power over such considerations of "justice and sound policy" as a qualification in representation. On the contrary, the Constitution has given this power to another and higher tribunal, to wit, the constituency of the Member. . . .
>
> Your committee are further emboldened to take this view of this very important constitutional question, because they find that in the same section [Art. I, §2] it is provided what shall be the qualifications of a representative of the people, so chosen by the people themselves. On this it is solemnly enacted, unchanged during

> the life of the nation, that "No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.
>
> Your committee believe that there is no man or body of men who can add or take away one jot or tittle of these qualifications. The enumeration of such specified qualifications necessarily excludes every other. It is respectfully submitted that it is nowhere provided that the House of Representatives shall consist of such Members as are left after the process of "purgation and purification" shall have been exercised for the public safety, such as may be "deemed necessary" by any majority of the House. The power itself seems to us too dangerous, the claim of power too exaggerated, to be confided in any body of men; and, therefore, most wisely retained in the people themselves, by the express words of the Constitution. H. Rept. No. 82, 42d Cong., 3d Sess.

When the special committee recommendation of expulsion was taken up, the House, after debate, voted 115 to 110 to adopt a substitute providing for the censure of Ames and Brooks. Ames was then censured by a vote of 182 to 36 and Brooks by 174 to 32.

A separate vote was requested on the preamble of the substitute, which read:

> Whereas by the report of the special committee herein it appears that the acts charged as offenses against Members of this House in connection with the Credit Mobilier occurred more than five years ago, and long before the election of such persons to this Congress, two elections by the people having intervened; and whereas grave doubts exist as to the rightful exercise by this House of its power to expel a Member for offenses committed by such Member long before his election thereto, and not connected with such election....

Objection was voiced to adopting such a preamble setting forth the views therein and after debate the preamble was disagreed to, 98 to 113.

VI. Conviction for a Crime; Appeal; Suspension from Participation in the Proceedings of the House

SUSPENSION: JOHN W. LANGLEY, KENTUCKY; 68TH CONGRESS; 1924; VI CANNON'S, §§402-403; REPUBLICAN; REPUBLICANS, 225, DEMOCRATS, 205, OTHERS, 5

402. The investigation of charges against John W. Langley, of Kentucky, and Frederick N. Zihlman, of Maryland.

Two unnamed Members having been implicated in a report by a Federal grand jury, the House directed the Attorney General to transmit the names of the Members implicated and the nature of the charges against them.

Instance wherein an executive officer declined to transmit information requested by the House.

A member of the Cabinet declining on his own responsibility to transmit data requested by the House was criticized for failure to communicate such refusal through the President as incompatible with public interest.

The House, when advised by the Attorney General that certain charges against Members were under investigation by the Department of Justice, did not insist on its request for information relative thereto.

On March 6, 1924,[1] the House agreed to the following resolution:

Whereas a grand jury of the District Court of the United States for the Northern District of Illinois, southern division, impaneled at the February term, 1924, has reported to that court that certain evidence has been submitted to them involving the payment of money to two Members of Congress:

Resolved, That the Attorney General be directed to transmit to the House of Representatives the names of the two Members of Congress and the nature of the charges made against them.

On March 8,[2] the Speaker laid before the House a communication from the Attorney General declining to comply with this request of the House, as follows:

MARCH 6, 1924.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

SIR: Resolution No. 211 of the House of Representatives of the United States passed March 6, 1924, directing me to transmit the names of the two Members of Congress mentioned in the report of the grand jury of the District Court of the United States for the Northern District of Illinois, eastern division, and the nature of the charges made against such Members of Congress can not be complied with by me for the reasons—

First, I am unwilling to make public the name of any man against whom any criminal charge has been made until the evidence in my possession convinces me that there is reasonable ground to believe that the person is guilty as charged and until proper legal steps shall have been taken to protect the public interests.

Second. To transmit to you the nature of the charges made against any persons under investigation in the Department of Justice is incompatible with the public interest and will tend to defeat the ends of justice.

If, however, the House of Representatives of the United States, acting within its constitutional power (under Article I) to punish its Members for disorderly behavior or to expel such Member, requests that all the evidence now in the possession of anyone connected with the Department of Justice shall be turned over to the House of Representatives to enable it to determine what action should be taken by the House in reference to the conduct of any of its Members, I will direct all such evidence, statements, and information obtainable to be immediately turned over to you or to such committee as may be designated by the House and will await the complete investigation of the facts of the House before continuing the investigation now being made by the Department of Justice. To have two tribunals attempting to act upon the same facts and to hear the same witnesses at the same time will result in confusion and embarrassment and will defeat the ends of justice.

Until I am requested by a resolution of the House of Representatives to submit these matters to the jurisdiction of the House the investigation now being conducted of the matters referred to in said resolution will continue in accordance with the usual rules of the department.

Respectfully,

H. M. DAUGHERTY, *Attorney General.*

On motion of Mr. Nicholas Longworth, of Ohio, this communication was referred to the Committee on the Judiciary which submitted its report thereon March 10,[3] with the following conclusions:

Under the reply of the Attorney General there is but one of two courses open to the House of Representatives:

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[1] First session Sixty-eighth Congress, Record, p. 3736.

[2] Record, p. 3803.

[3] House Report No. 282.

(a) The House take full charge of the investigation and evidence of the alleged charges and relieve the Department of Justice from any further responsibility.

(b) Allow the Department of Justice to continue the investigation now being made.

While there is a difference of opinion among the membership of your committee as to the correctness of the position of the Attorney General that the ends of justice would be imperiled by giving to the House the names of the Members of the House and the charges against them as requested by the House, and while it is a high duty which the House owes to itself and to the country at large to purge itself at the quickest possible moment, of all those, if any there be, unworthy to sit in that body, your committee is unwilling to recommend to the House that it permit itself to be placed in the position of being responsible for the suspension of proceedings by the Attorney General in connection with this matter.

The committee accordingly recommend:

Your committee, therefore, recommends to the House that no further action be taken for the present by the House to procure from the Attorney General the information heretofore requested of the Attorney General by the House and submits the following resolution:

Resolved, That the House take no further action for the present to procure from the Attorney General the information heretofore requested of the Attorney General by the House under House Resolution 211.

In the meantime Mr. John W. Langley, of Kentucky, and Mr. Frederick N. Zihlman, of Maryland, mentioned in the public press as the two Members referred to, rose severally to questions of personal privilege in the House and emphatically denied any guilt.

On March 11, Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary, called up the resolution recommended by the committee, when Mr. Fred H. Dominick, of South Carolina, offered a substitute declaring the reply of the Attorney General not responsive to the request of the House and directing him to transmit to the House the names of the two Members and the nature of the charges against them.

During the debate on the proposed substitute Mr. John N. Garner, of Texas, expressed criticism of the action of the Attorney General in refusing the information on his own responsibility instead of following custom in permitting the President to advise the House that compliance with its request was incompatible with public interest.

Pending action on the substitute, Mr. Graham offered the following amendment, which was agreed to, yeas 178, nays 162:

Resolved, That in view of its extreme importance to the House, the Attorney General be, and is hereby, requested to proceed at once and give preference and precedence to this investigation and report the results to this House.

Mr. Dominick's substitute was then rejected, yeas 152, nays 184, and the resolution recommended by the committee as amended was passed by a vote of yeas 222, nays 108.

403. The case of John W. Langley and Frederick N. Zihlman, continued.

A proposition to investigate charges against Members was presented as a question of privilege.

A decision by the House to procure from the Attorney General certain information is not such disposition as to preclude a proposition to secure the same information through one of its own committees.

A resolution relating to the privilege of the House takes precedence over a conference report.

A Member having been indicted by a grand jury, a committee of the House assumed that until final disposition of his case he would take no part in any business of the House or its committees.

A committee which had been empowered to investigate charges of corruption against Members recommended that action by the House be delayed pending trial in the courts.

Immediately upon the passage of the resolution recommended by the committee, Mr. Finis J. Garrett, of Tennessee, offered the following resolution which the Speaker held to be privileged: [1]

Whereas a grand jury of the District Court of the United States for the Northern District of Illinois, southern division, impaneled at the February term, 1924, has reported to that court that certain evidence has been submitted to them involving the payment of money to two Members of Congress;

Whereas the honor and dignity of the Congress require that the facts be immediately ascertained, to the end that such action as is essential for the Congress itself to take may be promptly taken: Therefore be it

Resolved, That a select committee of five Members of the House shall be appointed by the Speaker thereof whose duty it shall be to proceed forthwith to make an investigation of such allegation and ascertain—

(a) Whether said "two Members of Congress" so charged are Members of the House of Representatives; and

(b) If so, to make such further investigation as may be essential to establish the truth or falsity of said allegation.

Said committee shall have power to send for persons and papers and administer oaths and shall be permitted to sit during the sessions of the House and any recess thereof and at such place or places as may be necessary to discharge the duties herein imposed.

Resolved further, That the Speaker is hereby authorized to issue subpœnas to witnesses upon the request of the committee or any subcommittee thereof at any time, including any recess of the Congress; and the Sergeant at Arms is hereby empowered and directed to serve all subpœnas and other processes put into his hands by said committee or any subcommittee thereof.

Resolved further, That said committee shall report to the House as promptly as possible the results of its inquiries together with such recommendations as it may deem advisable.

A point of order by Mr. Louis C. Cramton, of Michigan, that the resolution related to subject matter already disposed of by the House was overruled by the Speaker.

The Speaker also held the resolution of highest privilege and subject to consideration notwithstanding a proposal by Mr. Cramton to call up the conference report on the Interior Department appropriation bill.

On the following day this resolution was agreed to, and the Speaker appointed as members of the committee so authorized, Mr. Burton, Mr. Purnell, Mr. Michener, Mr. Wingo, and Mr. Moore of Virginia.

On May 15 Mr. Burton, from this committee, submitted a report,[2] stating that the committee had—

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[1] Record, p. 3995.

[2] House Report No. 759.

formally ascertained that the Members referred to were Representatives Frederick N. Zihlman, of Maryland, and John W. Langley, of Kentucky.

As to Mr. Langley, the committee say:

It was agreed by the committee that, in view of the indictment and probable immediate trial in the District of Columbia of Representative Langley, the committee would first consider the Zihlman case. Since then Representative Langley has been indicted, tried, convicted, and sentenced in the Federal court for the eastern district of Kentucky. It is understood that he has initiated appellate proceedings, and therefore it would seem proper that further action by the committee in respect to him be deferred for the present, it being assumed that, until the final disposition of the case, he will take no part whatever in any of the business of the House or its committees.

As to Mr. Zihlman, the committee say:

The evidence is conflicting and sharply contradictory, and the question of the credibility of individual witnesses has frequently arisen. Taken as a whole, in the opinion of the committee, the evidence does not establish the truth of the charge against Representative Zihlman, and, accordingly, the committee recommends that, so far as he is concerned, no further action is required or should be taken by the House.

The report, which was referred to the House Calendar, was not acted on by the House.[1]

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[1] Mr. Zihlman was subsequently acquitted. Both Mr. Langley and Mr. Zihlman were reelected, and Mr. Zihlman took his seat in the Sixty-ninth Congress.

SUSPENSION: JOHN DOWDY, TEXAS; 92ND CONGRESS; 1972; DEMOCRAT; DEMOCRATS, 254, REPUBLICANS, 180

Mr. Dowdy was elected to fill a vacancy in the 82nd Congress in 1952, and re-elected biennially through the 92nd Congress.

On March 31, 1970, Mr. Dowdy was indicted by a federal grand jury in Baltimore, Maryland, for bribery, conspiracy, and perjury involving a state of affairs that commenced in early fall, 1965. Mr. Dowdy was, at that time, Chairman of the Subcommittee on Investigations of the House Committee on the District of Columbia. The Subcommittee was engaged in an investigation of urban renewal in the District of Columbia. The indictment charged Mr. Dowdy with intervening, as Subcommittee Chairman, in an investigation by the Department of Justice and the U.S. Attorney into possible violations of criminal statutes by a Washington area home improvement firm. His actions included subpoenaing documents relating to the firm from FHA and HHFA and providing for the furnishing of copies of some of the subpoenaed files to the firm. However, investigation of the activities of the firm continued and prosecution was initiated in 1969, when its President turned state's evidence and testified to the relationship with Mr. Dowdy. No prosecution of the firm at that time occurred. Mr. Dowdy was charged with accepting a bribe of $25,000 for services rendered in the matter for the firm.

One count of the indictment charged conspiracy (18 U.S.C., §371) to violate the federal conflict of interest statute (18 U.S.C., § 203). Another count charged conspiracy to violate the obstruction of justice statute (18 U.S.C., §1505). A third charged interstate travel (18 U.S.C., §1950) to facilitate federal bribery (18 U.S.C., §201), (the $25,000 was allegedly transferred at the Atlanta, Georgia, airport). Counts four through eight charged five acts of perjury before a federal grant jury in Maryland.

A motion to dismiss the indictment and each of its counts was made before the United States District Court, in Maryland. The Court rendered an opinion on July 16, 1970, denying the motion to dismiss (U.S. v. Dowdy and Clark, Criminal No. 70-0123, D.C. Maryland, 1970).

The Court referred to U.S. v. Johnson, 383 U.S. 169 (1966) wherein the defendant Congressman was deemed to be protected by Article I, section 6 (Speech or Debate) from prosecution for accepting a bribe to give a particular speech in the House, but not from prosecution for attempt, for pay, to stop the prosecution of a party by the Justice Department, the reason for the prohibition against prosecution in the one situation was that the former involved participation in a legislative function while the latter did not.

The Court, in Dowdy, referred to the Johnson decision, where the Court said: "No argument is made, nor do we think it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process. 383 U.S. at 172."

The Court, in Dowdy, continued:

"It appears, therefore, that the privilege protects only 'legislative acts' or acts which relate 'to the due functioning of the legislative process,' United States v. Johnson, 383 U.S. at 172, and it is still an open question whether such 'legislative acts' and the motives therefore may be inquired into in a prosecution which is 'founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.' Ibid, 383 U.S. at 185.

"We must consider whether Counts 1, 2 and 3, (A) relate to the 'due functioning of the legislative process', and (B) whether they are 'founded upon narrowly drawn statutes passed by Congress in the exercise of its legislative power to regulate the conduct of its members.'

"(A) With the exception of certain overt acts which charge (1) that Dowdy used his official position to obtain records, which were later turned over to Cohen, and (2) that he discussed with the co-conspirators a plan to have Cohen testify before a committee in order to obtain immunity (which was never done), the

acts charged to Dowdy cannot reasonably be considered 'legislative acts' within the meaning of the Johnson opinion. The object of the conspiracies charged in the first two counts was to prevent the prosecution of Cohen and Monarch by the Department of Justice. Count 3 simply charges interstate travel and use of the facilities of interstate commerce with the intent to facilitate bribery. Aside from the two items mentioned above, Dowdy's conduct which is the subject of the charges in Counts 1, 2 and 3 did not relate to the 'due functioning of the legislative process', within the meaning of that phrase, as used in United States v. Johnson, 383 U.S. at 172, 185."

"The essential elements of the charges in those counts do not relate to legislative acts, and therefore the prosecution of those counts is not barred for that reason..."

* * *

"(B) An inquiry into the area of 'legislative acts' is not necessarily barred, if the prosecution is 'founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.' United States v. Johnson, 383 U.S. at 169. Counts 1 and 3 charge offenses which are based on 'narrowly drawn statutes passed by Congress in the exercise of its legislative power to regulate the conduct of its members" and do not offend the Speech or Debate Clause.'

"Congress has the undoubted constitutional power to regulate the conduct of its members, including the power to inquire into the unlawful motivations of speech, debate or other legislative activities. Article I, sections 5 and 6, Powell v. McCormack, 395 U.S. 486, 548 (1959). Congress has seen fit to delegate its responsibility for policing such conduct to the Executive and Judicial Branches by the enactment of narrowly drawn statutes."

"For more than a century Congress has delegated to the courts the responsibility for trying legislators accused of accepting bribes. In the 1962 revision of the conflict of interest statutes, Congress responded to increased national concern over the ethical standards of political officials by reaffirming and broadening this delegation of authority to the courts. The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 341 (1965).

"Where Congress clearly intended to delegate such responsibilities, the Speech or Debate Clause should not be permitted to frustrate its intent. Congress itself still retains the ultimate control over the exercise of this authority; and so, the policy of the Clause is served. If the purpose of the Clause is the preservation of the independence of the legislative branch, a specific, revocable delegation of its power to regulate the conduct of its members, pursuant to which the legislative acts of its members may be drawn into question, does not impinge upon this independence.

"Sections 203 (conflict of interest) and 201 (bribery) are the sort of narrowly drawn statutes evidently contemplated by Johnson as an exercise of Congress' power to police its members. Each represents the present expression of an uninterrupted course of legislative intent to permit the executive to bring, and federal courts to hear, prosecutions of Members of Congress. The legislative history of 18 U.S.C. 201 and its predecessors, discussed by the government in its brief, supports the conclusion that Congress has consistently intended the bribery statutes to cover the actions, votes and decisions of its Members. Although the Supreme Court has never interpreted the Clause to apply only to speech and debate on the floor of Congress, but rather to include all legislative activities of Members of Congress, Congress has seen fit to enact and reenact bribery statutes applicable to these same legislative activities without ever questioning its power to do so. In view of this legislative and judicial history, an interpretation of the Speech or Debate Clause which would render bribery prosecutions of Members of Congress under section 201 constitutionally void where the legislative acts and motivations of the Members are drawn in question, would frustrate the wishes of Congress and impair its ability to regulate the conduct of its Members."

A petition for appeal, on the grounds of immunity, to the United States Court of Appeals for the Fourth Circuit, was dismissed,

September 1, 1970, as was a petition for a writ of certiorari to the United States Supreme Court (March 23, 1971).

The trial on the charges of the indictment commenced on November 8, 1971, in the Federal District Court in Baltimore, and the jury returned a verdict of guilty on all counts on December 31, 1971. On January 23, 1972, the Court sentenced Mr. Dowdy to 18 months in prison and a fine of $25,000. The verdict was appealed.

On May 3, 1972 (Daily Congressional Record, May 3, 1972, p. H. 4098), the House Committee on Standards of Official Conduct reported out H. Res. 933 (House Report 92-1039), which read as follows:

RESOLUTION

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.

The majority views of House Report 92-1039 were as follows:

The Committee on Standards of Official Conduct, to whom was referred the resolution (H. Res. 933) expressing the sense of the House of Representatives with respect to actions which should be taken by Members of the House upon being convicted of certain crimes, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the resolution do pass.

PURPOSE OF THE RESOLUTION

The purpose of the proposed resolution is to express the sense of the House with respect to actions which it feels Members, who are convicted of certain serious crimes, should take during the period of any appeals process when there is no presumption of innocence.

The committee recommends that during such a period such a Member should refrain from committee activities and from voting on the floor of the House.

The proposed resolution has two positive objectives: (1) to state a specific policy so that all concerned may be on notice, and (2) to assert publicly a concern for the reputations of the individual Members and of the House itself.

BACKGROUND

The Committee on Standards of Official Conduct was established by House Resolution 418, 90th Congress, first session, on April 13, 1967,

and therein was instructed to report to the House its recommendations for changes in laws, rules, and regulations that would effectively establish and maintain standards of official conduct for Members, officers, and employees of the House of Representatives. In response to this assignment, a year later, the committee reported its recommendations, which were adopted by the House by a vote of 406 to 1.

During that organizational year, the committee spent countless hours discussing what the committee's powers should be and also what limitations should be placed on the committee's powers.

Clearly, the assignment to establish a potential disciplinary instrument that might preempt, or share, or be paramount to the already existing disciplines of statutory law and the ballot box was indeed sensitive. The question was not only what actions were appropriate for the committee to recommend but also when those actions should be taken.

To the question of what actions the committee might take, the House gave the committee broad powers of investigation but limited its disciplinary powers to recommendations to the full membership.

To the question of when to act, the committee adopted a policy which essentially is: where an allegation is that one has abused his direct representational or legislative position—or his "official conduct"—the committee concerns itself forthwith, because there is no other immediate avenue of remedy. But where an allegation involves a possible violation of statutory law, and the committee is assured that the charges are known to and are being expeditiously acted upon by the appropriate authorities, the policy has been to defer action until the judicial proceedings have run their course. This is not to say the committee abandons concern in statutory matters—rather, it feels it normally should not undertake duplicative investigations pending judicial resolution of such cases.

The implementation of this policy has shown, through experience, only one need for revision. For the House to withhold any action whatever until ultimate disposition of a judicial proceeding, could mean, in effect, the barring of any legislative branch action, since the appeals processes often do, or can be made to, extend over a period greater than the 2-year term of the Member.

Since Members of Congress are not subject to recall and in the absence of any other means of dealing with such cases short of reprimand, or censure, or expulsion (which would be totally inappropriate until final judicial resolution of the case), public opinion could well interpret inaction as indifference on the part of the House.

The committee recognizes a very distinguishable link in the chain of due process—that is the point at which the defendant no longer has claim to the presumption of innocence. This point is reached in a criminal prosecution upon conviction by judge or jury. It is to this condition and only to this condition that the proposed resolution reaches.

The committee reasons that the preservation of public confidence in the legislative process demands that notice be taken of situations of this type.

COMMENT ON TERMS USED IN THE RESOLUTION

Sense of the House

A "sense-of-the-House" resolution amounts to a policy declaration by the House for the Congress in which it is passed. Like any other internal House action it is subject to repeal or change at any time. It is not incorporated into the permanent Rules of the House nor does it have any specific weight of law. However, to act contrary to it would violate an expressed position of the body and would not affect any other authority of the House with respect to the behavior and conduct of its Members.

Convicted

This condition obtains upon certification by the court of a finding of guilty by a judge or jury. Though sentencing may occur somewhat later it is at the point of conviction that the defendant loses his presumption of innocence.

Court of record

The committee feels that the purposes of the resolution would not be served if the convictions that would bring the resolution into effect were limited to any particular jurisdiction. Thus any court of record which is empowered to hear cases on charges carrying penalties of 2 or more years' imprisonment, would be of sufficient stature and jurisdiction for the House to recognize as appropriate.

Sentence of 2 or more years

Though the committee appreciates that the particular length of imprisonment is somewhat arbitrary, a possible sentence of two years or more is equal to or longer than that which constitutes a felony in most jurisdictions. However, whether the crime is a felony or not, the committee reasons that if the offense is regarded by the legislative body that enacted the law as serious enough to warrant as much as two years' imprisonment, it is likewise serious enough to warrant recognition by the House for the purposes of this resolution.

Refrain from participation in committee business

The committee in making this recommendation regards this term as encompassing active participation such as functioning as chairman of a committee or of a subcommittee, or voting in the full committee or a subcommittee. The committee does not feel this recommendation covers attendance at sessions or communication with constituents regarding matters before committees. The companion recommendation regarding voting on the floor of the House is self-explanatory.

Proceedings resulting in reinstatement of presumption of innocence

Any effect of this resolution would be reversed upon such reinstatement. As stated earlier the resolution is purposely drawn for automatic restoration of full privileges to a Member who has responded to it, upon any of numerous actions which result in the reinstatement. Without such a provision and assuming the case was subsequently remanded or reversed, the House could find itself in the extremely untenable position of having punished a Member, at least to some degree.

for an act which legally did not occur. With this provision the resolution would fully remove any implication of restraint on the Member concerned.

Reelected to the House after the date of such conviction

The same restoration that would follow the reinstatement of the presumption of innocence is provided for under the above captioned contingency. Precedents, without known exception, hold that the House will not act in any way against a Member for any actions of which his electorate had full knowledge at the time of his election. The committee feels that these precedents are proper and should in no way be altered.

Not affect any other authority of the House

As stated in the comment on "sense-of-the-House," this resolution has no specific enforcement capability. However, any Member subject to its provisions at the time of the resolution's adoption, or thereafter, who violates the clear principles it expresses, will do so at the risk of subjecting himself to the introduction of a privileged resolution relating to his conduct, in accordance with other provisions of House rules.

CONCLUSION

This committee is mindful that the recommendations it makes herein are largely unique among the traditional customs and practices of the House. It fully appreciates that any suggestion of restraint against the maximum freedom of Members to represent their constituencies would contain some element of hazard to the basic legislative process, but against this risk it felt that a policy of total inaction, which could be interpreted as indifference, more than balances the scale in favor of the proposed resolution. The committee recommends its adoption by the House.

COMMITTEE ACTION

Pursuant to rule XI, clause 27(b), the committee announces that House Resolution 933 was ordered to be reported by a vote of 10 to 2.

No action was taken on the resolution after it had been reported out.

However, Mr. Dowdy filed a letter with House Speaker Albert on June 21, 1972, promising to refrain from voting on the floor or in committee and from participating in committee business (see, Congressional Quarterly Weekly Report, July 8, 1972, p. 1167).

He did not run for re-election in 1972.

On March 12, 1973, the United States Court of Appeals for the Fourth Circuit (United States of America v. John Dowdy, No. 72-1614, March 12, 1973), rendered a decision reversing the two conspiracy counts, the interstate travel count, and the first two of the five perjury counts on the ground that they were obtained by the use of evidence which infringed the Speech or Debate Clause. Counts six through eight (perjury) were sustained. It also concluded that violations of counts one-five might have been proved without improper inquiry into legislative acts, affording the Government the right to try them anew if it so determined.

On reaching its conclusion on the immunity clause the Court referred to United States v. Gravel, 408 U.S. 606 (1972), which held that inquiry concerning the business of a subcommittee, irrespective of the motives and purposes of a member thereof, is forbidden by the Speech or Debate clause. Mr. Dowdy's conversations and arrangements with the United States Attorney, the FHA and HHFA concerning the home improvement firm were deemed protected by the Clause since he was chairman of a subcommittee investigating a complaint (that of the firm that it was being "coerced" by the Department of Justice and federal housing agencies), and had been gathering information in preparation for a possible subcommittee investigatory hearing.

The Court further described what it deemed to be a "narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members". Unlike the District Court (see supra) it did not hold the conflict of interest statute or the bribery statute to be narrowly drawn statutes within the exception to the Speech or Debate Clause aa set forth in U.S. v. Johnson (see supra). It held that if either House of Congress feels itself ill-equipped to conduct a trial of one of its own Members in a situation that could fall within the Speech or Debate Clause, and it decides to permit judicial inquiry into legislative acts motivations, it must do so in clear and unmistakable language. "In short," it said, "there must be a specific and express delegation of authority to inquire into legislative acts or motivations," and, "both the conflict of interest statute and the bribery statute, although they are applicable to Congressmen and others, are lacking in an express delegation of this nature."

The statutes at issue, the Court stated, were general statutes under which prosecution could not proceed if such drew into question a Congressman's legislative acts or motivations (see U.S. v. Johnson, supra; U.S. v. Gravel, supra and U.S. v. Brewster, 408 U.S. 501 (1972)), and this was the situation in respect to Mr. Dowdy.

The Court also considered the scope of the protection offered by the Speech or Debate Clause. It held that, "The clause does not simply protect against inquiry into acts which are mani-

festly legislative. In our view, it also forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact. Once it was determined, as here, that the legislative function (here, full investigation of the complaint of the home improvement firm to determine if formal subcommittee hearings should be held) was apparently being performed, the propriety and the motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry."

Since the evidence advanced at the trial as respects the first five counts related to activity involving the legislative function, and since the statutes under which the prosecution proceeded were not narrowly drawn laws under which Congress had delegated its power to furnish its own Members to the Executive and Judicial Branches, the Speech or Debate Clause, the Court concluded, required the reversal of the counts.

VII. Indictment; Suspension from Participation

SUSPENSION: FREDERICK N. ZIHLMAN, MARYLAND; 71ST CONGRESS, 2ND SESSION; 1909; VIII CANNON'S, § 2205; REPUBLICAN, REPUBLICANS, 267, DEMOCRATS, 167, OTHER, 1

2205. Prior to adjudication by the courts, the House took no note of criminal proceedings brought against a Member, and retained him in his position as chairman of a committee.

A member under criminal indictment retained his position as chairman of a committee but refrained from active participation in legislative proceedings pending judicial determination.

On December 12, 1929,[5] Mr. Frederick N. Zihlman, of Maryland, who had been indicted December 10 by the grand jury of the Supreme Court of the District of Columbia, was reelected as chairman of the Committee on the District of Columbia.

However, in compliance with an unwritten rule of the House, Mr. Zihlman refrained from active participation in the proceedings of the House, and the committee was represented[6] on the floor by the ranking member, Mr. Clarence J. McLeod, of Michigan.

[5] Second session Seventy-first Congress, Record, p. 542.
[6] Record, pp. 2370, 9599, 10077, 11544, 4993, 8707, 9520, 10442.

Instances In Which The House Censured Members

During its existence, the House has censured 17 Members and one Delegate. All but one of the instances of censure occurred during the 19th century, 13 Members being censured between 1864 and 1875.

Seven cases of censure involved use of unparliamentary language; two involved conspiracy to assault and assault upon another Member; two involved utterance of treasonable language; two involved insults to the House by the introduction of offensive resolutions; and, five involved corrupt acts.

The last censure case on record arose in 1921, and involved Representative Thomas L. Blanton, of Texas.

The following cases are taken from Hinds' and Cannon's Precedents of the House of Representatives:

1. Use of unparliamentary language—

(a) Jan. 15, 1868, 40th Cong., 2nd Sess., House Journal, pp. 193-195.

Rep. Fernando Wood, of N.Y.

During the consideration of a bill supplementary to the act to provide for the more efficient government of the rebel states, Mr. Wood was called to order for using the words; "A monstrosity, a measure the most infamous of the many infamous acts of this infamous Congress".

Mr. Wood, having declined to explain, the question was put: Shall the Member be permitted to proceed?, and decided in the negative, yeas 40, nays 108.

Then Mr. Henry L. Dawes of Mass. submitted a resolution directing the Speaker to pronounce the censure of the House, which resolution was agreed upon under the operation of the previous question, yeas 114, nays 39.

Whereupon, Mr. Wood appeared at the bar of the House and received the reprimand of the Speaker (Hinds', Vol. II, par. 1247).

(b) May 17, 1890, 51st Cong., 1st Sess., House Journal pp. 623-625.

Rep. William D. Bynum of Indiana.

During consideration of a tariff bill in Committee of the Whole, Rep. Bynum acknowledged that he had on a previous day called another Member "a liar and a perjurer". He then added, "I want to say that I accept and am willing to believe that I have as great confidence in the character of Mr. Campbell as I have in the character of the gentleman who makes this attack upon me".

The Committee rose and the language was reported to the House.

After several procedural matters were considered involving certain points of order and an appeal therefrom, which appeal was laid on the table by a vote of yeas 126, nays 101, Mr. Cutcheon of Michigan submitted a resolution that Mr. Bynum had been guilty of violation of

the rules of the House and merited censure and that censure be administered by the Speaker.

After several further points of order and appeals therefrom (which were laid on the table), the "resolutions (were) agreed to by the House". Mr. Bynum then appeared at the bar of the House and received the reprimand of the Speaker (Hinds' Vol. II, par. 1259).

(c) Jan. 26, 1867, 39th Cong., 2nd Sess., House Journal, pp. 271-273.

Rep. John W. Hunter of N.Y.

During debate on a bill to restore to the States late in insurrection their full political rights, Mr. Hunter was called to order by Rep. Hill of Indiana for use of the following words: "I say that, so far as I am concerned, it is a base lie", referring to a statement by Rep. Ashley of Ohio.

The Speaker having decided the words out of order, Mr. Hill submitted a resolution of censure which was agreed to, yeas 77, nays 33. Mr. Hunter appeared at the bar of the House and the Speaker administered the censure, (Hinds', Vol. II, par. 1249).

(d) Feb. 14, 1869, 40th Cong., 3rd Sess., House Journal, pp. 225-76.

Rep. E. D. Holbrook Delegate from Idaho.

During consideration of a bill making appropriations for the Indian department, Mr. Holbrook was called to order for declaring

that the Representative in charge of the bill had raised points of order and made assertions which he knew at the time to be "unqualifiedly false".

The Speaker ruled the words out of order and Mr. Holbrook, having declined to retract, Mr. James Garfield of Ohio submitted a resolution of censure.

The resolution was agreed to under operation of the previous question and Mr. Holbrook appeared at the bar of the House and was censured by the Speaker, (Hinds', Vol. II, par. 1305).

(e) Feb. 4, 1875, 42nd Cong., 2nd Sess., House Journal pp. 392-394.

Rep. John Young Brown of Kentucky.

During debate on a motion to recommit a bill to protect all persons in their civil and political rights, Rep. Brown referred to Rep. Benjamin Butler of Massachusetts as one "outlawed in his own home from respectable society; whose name is synonymous with falsehood; and who is the champion, and has been on all occasions, of fraud; who is the apologist of thieves; who is such a prodigy of vice and meanness that to describe him would sicken imagination and exhaust invective."

Rep. Hale of N.Y. submitted a resolution of censure. Rep. Dawes of Mass. moved to amend it by substituting a resolution of expulsion but, after debate, withdrew it.

The resolution of censure was agreed to, yeas 161, nays 79, and Mr. Brown appeared at the bar of the House and was censured by the Speaker (Hinds', Vol. II, par. 1251).

(f) Oct. 24, 1921, 67th Cong., 1st Sess., House Journal p. 498.

Rep. Thomas L. Blanton of Texas.

On Oct. 24, 1921, the House agreed to a notion by Mr. Frank Mondell of Wyoming to expunge from the Record an extension of remarks by Mr. Blanton, inserted on the previous legislative day containing "grossly indecent and obscene language". The motion was agreed to, yeas 314, nays 1.

Rep. Mondell then introduced a motion for expulsion and Mr. Garrett of Tennessee submitted a substitute motion of censure.

After debate on procedure the House voted on the expulsion resolution, which, not receiving two-thirds concurrence, was not adopted. The House then adopted the censure resolution, yeas 293, nays 0, and Mr. Blanton appeared at the bar of the House and was censured by the Speaker (Hinds', Vol. VI, sec. 236).

(g) July 11, 1832, 22nd Congress, 1st Sess., House Journal pp. 1113, 1118, 1134-35.

Rep. William Stanberry, of Ohio.

On July 9, 1832, during debate on a question of order, Mr. Stanberry made a statement criticising a ruling of the chair and

adding, "I have heard the remark frequently made, that the eyes of the Speaker are too frequently turned from the chair you occupy toward the White House."

He was called to order and Rep. Foster of Georgia moved to suspend the rules in order to submit a resolution stating that Mr. Stanberry's remark was an indignity to the Speaker and the House and merited the decided censure of the House.

The House, on a vote, refused to suspend the rules, and on July 10, Mr. Bates of Maine presented the resolution again with a slight modification. After some debate on questions of procedure the House took up the orders of the day.

But on the following day debate on the censure resolution was resumed and after hearing Mr. Stanberry speak in his defense, the resolution was agreed to, yeas 93, nays 44 (Hinds', Vol. II, par. 1248).

2. For assult

(a) July 24, 1866, 39th Cong., 1st Sess., House Journal pp. 842, 843, 1018, 1028, 1031, 1033, 1037, 1074-76, 1111.

Rep. Lovell H. Rousseau, of Kentucky.

On June 15, 1866, Rep. Spalding of Ohio submitted a resolution which was agreed to by the House creating a select committee to investigate and report on an alleged assault by Rep. Rousseau of Kentucky upon Rep. Josiah Grinnell of Iowa for words about "cowardice" spoken by the latter during debate in the House.

The Committee recommended that Mr. Rousseau be expelled and that Mr. Grinnall, for his language, merit the contempt of the House.

After considerable debate, the resolution for expulsion was defeated, two-thirds not concurring therein (July 17).

Thereafter an amended resolution was offered as a substitute providing for the censure of Rep. Rousseau although it was announced that he had submitted his resignation to the Governor of his State. This resolution was agreed to, yeas 89, nays 30 (Hinds', Vol. II, par. 1656).

(b) July 15, 1856, 34th Congress., 1st Sess., House Journal, generally pp. 1023-1216.

Rep. Lawrence Keitt of South Carolina.

This case of censure arose as an aspect of House action to expel Rep. Brooks of South Carolina for physically assaulting Sen. Sumner of Mass. with a cane for words spoken by the Senator in the Senate. The Senate having complained to the House, a select committee was appointed to report and recommend to the House.

Rep. Edmundson of Virginia and Rep. Keitt of South Carolina, were implicated in that it was charged that they had been informed of Rep. Brooks' intent sometime prior to the assault and had done nothing to discourage or prevent it.

On July 14, the House voted on the resolution to expel Rep. Brooks, but it was defeated, two-thirds not concurring. Then, on July 15, the House voted to censure Mr. Keitt, yeas 106, nays 96, but voted to disapprove the censure of Mr. Edmundson, yeas 69, nays 136.

Both Mr. Brooks and Mr. Keitt resigned from the House immediately (Hinds', Vol. II, par. 1621).

3. For treasonable words

(a) April 9, 1864, 38th Cong., 1st Sess., House Journal pp. 506-509.

Rep. Benjamin G. Harris of Maryland.

Rep. Washburne of Illinois submitted a resolution to expel Rep. Harris for stating that the South had asked to be left in peace and not subjugated, "and may God Almighty grant that it may never be (subjugated)".

A vote being taken on the resolution and two-thirds not concurring, Rep. Schanck of Ohio submitted a motion of censure.

This was agreed to by the House, yeas 98, nays 20 (Hinds', Vol II, par. 1254).

(b) April 9, 1864, 38th Cong., 1st Sess., House Journal pp. 505, 520, 522, 523.

Rep. Alexander Long of Ohio.

Speaker Colfax of Indiana temporarily left the Chair to introduce a resolution to expel Rep. Long for having declared himself in favor of recognizing the Confederacy.

After some debate, on April 14, a substitute amendment was offered declaring Mr. Long "to be an unworthy Member of the House of Representatives". The preamble to this resolution was then approved by a vote of yeas 78, nays 53, and the resolution by a vote of 80 yeas and 70 nays (Hinds', Vol. II, par. 1253).

4. For insults to the House

(a) May 14, 1866, 39th Cong., 1st Sess., House Journal p. 695.

Rep. John W. Chanler of N.Y.

Rep. Chanler introduced a resolution expressing House support for Pres. Johnson's vetoes "in (protecting) the rights of the people of this Union against the wicked and revolutionary acts of a few malignant and mischievous men".

Mr. Schenck of Ohio submitted, as a question of privilege, a resolution of censure on the theory that the Chanler resolution was a "gross insult to the House".

The resolution of censure was agreed to, yeas 72, nays 30 (Hinds', Vol. II, par. 1246).

(b) Mar. 21, 1842, 27th Cong., 2nd Sess., House Journal, pp. 573, 576.

Rep. Joshua R. Giddings of Ohio.

Rep. Giddings had presented to the House a series of incendiary resolutions touching upon a portion of the Union then a subject of negotiation between the U.S. and Great Britain, which resolutions reportedly approved "mutiny and murder".

Rep. John B. Weller of Ohio submitted a resolution holding the conduct of Mr. Giddings "unwarranted" and "unwarrantable", and "deserving the severe condemnation of the people of this country, and of this body in particular".

After some debate on Mr. Giddgins' right to speak in his defense, the preamble of the resolution was agreed to by yeas 119, nays 66, and the resolution by yeas 125, nays 69.

On Mar. 23, Mr. Giddings resigned his seat in the House but was re-elected to succeed himself and took his seat on May 5 (Hinds', Vol. II, par. 1256).

5. For corrupt acts

(a) Feb. 27, 1873, 42nd Cong., 3rd Sess., House Journal, generally pp. 429-499.

Rep. Oakes Ames of Mass., and Rep. James Brooks of N.Y.

Speaker Blaine, on Dec. 2, 1872 submitted a resolution for the creation of a select committee to investigate and report on

the Credit Mobilier and Union Pacific R.R. Co. scandal.

The Committee reported on Feb. 18, 1873 (House Rept. 72, 42nd Cong., 3rd Sess.) finding that Reps. Ames and Brooks had attempted to bribe Members of Congress by offering them shares of Credit Mobilier stock considerably below value, and recommending their expulsion. The transactions reportedly occurred before both men were elected to the 42nd Congress. On Feb. 26, Rep. Sargent of California offered a substitute resolution pointing out that the alleged transgressions had taken place more than five years previously and were not connected with the election of the Members to the 42nd Congress; and, that the House "absolutely condemn" both Members.

The substitute was adopted, yeas 115, nays 110, and the resolution condemning Ames was adopted, yeas 182, nays 36, as was the resolution condemning Brooks, yeas 174, nays 32 (Hinds', Vol. II par. 1286).

(b) March 16, 1870, 41st Congress, 2nd Sess., House Journal, pp. 481, 485, 487-88.

Rep. Roderick R. Butler of Tenn.

On March 16, 1870, a majority of the House Military Affairs Committee submitted a report recommending that the House condemn Rep. Butler for nominating a young man to West Point who was not an

actual resident of his district and for subsequently taking money from the boy's father for political purposes.

A minority of the Committee recommended a resolution of expulsion and the House, by 101 yeas to 68 nays agreed to substitute this for the resolution of condemnation. The expulsion resolution was defeated, two-thirds not concurring therein, and the original resolution of condemnation was amended to a resolution of censure. The resolution, as amended, was adopted, yeas 158, nays 0 (Hinds', Vol. II, par. 1274.).

(c) Feb. 24, 1870, 41st Cong., 2nd Sess., House Journal pp. 373.

Rep. B. F. Whittemore, of South Carolina.

On Feb. 21, 1870, the Committee on Military Affairs, having been instructed to investigate the alleged sale of appointments to the Military and Naval Academies by Members of Congress submitted a report recommending the expulsion of Mr. Whittemore.

After some procedural debate about the right of Mr. Whittemore to speak in his defense, and during the presentation of his remarks, the Speaker was informed that Mr. Whittemore had submitted his resignation from the House to the Governor of South Carolina. The Speaker then cut Mr. Whittemore off, ruling that he could only proceed by unanimous consent.

The House then decided, that Mr. Whittemore having resigned, the expulsion resolution should be laid on the table.

The Military Affairs Committee then submitted a resolution declaring that Mr. Whittemore was unworthy to hold a seat in the House and condemning him as having engaged in conduct unworthy of a Representative. This was adopted, yeas 187, nays 0 (Hinds', Vol. II par. 1273).

(d) March 1, 1870, 41st Congress, 2nd Sess., House Journal, pp. 390, 396.

Rep. John T. Deweese, North Carolina.

On Feb. 28, 1870, the House was informed that Mr. Deweese had resigned from Congress. On Mar. 1, 1870, the House Military Affairs Committee submitted a resolution of condemnation against Mr. Deweese for selling an appointment to the Naval Academy pointing out that a resolution of expulsion would have been reported had Mr. Deweese not resigned. The resolution of censure was agreed to, yeas 170, nays 0, (Hinds', Vol. II, par. 1239).

Instances In Which The House Expelled Members

Treason

(a) July 13, 1861, 37th Congress, 1st Session, House Journal, pp. 75-76.

Member-elect John B. Clark, of Missouri.

On July 13, 1861, Representative Francis P. Blair, Jr., of Missouri, as a question of privilege, submitted a preamble and resolution to the effect that John B. Clark was elected to the Thirty-seventh Congress in August, 1860, that since that time he had taken up arms against the Government and held a commission in the so-called State guard of Missouri, under the Confederate Governor of that State, and that he had taken part in the battle at Booneville, Missouri, in June, 1861, and, that he had forfeited all right to sit as a Representative and that he be expelled.

Congress was in a special session, convening on July 4, 1861.

Hinds' reports that the debate was brief, being limited by the previous question. Representative Blair, upon his responsibility as a Member, affirmed that the allegation of the preamble was true. There was some objection that the case should be considered by a committee; but no Member raised the point, which is apparent from the Journal, that Mr. Clark was a Member-elect merely, not having appeared and taken the oath.

The resolution of expulsion was agreed to by a two-thirds vote, yeas 94, nays 45 (Hinds', Precedents of the House of Representatives, Vol. II, §1262; Congressional Globe, 37th Congress, 1st Session, pp. 116-117).

(b) December 2, 1861, 37th Congress, 2nd Session, House Journal, p. 8.

John W. Reid, of Missouri.

On December 2, 1861, Representative Francis P. Blair, Jr., of Missouri, offered a resolution to expel John W. Reid, of Missouri, for having taken up arms against the Government, which was agreed to by a two-thirds vote (Hinds', supra, Vol. II, §1261).

Mr. Reid had not occupied his seat after August 3, 1861.

(c) December 3, 1861, 37th Congress, 2nd Session, House Journal, pp. 26-27.

Henry C. Burnett, of Kentucky.

On December 3, 1861, Representative W. McKee Dunn, of Indiana offered a preamble and resolution that Rep. Burnett of Kentucky was in open rebellion against the Government, that he be expelled, and that the Sergeant-at-Arms be directed not to pay to Rep. Burnett his salary accrued since the close of the first (special) session (August 6, 1861). The resolution was agreed to by a two-thirds vote (Hinds', supra, Vol. II, §1261).

During the debate on the resolution it was revealed that Mr. Burnett was president of a revolutionary convention claiming to be the

provisional government of the State, some of the members of which were in armed rebellion, and that the convention was planning to carry the State into the Confederate cause (Congressional Globe, 37th Cong., 2nd Sess., pp. 7-8).