
# Qualifications of Members of Congress

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July 10, 2014

**Congressional Research Service**
7-5700
www.crs.gov
R41946

**CRS Report for Congress**
*Prepared for Members and Committees of Congress*

# Summary

There are three, and only three, standing qualifications for United States Senator or Representative in Congress which are expressly set out in the United States Constitution: age (25 for the House, 30 for the Senate); citizenship (at least seven years for the House, nine years for the Senate); and inhabitancy in the state at the time elected. U.S. Constitution, Article I, Section 2, cl. 2 (House); and Article I, Section 3, cl. 3 (Senate). The Supreme Court of the United States has affirmed the historical understanding that the Constitution provides the *exclusive* qualifications to be a Member of Congress, and that neither a state nor the Congress itself may add to or change such qualifications to federal office, absent a constitutional amendment. *Powell v. McCormack,* 395 U.S. 486, 522 (1969); *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 800-801 (1995); *Cook v. Gralike,* 531 U.S. 510 (2001).

The Constitution expressly delegates to each house of Congress the authority to be the final judge of the qualifications of its own Members (Article I, Section 5, cl. 1). In judging the qualifications of their Members, and deciding by majority vote, the House and Senate are limited to judging only the qualifications set out in the Constitution. *Powell v. McCormack*, *supra.*

Although the states have no authority to add to the constitutional qualifications for congressional office, the states have the responsibility under the "Times, Places, and Manner" clause of the U.S. Constitution (Article I, Section 4, cl. 1) for *administering* elections for federal office, including regulating such subjects as ballot design, candidate placement on the ballot, ballot security measures, nomination procedures to appear as a party's nominee on the ballot, and ballot access requirements for independent and new or minor political party candidates. Legitimate "ballot access" rules and regulations, even though they may pose certain administrative requirements on federal candidates, have been upheld when they have been found to be within a state's constitutional authority to regulate the election process, to ensure orderly elections, and to prevent fraud and voter confusion. The states have been allowed to implement rules which, for example, prevent over-crowding and confusion on the ballot by requiring a minimum show of public support to appear on the ballot, by prohibiting such things as dual candidacies on the ballot, and by implementing "sore loser" laws that bar a candidate on the general election ballot from appearing as an independent if that candidate had lost a party primary. Such administrative requirements have not been deemed to be additional "qualifications" to run for office. However, requirements that are more than merely administrative and procedural or measures to protect ballot integrity have been found to be unconstitutional as additional qualifications for office. Examples include requirements for congressional candidates to live in the congressional district (and not just the state), durational residency requirements, ineligibility of convicted felons, and disqualification of incumbents (term limits).

This report updates an earlier CRS report, and will be revised as decisions, rulings, and/or events warrant.

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## Contacts

The qualifications required to hold the office of U.S. Senator or Representative to Congress are established and set out within the U.S. Constitution. These constitutional qualifications are the *exclusive* qualifications for congressional office, and may not be changed or added to by the Congress, nor may these qualifications be added to or changed unilaterally by a state.[1] There are only three "positive" standing qualifications for the office of U.S. Senator and Representative:

- Age—a Representative to Congress must be at least 25 years old; a Senator must be at least 30 years old.
- Citizenship—a Representative must be a citizen of the United States for at least seven years; a Senator must be a citizen of the United States for at least nine years.
- Inhabitancy—a person elected to the House or Senate must be an "inhabitant" of the state from which chosen "when elected."[2]

# Exclusivity of Constitutional Qualifications

Although there may have been some credible minority argument concerning the ability of Congress or the states individually to set *additional* or different qualifications for federal office from those set out in the Constitution, it is now well-settled that the qualifications established in the U.S. Constitution are the *exclusive* qualifications for federal office (and are not merely "minimum" qualifications). The constitutional history and case law demonstrate that such constitutional qualifications are fixed and may not be changed, added to, or subtracted from by Congress, nor by the state legislatures (other than by an amendment to the U.S. Constitution).[3]

## Constitutional History

The history of the adoption of the qualifications provisions within the Constitution demonstrates a philosophic commitment of the framers to minimal qualifications for congressional office, fixed in the federal Constitution, as an underlying principle of republican government. In warning against an "uncontrollable power over the elections to the federal government" either in the state legislatures or in the federal government itself, Alexander Hamilton, in an oft-quoted comment from the *Federalist Papers*, explained that, "The qualifications of the persons who may ... be chosen ... are defined and fixed in the Constitution, and are unalterable by the legislature."[4] Similarly, James Madison argued at the Constitutional Convention of 1787 for very minimal

[1] Powell v. McCormack, 395 U.S. 486, 522 (1969); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 800-801 (1995); see also Cook v. Gralike, 531 U.S. 510 (2001).

[2] U.S. CONST. art. I, § 2, cl. 2, and art. I, § 3, cl. 3. Additionally, as discussed later in this report, there are certain constitutional disqualifications or disabilities that must be removed for one to serve in Congress.

[3] *Powell v. McCormack, supra*; *U.S. Term Limits, Inc. v. Thornton, supra*; *Cook v. Gralike, supra*. While the states are authorized to regulate the "Times, Places, and Manner" of federal elections (U.S. CONST. art. I, § 4, cl. 1), such authority is a circumscribed administrative power over elections procedures and ballots (including reasonable "ballot access" rules); it is not an authority to alter the substantive qualifications or terms of federal office. *U.S. Term Limits, Inc., supra* at 832-835; *Cook v. Gralike, supra* at 522.

[4] THE FEDERALIST OR THE NEW CONSTITUTION, PAPERS BY ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY [hereinafter THE FEDERALIST PAPERS], No. 60 (Hamilton), at pp. 402, 407 (New York 1945).

required qualifications for Congress that "ought to be fixed by the Constitution," as a means to prevent infringement on the free choice of the people of whom they wish to have represent them, and as a way of preventing "an aristocracy or oligarchy ... by limiting the number capable of being elected."[5] Madison expanded on the premise of minimal qualifications of those being chosen by the people for Congress as a means of preserving the "principles of republican government," discussing those who the people may choose for Congress:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.[6]

The qualifications for congressional office were thus intentionally kept to a minimum by the framers to empower the electorate, and to promote the "fundamental" democratic principle that in the new republic "the people should choose whom they please to govern them."[7] One constitutional scholar has noted that in setting minimal qualifications in the Constitution in 1787 and "barr[ing] both Congress and states from adding statutory property qualifications—or any other qualifications for that matter—to Article I's short list of age, residency, and citizenship," the "federal Constitution positioned itself on the democratic frontier" for its time, in comparison even to the provisions in the colonial legislatures:

> A man of merit and repute who owned little or no property—say, a minister, schoolmaster, or war hero—could serve as a federal representative even though eleven states would have barred him from their own lower houses.[8]

The commitment of the framers to minimal qualifications to hold elective office in Congress, the Supreme Court has noted, was to further the fundamental principle of electoral choice, and that "this broad principle incorporated at least two fundamental ideas." "First, we emphasized the egalitarian concept that the opportunity to be elected was open to all."[9] Secondly, "we recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government."[10]

## Supreme Court Decisions on Exclusivity of Qualifications

Modern-era Supreme Court cases have affirmed that "the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications."[11] The qualifications for federal office

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[5] 2 Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, 249-250 (Yale University Press 1911)[hereinafter Farrand]. See also THE FEDERALIST PAPERS, *supra*, Nos. 52 and 57 (Madison).

[6] THE FEDERALIST PAPERS, *supra*, at No. 57 (Madison), p. 383.

[7] *Powell v. McCormack, supra* at 547, quoting Alexander Hamilton at the New York Ratifying Convention (Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 [hereinafter ELLIOT'S DEBATES], Vol. 2, at p. 257 (New York 1888).

[8] Akhil Reed Amar, AMERICA'S CONSTITUTION, A BIOGRAPHY, at 66 (2005).

[9] *U.S. Term Limits, Inc., supra* at 793-794.

[10] *Id*. at 794.

[11] *U.S. Term Limits, Inc., supra* at 800-801; see also *Cook v. Gralike, supra*.

established in the U.S. Constitution were intended to be uniform and consistent across the nation, and may not be changed unilaterally by one state such that they would differ from state to state.[12]

As to any authority of the states over *federal* offices which are established in the U.S. Constitution, the Supreme Court in *U.S. Terms Limits, Inc.,* and again in *Cook v. Gralike,* explained that whatever authority the states have over qualifications and elections of *federal* officers must be a "delegated" authority arising, as does the national government, "from the Constitution itself," and could *not* be a "reserved" power of the states (under the Tenth Amendment), since a state could not "reserve" a power which it never possessed, that is, the states could not have "reserved" a power relative to something which did not exist before its creation in the Constitution.[13] As explained by the Supreme Court,

> Because any state authority to regulate election to ... [federal] offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States."[14]

The individual states may not, therefore, establish their own (and potentially varying) qualifications for the office of U.S. Senator or Representative. State laws which have attempted to place requirements on candidacies to Congress that have been deemed to constitute "additional qualifications" to be elected to federal office, such as, for example, requirements of residency in the congressional district from which one is running (for the House of Representatives), disqualification from office of certain convicted felons, additional residency requirements for one to be an "elector" qualified to run for congressional office (or other durational residency requirements), or the disqualification for certain long-term incumbents (term limits), have been found to be unconstitutional when challenged.[15]

# Judging Qualifications to Office

The U.S. Constitution, at Article I, Section 5, clause 1, expressly delegates to each house of Congress the authority to judge the qualifications for office of its own Members: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members ...." As noted by authorities on parliamentary democracies and the Constitution, since the Congress is an independent, separate, and co-equal branch of government, it would not be consistent with its

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[12] Note discussion in *U.S. Term Limits, Inc., supra* at 798 - 815.

[13] *U.S. Term Limits, Inc., supra* at 802-805; *Cook v. Gralike, supra* at 519. Quoting Justice Story, the Supreme Court noted that "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them. ... Simply put, '[n]o state can say, that it has reserved, what it never possessed." *Cook v. Gralike, supra* at 519, see Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Vol. II, § 626 (1833, 1970 De Capo Reprint ed.).

[14] *Cook v. Gralike, supra* at 522, citing *U.S. Term Limits, Inc. supra* at 804.

[15] District residency requirements: Hellmann v. Collier, 141 A.2d 908, 911 (Md. 1958); Exon v. Tiemann, 279 F. Supp. 609, 613 (Neb. 1968); State *ex rel*. Chavez v. Evans, 446 P.2d 445, 448 (N.M. 1968). Restrictions on convicted felons: Application of Ferguson, 294 N.Y.S.2d 174, 176 (Super. Ct. 1968); Danielson v. Fitzsimmons, 44 N.W. 2d 484, 486 (Minn. 1950); State *ex rel*. Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918). Disqualification of incumbents (term limits): *U.S. Term Limits, Inc. v. Thornton., supra*; *Cook v. Gralike, supra;* Thorsted v. Gregoire, 841 F. Supp. 1068, 1081 (WD Wash. 1994); Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992). Durational residency requirements: Dillon v. Fiorina, 340 F. Supp. 729, 731 (N.M. 1972); Campbell v. Davidson, 233 F.3d 1229 (10th Cir. 2000), *cert. denied,* 532 U.S. 973 (2000); Schaefer v. Townsend, 215 F.3d 1031 (9th Cir. 2000), *cert. denied*, Jones v. Schaefer, 532 U.S. 904 (2001).

status or functions, nor with the separation of powers principles generally, for a different branch of the government, such as the judiciary, to determine the legislature's make-up:

> The propriety of each House being the judge of these matters is very obvious. No power external to the House could decide them without an intrusion upon the question of its organization, which would be fatal to its freedom and independence. The right of the House, as a body, to determine upon the right of each member to a place in that body is so obvious that it needs no comment. The power of election is vested, as we have seen, in the constituency under the laws of the States; but whether that constituency have elected qualified persons, and whether the officers holding the election have made proper returns, is left to the House in order to prevent intrusion of persons disqualified or not duly elected upon their deliberations.[16]

Justice Joseph Story explained the purpose behind the constitutional authority to judge the elections and returns of each House's own members:

> It is obvious that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty as to who were legitimately chosen members, and any intruder or usurper might claim a seat, and thus trample upon the rights and privileges and liberties of the people. ... If lodged in any other, than the legislative body itself, its independence, its purity and even its existence and action may be destroyed, or put into imminent danger.[17]

The courts have thus indicated that the House or the Senate, respectively, and not the courts, would be the proper forum for a challenge concerning the qualifications of one to be a Member of Congress. The Supreme Court in *Barry v. Cunningham*, for example, stated that, "The Senate [has the] sole authority under the Constitution to judge of the elections, returns and qualifications of its members ..." and "to render a judgment which is beyond the authority of any other tribunal to review."[18] In *Seville v. Elizalde,* the U.S. Court of Appeals for the District of Columbia Circuit found the following:

> We are cited no cases, and we find none, in which the Federal courts have ever been asked to determine the qualifications of a member of Congress. Apparently, it has been fully recognized that that power is lodged exclusively in the legislative branch.[19]

In a case concerning a challenge to the results of a congressional election, then-Judge Scalia writing the opinion of the U.S. Court of Appeals for the District of Columbia Circuit, found that the court need not rely on the "amorphous and partly prudential" political question doctrine to abstain from ruling on the matter.[20] The court found that since the judging of the elections, returns, and qualifications of its own Members is textually committed in the Constitution to the Congress, the court "simply lack[s] jurisdiction to proceed":

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[16] John Randolph Tucker and Henry St. George Tucker, THE CONSTITUTION OF THE UNITED STATES. A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION, Volume I, at pp. 426-427 (1899).

[17] Story, II COMMENTARIES ON THE CONSTITUTION, *supra* at § 831, pp. 294-295.

[18] 279 U.S. 597, 613, 619 (1929). *See* also Reed v. County Commissioners, 277 U.S. 376, 388 (1928); Keogh v. Horner, 8 F. Supp. 933, 935 (S.D. Ill. 1934).

[19] 112 F.2d 29, 38 (D.C. Cir. 1940).

[20] Morgan v. United States, 801 F.2d 445, 450 (D.C.Cir. 1986).

> It is difficult to imagine a clearer case of "textually demonstrable constitutional commitment" of an issue to another branch of government to the exclusion of the courts ... than the language of Article I, section 5, clause 1 that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." The provision states not merely that each House "may judge" these matters, but that each House "shall be *the* Judge" (emphasis added). The exclusion of others – and in particular others who are judges – could not be more evident. Hence, without need to rely upon the amorphous and partly prudential doctrine of "political questions," [citations omitted] we simply lack jurisdiction to proceed.[21]

The congressional precedents interpreting the constitutional qualifications of age, citizenship, and inhabitancy, when such questions have arisen with regard to the seating of a Member-elect, provide the guidelines for examining the constitutional qualifications.

## Procedure

A person who is elected to Congress (or temporarily appointed to the Senate to fill a vacancy pursuant to the Seventeenth Amendment), and appears in Congress with valid credentials from the proper officials in the state, is a "Member-elect" (or Senator-designate). The individual becomes a Member of Congress when sworn in and seated by the House or Senate.[22] The presentation of "credentials"—a certificate of election or appointment from a governor and secretary of state (that is, the official "return")[23]—is considered to be *prima facie* evidence that the person holding those credentials is entitled to the seat, subject to the final determination of the House or Senate.[24] If the House or Senate finds that a Member-elect does not meet the constitutional qualifications (or has not been "duly elected" by the people of his or her district or state), then the House or Senate, as appropriate, may "exclude" that person from the respective body by a simple majority vote. An "exclusion" is a decision to refuse to seat a Member-elect.[25]

In practice, if the "qualifications" of a Member-elect are challenged by another Member-elect at the time of swearing in and seating, or if a petition or protest to that effect has been properly

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[21] 801 F.2d at 447.

[22] "[E]lection does not, of itself, constitute membership ...." DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, Ch. 9, § 47, p. 481. "Neither do election and return create membership .... [A] person may be selected by the people, destitute of certain qualifications, without which he cannot be admitted to a seat." DESCHLER'S PRECEDENTS, *id.*, citing Hammond v. Herrick, 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 499; Brown and Johnson, HOUSE PRACTICE, 108th Cong., 1st Sess., Ch. 33, § 1 (2003). See also Riddick and Fruman, RIDDICK'S SENATE PROCEDURE, PRECEDENTS AND PRACTICES, at 707 (1992). U.S. CONST. art. VI, cl. 3 (oath of office).

[23] In 18th and 19th century parlance the term "return" indicates the certificate of election or credentials transmitted on behalf of the candidate certified by the state as being authorized to hold the seat and perform the duties of office: "The purpose of a return is to authenticate the election in such a manner, as to enable the persons elected to take upon themselves their official functions. In this country, the object is effected by means of certificates of elections (also called returns) under the hands of the returning officers, either given to the persons elected, or sent to some appropriate department of the government." Luther Stearns Cushing, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES, at § 136, p. 50 (1856). See also George H. Haynes, THE SENATE OF THE UNITED STATES, ITS HISTORY AND PRACTICE, 124-125 (1938).

[24] Note discussion of 1857 and 1794 precedents in 1 HINDS' PRECEDENTS, *supra* at § 534, pp. 693-694: "... the credential, being prima facie evidence, was liable to be rebutted at any stage."

[25] U.S. CONST. art. I, § 5, cl. 1; Powell v. McCormack, 395 U.S. 486, 506-512, 518-522 (1969); DESCHLER'S PRECEDENTS, *supra,* at Ch. 7, § 9, and Ch. 12, § 14. An exclusion may also relate to failure to remove "disqualifications," DESCHLER'S PRECEDENTS, *supra* at Ch. 7, § 9, p. 96 (note 14th Amendment "disqualification" clause for aiding the enemy after having taken an oath to support the Constitution, and exclusions of Victor Berger, discussed in *Powell v. McCormack, supra* at 545, n.83).

brought before the House or Senate for consideration, the Member-elect whose qualifications have been challenged may be sworn and seated provisionally, that is "without prejudice" to the House or Senate's right to exclude in the future upon a majority vote after an examination and investigation of the matter is made by the appropriate committee.[26] The Member-elect whose qualifications, election, or credentials are questioned may be asked to "stand aside" during the taking of the oath of office by the other Members-elect, and then given the oath separately and seated "without prejudice" during the pendency of the resolution of the matter, or the Member-elect may be sworn in and seated without having to stand aside, and the matter may still be referred to the appropriate committee for ultimate resolution by the House or Senate.[27]

## Burden of Proof

There is no formal requirement in the House or the Senate for a candidate or Member-elect to routinely present "proof" of eligibility regarding age, citizenship, or inhabitancy. Although the credentials in proper form from state officials presented to the House or Senate provide *prima facie* evidence of entitlement to the seat as far as being "duly elected" (and the regularity of such election), that certificate does not necessarily add to the presumption of eligibility regarding qualifications.[28] However, there is a general (legal) presumption within the American democratic tradition that the whole of the adult citizenry are eligible to serve in political office,[29] and anyone challenging such presumption of eligibility has the burden of proof with respect to challenges and allegations regarding eligibility. As stated by former U.S. Court of Appeals Judge, and former Member of Congress (and chairman of the Committee on Elections), George W. McCrary, in his book, *A Treatise on the American Law of Elections*:

> The presumption always is, that a person chosen to an office is qualified to fill it, and it is never incumbent upon him to prove his eligibility. The certificate of election does not add to this presumption, but simply leaves it where the law places it, and he who denies the eligibility of a person who is certified to be elected, must take the burthen of proving that he is not eligible.[30]

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[26] See Haynes, THE SENATE OF THE UNITED STATES, ITS HISTORY AND PRACTICE, *supra* at 123, citing Senator Hoar in 1903: "The orderly and constitutional method of procedure in regard to administering the oath to newly elected Senators is that when any gentleman brings with him or presents credentials consisting of the certificate of his due election from the executive of his state, he is entitled to be sworn in, and all questions relating to his qualifications should be postponed and acted upon by the Senate afterwards." See also RIDDICK'S SENATE PROCEDURE, *supra* at 704. As to the House, see Brown and Johnson, HOUSE PRACTICE, *supra* at Ch. 33, § 3, p. 634.

[27] Brown and Johnson, HOUSE PRACTICE, *supra* at Ch. 33, § 3, p. 635; Senate Legal Counsel, CONTESTED ELECTION CASES, at 14 (October 2006).

[28] George W. McCrary, A TREATISE ON THE AMERICAN LAW OF ELECTIONS, at 239 (1875, Fourth ed. by Henry L. McCune, 1897): "The certificate of election does not ordinarily, if ever, cover the ground of the due qualification 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 on the face of returns, and nothing more."

[29] Chief Judge Posner of the U.S. Court of Appeals for the 7th Circuit noted, in another context, in *Herman v. Local 1011, United States Steelworkers of America,* 207 F.3d 924, 925 (7th Cir. 2000): "The democratic presumption is that any adult member of the polity ... is eligible to run for office. U.S. Term Limits, Inc .v. Thornton, 514 U.S. 779, 793-95, 819-20 (1995); Powell v. McCormack, 395 U.S. 486, 547 (1969)."

[30] McCrary, A TREATISE ON THE AMERICAN LAW OF ELECTIONS, *supra* at 239-240. The word "burthen" is a now archaic variation of the word "burden."

An early case in the House of Representatives demonstrated the issue of the burden of proof regarding challenges to eligibility. In this case, a petition signed by 125 individuals attested that an individual elected to Congress in 1905, Anthony Michalek, was not a citizen of the United States.[31] The House Elections Committee, to which the protest was referred, noted that although there were affidavits, statements, and conclusions drawn by complainants, there was offered no actual proof in support of these claims of non-citizenship. The committee noted that the Member in question, who was born in Bohemia and brought to the United States as an infant by his parents, could be an American citizen if during minority his father or his mother (after the death of his father) had been naturalized as a U.S. citizen, or if the Member himself had been previously naturalized, and that in the Chicago area where he was from, such naturalization could have occurred in any of six different state or federal courts. Complainants forwarded records and registers from state courts in Cook County with regard to the Member's father,[32] but not from federal courts, and no records or registers were forwarded regarding the Member's mother or the Member: "No testimony was offered concerning the naturalization of Vaclav Michalek [the father] in the two federal courts and no testimony was offered as to the naturalization of Therese Michalek [the mother] or Anthony Michalek in any of the six courts."[33] Since the complainants did not forward proof that there had not been a naturalization of the father from any of the federal courts, or for the mother or the Member in federal or state courts, the committee found that the complainants had not made out a *prima facie* case of non-citizenship that would shift the burden of proof to the Member of Congress, and that the Member of Congress, therefore, need not present *any* defense to have the matter dismissed: "Your Committee is of the opinion that when charges affecting the eligibility of a Member of Congress to his seat are made, some proof should be offered in their support before putting the sitting Member to the expense and the burden of making a defense."[34] The committee's resolution of the matter was approved by the House.[35]

## Result of Exclusion

In judging congressional qualifications and elections, the practice and experience in the Senate and the House concerning the implications of finding a Member-elect or Member-designate disqualified or ineligible is clear, and is remarkably consistent given the great potential for partisan division on this issue when it arises with respect to a particular Member-elect. The overwhelming weight of authority in both the Senate and the House demonstrates that the ineligibility of the majority candidate in a congressional election, whether because of death, disqualification, disability, or other incapacity before or after the election, gives no title or right to the office to the runner-up candidate, but rather merely creates a "vacancy" in the office from that state.[36] The Senate and the House thus both follow what is known as the "American Rule" (as opposed to the so-called "British Rule"), whereby the next highest qualified vote-getter in an election is *not* deemed to be entitled to the seat upon the disqualification of the person receiving the most votes.[37] As noted in House precedents, "If the House finds that a Member-elect has not

[31] I HINDS' PRECEDENTS, *supra* at §§ 426, 427, pp. 406-413.

[32] It was noted by the Committee that these registers from large cities were typically notorious for errors, omissions, misspellings, and variations of names employed. I HINDS' PRECEDENTS, *supra* at § 427, p. 411-412.

[33] I HINDS' PRECEDENTS, *supra* at § 427, p. 411. H.R. Rpt. No. 2117, 59th Cong., 1st Sess. (1906).

[34] I HINDS' PRECEDENTS, *supra* at § 427, p. 413. H.R. Rpt. No. 2117, *supra*.

[35] 40 CONG. REC. 3399 (March 6, 1906).

[36] RIDDICK'S SENATE PROCEDURE, *supra* at 701; DESCHLER'S PRECEDENTS, *supra* at Vol. 2, Ch. 7, § 9, at p. 96.

[37] See discussion of "American Rule" versus "English Rule," in Smith v. Brown (40th Cong.), ROWELL'S DIGEST OF CONTESTED ELECTION CASES, 1789-1901, at pp. 220-221 (1901), and McCrary, A TREATISE ON THE AMERICAN LAW OF (continued...)

met the qualifications for membership, or has failed to remove disqualifications, a new election must be held. An opposing candidate with the next highest number of votes cannot claim the right to the seat."[38] Similarly, the "American Rule" followed in the Senate is noted: "In election cases the ineligibility of a majority candidate, for a seat in the Congress gives no title to the candidate receiving the next highest number of votes."[39]

If there is such a finding by the House or the Senate that the majority candidate is disqualified (or is otherwise not "duly elected"), there is then created a "vacancy" in the office which must be filled according to the procedures established in the U.S. Constitution. When there is a "vacancy" in a House seat, the Constitution calls for a special election to fill that vacant House seat;[40] and when there is a vacancy in the Senate, the Constitution provides that there may be a temporary appointment by the governor of a Senator, if authorized under the state law, until an election is held for the remainder of the term.[41]

## Limit on Congress's Authority to Exclude for Qualifications

The extent of the authority of one house of Congress to *exclude* by a majority vote a Member-elect from being seated based on the Member-elect's "qualifications" was delineated by the Supreme Court in 1969 in *Powell v. McCormack*. The Court stated that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution," that is, the Member-elect's age, citizenship, and inhabitancy in the state from which elected.[42] The Court noted that the House is "without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[43]

An "exclusion" is *not* a disciplinary matter or proceeding. It is a proceeding pursuant to the authority of each house of Congress to judge the constitutional qualifications and the elections of its own Members.[44] Judging the "qualifications" of Members-elect is thus *not* an exercise of judging a person's rectitude, character, or moral fitness to hold office, and is substantively and procedurally different from a *disciplinary* matter such as an "expulsion."[45] After *Powell*, it is clear that an "exclusion" by a mere majority vote can *not* be used by the House or the Senate to judge past "misconduct" or the "fitness" of a Member-elect in a decision to seat or not to seat such a person. As discussed in *Deschler's Precedents*,

> The [Supreme Court's *Powell*] decision apparently precludes the practice of the House or Senate, followed on numerous occasions during the 19th and 20th centuries, of excluding

(...continued)

ELECTIONS, *supra* at 247-250.

[38] DESCHLER'S PRECEDENTS, *supra* at Ch. 7, sec. 9, p. 96.

[39] RIDDICK'S SENATE PROCEDURE, *supra* at 701.

[40] U.S. CONST. art. I, § 2, cl. 4.

[41] U.S. CONST. amend. XVII.

[42] *Powell, supra* at 550.

[43] *Id.* at 522.

[44] As a *disciplinary* matter, a Member of either house may be expelled from membership in that body, but only upon a vote of two-thirds of the Members present and voting. U.S. CONST. art. I, § 5, cl. 2.

[45] *Powell, supra* at 506-512; DESCHLER'S PRECEDENTS, *supra* at Ch. 12, §§ 13 and 14.

> Members-elect for prior criminal, immoral, or disloyal conduct. The court upheld in *Powell* the interest of state voters in being represented by the person of their choice, regardless of congressional dislike for the Member's-elect moral, political, or religious activities.[46]

Congressional precedents and cases prior to the Supreme Court's 1969 decision in *Powell* may, therefore, be of little precedential value as to the current practice regarding judging the "qualifications" of a Member-elect. The Court in deciding *Powell*, and limiting the authority of each house to judge only the qualifications set out in the Constitution, did note past actions and some early colonial precedent whereby the legislature found that a legislator-elect's "character or past conduct rendered him unfit to serve."[47] However, the Court discussed and recognized the influence on the framers of the British case of John Wilkes, where Wilkes had been expelled from Parliament for "seditious libel" against the Crown. In the special election to fill the vacancy, Wilkes was re-elected by the people, and then excluded by the House of Commons three consecutive times. Eventually, after returning from exile, Wilkes was elected to the next Parliament, and was successful in having his previous exclusions expunged from the record. The Court noted the influence on the framers at the Constitutional Convention of the resolution of the Wilkes case on the "eve of the Convention" (in 1782), characterized by the Court as ending the "long and bitter struggle for the right of the British electorate to be represented by men of their own choice,"[48] and confirming the historical understanding that the framers intended the House or Senate to be without the authority to *exclude* (by majority vote) a person who has been duly elected by his or her constituents and who meets the qualifications established in the Constitution.

## Contested Elections

The Constitution also expressly delegates the authority to each house of Congress to judge the "elections" and "returns" of their Members, as well as "qualifications." There may thus be "election contests" filed in either the House or the Senate, or a challenge raised by a Member-elect to the swearing in of another Member-elect, where the institution is asked not to judge the standing "qualifications" of a Member-elect, but rather to determine if the Member-elect presenting himself or herself for seating in the House or Senate was, in fact—as noted by the Supreme Court—"duly elected"[49] (or, with respect to a Senator-designate, was duly chosen).[50] It does not appear that a "contested election" procedure or complaint, at least as set out in the statutory provisions of the Federal Contested Election Act concerning elections to the House,[51] is the proper vehicle to challenge the "qualifications" or eligibility of a Member-elect. As noted in *Deschler's Precedents*,

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[46] DESCHLER'S PRECEDENTS, *supra* at Ch. 7, § 9, p. 98. Note, for example, the Senate consideration of the case of Senator-elect Arthur R. Gould of Maine, in 1926, concerning allegations of bribery of a foreign official in 1910 in a business deal. *Senate Election Cases*, *supra*, Case 111.

[47] *Powell, supra* at 521-522.

[48] *Powell, supra* at 527-531.

[49] *Powell, supra* at 522. Concerning "contested elections" in the House, see CRS Report RL33780, *Procedures for Contested Election Cases in the House of Representatives*, by Jack Maskell and L. Paige Whitaker, and CRS Report 98-194, *Contested Election Cases in the House of Representatives: 1933 to 2011*, by L. Paige Whitaker. As to contested elections in the Senate, see Senate Legal Counsel, CONTESTED ELECTION CASES (October 2006).

[50] For a general discussion of the Senate judging elections and returns of elected or appointed Senators, see CRS Report R40105, *Authority of the Senate Over Seating Its Own Members: Exclusion of a Senator-Elect or Senator-Designate*, by Jack Maskell.

[51] 2 U.S.C. §§ 381 *et seq*.

> A challenge to seating a Member-elect may also be based on his failure to meet the constitutional requirements of citizenship, residence, or age for the office, and in that context is treated as a matter of 'exclusion' and not as a contested election.[52]

Under the contested elections law, the "contestant," that is, the one filing to contest the election, must have a legitimate claim of "a right to such office,"[53] which could not be the case for a person who has not actually received the most votes in the election, even if the candidate who has actually received the most votes is ultimately not seated because of lack of qualifications.[54]

# Constitutional Qualifications

Modern precedents and decisions in the House or Senate on determining "qualifications" are fairly rare, in part because of the clarification by the Supreme Court in 1969 in *Powell v. McCormack* delineating Congress's authority to judge only the express constitutional "qualifications" for office (and whether one is "duly elected"), and because modern communications, investigative reporting, and extensive media coverage, as well as more sophisticated party vetting processes, make it more likely that an actual disqualifying condition (such as a candidate's age or lack of citizenship) would be revealed before actual nominations by a major political party are made.

## Age

The nominal debate that occurred in the Constitutional Convention of 1787 about the age qualifications of proposed members of the national legislature involved generally a balancing of the concerns of those framers who wished for as few eligibility requirements as possible for those able to be elected—to accommodate the wishes and free choice of the electorate as to whom their representatives would be—and the concerns of those who wanted to assure some maturity of thought and experience in those who would make decisions for the nation in the proposed national legislature. Colonel George Mason suggested in Convention, on June 22, 1787, to replace the proposed age qualification of 21 for membership in what was to be the House of Representatives, with 25 years of age, noting that his own "political opinions at the age of 21 were too crude & erroneous to merit an influence on public measures."[55] Other delegates at the Convention were "agst. abridging the rights of election in any shape," and argued against the higher age eligibility which they believed could "damp the efforts of genius, and of laudable ambition."[56] The motion to establish the age qualification for the House at 25 was adopted by the delegates, and the higher age requirement of 30 years for Senators was later explained by James Madison in the *Federalist Papers*:

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[52] DESCHLER'S PRECEDENTS, *supra* at Ch. 9, § 9, p. 362.

[53] 2 U.S.C. § 382(a).

[54] As noted in the discussion above, under the so-called "American Rule" followed in the House and Senate, no such claim to a right to the office could be made by a contestant who is the second-place finisher, even if the winner of the election is ultimately found not to be qualified to be seated. See, for example, H. R. Rep.108-208, "Dismissing the Election Contest Against Bart Gordon," at 4: "The Committee finds that, as a general matter challenges to the qualifications of a Member-elect to serve in the Congress fall outside the purview of the FCEA, which was designed to consider allegations relating to the actual conduct of an election."

[55] 1 Farrand, *supra* at 375 (Mason).

[56] 1 Farrand, *supra* at 375 (Wilson).

> A Senator must be thirty years of age at least; as a representative must be twenty-five. ... The propriety of these distinctions is explained by nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages ....[57]

The age eligibility requirement in the Constitution has been interpreted in precedents by both the House of Representatives and the Senate to be a qualification to hold the office, rather than as a qualification to run for the office. That is, the age qualification becomes relevant at the time when the Member-elect presents himself or herself to the House or the Senate to take the oath of office and to be seated. On occasion, both the House and the Senate have actually allowed a Member-elect to delay presenting credentials to the body at the opening of a session to allow that Member-elect to reach the required constitutional age. In the Senate, for example, in the case of Senator-elect Rush D. Holt, in 1935, the candidate receiving the most votes was not *yet* eligible to serve in the Senate at the time he was on the ballot for the general election, nor at the time of the beginning of the new congressional session, because he was only 29 years of age. The Senate found that since the issue of "qualifications" arises when the Member-elect presents his credentials to the Senate to take the oath of office and be seated, the Senate could, and did, allow the candidate/Member-elect to delay presenting his credentials until the time he was 30 years old, and thus qualified.[58]

The precedents in the House similarly indicate that the issue of qualifications of "age" would arise at the time a Member-elect presents his or her credentials for seating, generally at the commencement of the session, and that the Member-elect would have to meet that particular requirement at that time. The House of Representatives, for example, in 1859, apparently allowed a Member-elect, Mr. John Y. Brown of Kentucky, to defer taking the oath of office beyond the opening of the Congress, until the beginning of the next session in December of 1860, at which time Mr. Brown met the constitutional age requirement.[59]

## Citizenship

The issue of a citizenship requirement for eligibility to be a Member of Congress garnered significant debate and attention by the framers at the Federal Convention of 1787. In stating concerns regarding the citizenship of congressional officeholders, and the required length of such citizenship, George Mason argued that although he "was for opening a wide door for immigrants; ... [h]e did not chuse to let foreigners and adventurers make laws for us"; nor would he want "a rich foreign Nation, for example Great Britain, [to] send over her tools who might bribe their way" into federal office for "invidious purposes."[60] These arguments were echoed later by delegates at the Convention who were concerned with "admitting strangers into our public Councils,"[61] and who feared that "foreigners without a long residency in the Country ... bring with them, not only attachments to other Countries; but ideas of Govt. so distinct from ours that in every point of view they are dangerous."[62] Thus, citizenship requirements of seven years for

[57] THE FEDERALIST PAPERS, *supra*, No. 62 (Madison), at 414.

[58] Hatfield v. Holt, Case No. 119, SENATE ELECTION, EXPULSION AND CENSURE CASES, *supra* at p. 360.

[59] 1 HINDS' PRECEDENTS, *supra* at § 418, pp. 389-390.

[60] 2 Farrand, *supra*, at 216.

[61] *Id*. at 235 (Mr. Morris).

[62] *Id.* at 236 (Mr. Butler).

Representatives and nine years for Senators were eventually adopted, although the Convention did not act upon the wishes of Mr. Gerry "that in the future the eligibility might be confined to Natives."[63] There was significant opinion at the Federal Convention that the length of citizenship required to participate in the national legislature should not be so great as to "discourage the most desirable class of people from emigrating to the U.S.," and that the country should encourage the emigration of those "who love liberty and wish to partake of its blessings."[64]

It is clear from the language and the debates on the adoption of this eligibility requirement that the citizenship requirement includes both native or "natural born" citizens (those who have the status of U.S. citizens at birth or by birth), as well as "naturalized" citizens (those who are born "aliens" and must go through the process of naturalization to be citizens of the U.S.). It is interesting to note that although the Congress may not by legislation change the standing qualifications for office fixed in the Constitution,[65] Congress is expressly authorized in the Constitution to "establish an uniform Rule of Naturalization ...."[66] By exercising this authority to change the statutory rules for citizenship, Congress can then adjust and affect what is required for naturalized citizenship (or add to the categories of those who are citizens "at birth" and need no naturalization—see 8 U.S.C. § 1401), and thus indirectly affect what is required to meet the citizenship qualification requirement for Congress.

There is an apparent split in the precedential authority in the House and Senate as to whether, similar to the age qualification, the citizenship eligibility requirement becomes relevant at the time a Member-elect presents his or her credentials and seeks to take the oath of office and be seated, or whether the requirement should be recognized and enforced at the time of election. The House has in the past allowed a Member-elect to defer taking the oath of office until the beginning of the second session of the Congress (even though Congress was called into session earlier by a presidential proclamation), at which time the Member-elect had met the seven-year citizenship requirement, notwithstanding the fact that he was "ineligible," that is, he was not a citizen for seven years at the time he was on the ballot and elected in the November congressional election, nor at the beginning of the first session of the new Congress.[67]

In very early Senate precedents, however, the Senate eventually ruled ineligible and voided the selection of two Senators who had actually taken the oath of office, but at that time had not yet met the citizenship qualification.[68] It was argued in a later Senate case regarding the age qualification, in 1935, that such early precedents in the 1700s and 1800s could be distinguished because the Members-elect had not specifically sought or requested a delay in taking the oath until they were qualified, but rather took the oath of office at a time when they were not yet citizens for nine years.[69] It also appears, as noted by the Senate historians, that factionalism or

[63] *Id*. at 268. Mr. Gerry stated his fear that "Persons having foreign attachments will be sent among us & insinuated into our councils, in order to be made instruments for their purpose."

[64] *Id*. at 236 (Madison).

[65] *Powell v. McCormack, supra.*

[66] U.S. CONST. art. I, § 8, cl. 4.

[67] In re Ellenbogen (1934), DESCHLER'S PRECEDENTS, supra at Ch. 9, § 47, pp. 479 - 482.

[68] See 1794 qualifications case against Albert Gallatin, SENATE ELECTION, EXPULSION AND CENSURE CASES, *supra* at p. 3 (Case 1), and the 1849 qualifications case against James Shields, SENATE ELECTION, EXPULSION AND CENSURE CASES, *supra* at p. 54 (Case 21).

[69] See discussion in Hatfield v. Holt, SENATE ELECTION, EXPULSION AND CENSURE CASES, *supra* at pp. 360-361(Case 119). The majority in the Holt case found that one is not a "Senator," but rather is only a "Senator-elect," until one takes the oath of office and, therefore, the eligibility requirement would apply at the time one is to take that oath.

partisanship (between the Federalists and the Republicans) played a major role in the decision respecting Albert Gallatin, (and between the Whigs and the Democrats) as well as in the case of James Shields,[70] and thus the strength of the cases as precedent may be somewhat diminished. In the case of Shields, after the selection was voided, the state legislature was called back into session to choose a replacement, and Shields was again selected, but by that time had met the nine-year citizenship requirement.

# Inhabitancy

Unlike the age and citizenship qualification requirements, the inhabitancy qualification expressly requires the requisite inhabitancy status at the time of election, as opposed to when a Member-elect presents himself or herself to the House or Senate for seating. Article I, Section 2, clause 2, and Article I, Section 3, clause 3 of the Constitution expressly require one to be an "inhabitant" of the state "when elected."

## Constitutional History

There is, it should be emphasized, no precise constitutional definition of the term "inhabitant." The word "inhabitant" was substituted for the term "resident" at the Constitutional Convention of 1787, an amendment supported, and seconded, by James Madison who believed that although both words were "vague," the term "inhabitant" might protect one's right to be chosen from a state even though that person may have temporarily not resided in the state because of an occasional absence, even for a "considerable" period of time, on public or private business.[71] Some delegates objected to any inhabitancy or residency requirement, believing that people would "rarely chuse a nonresident," and noting that there were great disputes in some of the state colonial legislatures over technical and legal definitions of the term "which were decided by the arbitrary will of the majority,"[72]or as noted by Madison, "determined more according to the affection or dislike to the man, than any fixt interpretation of the word."[73] George Mason, however, argued for some requirement of inhabitancy or residency, to preserve a knowledge and understanding of the state and to prevent wealthy interlopers from neighboring states:

> If residence be not required, Rich men of neighbouring States, may employ with success means of corruption in some particular district and thereby get into the public Councils after having failed in their own State. This is the practice in the boroughs of England.[74]

The apparent constitutional concern of the framers who debated this provision was thus to craft a term that was not so overly technical that it could be applied in a strict, capricious fashion by a political majority to their advantage, but rather to express a requirement of an actual connection to the state as one's home. The mere absence of physical presence from the state for a particular duration, or a required presence for any period of continual duration, was obviously not to be the

[70] SENATE ELECTION, EXPULSION AND CENSURE CASES, *supra* at pp. 3, and 54.

[71] 2 Farrand, *supra* at 217. Madison noted specifically as to the terms "resident" and "inhabitant" that "both were vague, but the latter least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business."

[72] *Id.* at 217 [Gouverneur Morris].

[73] *Id.* at 217.

[74] *Id.* at 218.

definitive or conclusive concept, since "so strict an expression might be construed to exclude the members of the Legislature, who could not be said to be actual residents in their States whilst at the Seat of Genl. Government."[75]

"Inhabitancy" does not, however, and has not, incorporated any particular measure of *duration* of time that one has been a resident or has physically been in or outside of the state. There is *no* specific or implied "durational" residency requirement in the Constitution for U.S. Senators or Representatives requiring that one must reside in or be an "inhabitant" of a state for any particular period of time before one is eligible to be a U.S. Senator or Representative from that state. Such a durational requirement for Members of Congress was debated in the drafting of the U.S. Constitution, but durational requirements for "residency" or for being an "inhabitant" in a state for one year, three years, and seven years, were all rejected by the framers in favor of the final version of merely requiring one to be an "inhabitant" of the state "when elected."[76] The final word on the subject at the Constitutional Convention appears to be that of Mr. Williamson of North Carolina who argued against any specific required duration of residency or inhabitancy:

> He was agst (sic) requiring any period of previous residence. New residents if elected will be most zealous to Conform to the will of their constituents, as their conduct will be watched with a more jealous eye.[77]

In the Senate election case of Pierre Salinger in 1964, some Senators argued that Senator-designate Salinger was not qualified to be chosen to fill the unexpired term of a Senator from California because, under the laws of the state of California, he had not resided in California long enough to meet the state's qualifications for being an "elector" in the state, which the state required for a candidate for Congress. The Senate found, in accordance with the findings of the Privileges and Elections Subcommittee of the Committee on Rules, however, that state law can not bind the Senate in determining the constitutional qualifications for office, and can not, therefore, add a "durational" residency requirement to the qualification for Senator set out in the Constitution, that is, to be an "inhabitant" of the state "when elected."[78]

In addition to the fact that there is no "durational" residency requirement for Congress within the Constitution, there is explicitly *no* requirement that one own land or property in the state to be qualified to run for or hold the office. The framers explicitly rejected a property qualification for eligibility to Congress.[79] In this regard there is also no continuing requirement of a Member of Congress to own property in the state one represents, nor is there necessarily any continuing obligation or requirement, other than what one may consider to be a "political" or practical necessity, to own property or even to reside in a state *after* election. That is, technically, the constitutional requirement is to be an inhabitant of the state from which chosen "when elected."[80]

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[75] *Id.* at 218.

[76] *Id*. at 216-219.

[77] *Id.* at 218.

[78] Election case of Pierre E.G. Salinger, Case 134, UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES, *supra* at 413 (1995); S. Rpt. 1381, 88th Cong., 2d Sess. 4-6 (1964).

[79] 2 Farrand's, *supra* at 123-124: "Mr. (Madison) moved to strike out the word *landed*, before the word "qualifications." Note discussion among Dickenson, King, Gerry, and Madison on property qualifications.

[80] In Texas Democratic Party v. Benkiser, 459 F.3d 582, 585-588 (5th Cir. 2006), *Application for Stay to Supreme Court, denied.*, No. 06-A-139 (2006), the court held that a candidate for Congress was not, weeks before the election, ineligible for office because he had changed his official, legal residence out of state, since the candidate could simply move back into the state the day before election and would still qualify under the Constitution as being an inhabitant of (continued...)

The reality of modern government in the United States is that Congress is now in session almost continuously throughout the year, and many Members find that it is more convenient, efficient, and conducive to stable family life to temporarily reside, with their families, in the Washington, D.C., area during their tenure in Congress. Federal law, recognizing the issue of temporary residences in a jurisdiction to attend sessions of Congress, expressly provides that a Member of Congress "who maintains a place of abode for purposes of attending sessions of Congress" in a particular state (or the District of Columbia) may not be treated as a resident or domiciliary of that state or jurisdiction for tax purposes (unless the Member represents such state or district), and thus will be taxed on income in accordance with the laws of his or her home state.[81] Sitting Members of Congress, particularly those contemplating running for re-election will, for many reasons, generally continue to maintain a home or place of abode in their home town, district, or state, which serves as their principal place of residence, their domicile, and from which they exercise their civic duties, such as voting and paying taxes, even while temporarily residing in the Washington area to attend Congress.

## Congressional Precedents

Early congressional decisions on inhabitancy might have appeared, at first glance, to have borne out to some extent some of the framers' concerns about overly technical definitions, but upon examination show a more reasoned conclusion. In the case of John Bailey in the 18th Congress, for example, the House of Representatives found a Member-elect from Massachusetts not to be an "inhabitant" of that state, when he had left the state to work for the federal government and reside in the District of Columbia for a number of years. Even in this seemingly strict interpretation, however, the committee and the House noted that it was a voluntary action on the part of Bailey to "abandon" his domicile and establish residency in the District of Columbia; that he had lived "exclusively" in the District for a period of over six years; that he had in the District "married a wife and established a family of his own, thereby leaving his natural or original domicile in his father's house"; and that, significantly, "Mr. Bailey had no domestic establishment or estate in Massachusetts."[82] Noting that one "may acquire inhabitancy in the District of Columbia in the same way as in any of the States," the House and Committee on Elections, as reported in *Hinds' Precedents*, specifically concluded,

> If the residence of Mr. Bailey here [the District of Columbia] had been transient and not uniform; had he left a dwelling house in Massachusetts in which his family resided a part of the year; had he left there any of the insignia of a household establishment; there would be indication that his domicile in Massachusetts had not been abandoned. It had been urged that the expressed intention to return to Massachusetts should govern. But the law ascertained intention in such a case by deducing from facts. ... The committee did not contend that a Member must be actually residing in a State at the time of his election.[83]

The concept of "inhabitancy" that evolved in congressional decision making and has traditionally been employed in congressional consideration, alluded to in the 1824 case of John Bailey, appears to be somewhat akin to the understanding of the legal term "domicile," and thus would

(...continued)

the state "when elected."

[81] 4 U.S.C. § 113.

[82] 1 HINDS' PRECEDENTS, *supra* at § 434, pp. 419-421.

[83] *Id.* at p. 421.

encompass not only actions taken which evidence the establishment of a physical and principal "home" in a state, such as the purchase or maintenance of a primary personal residence, but also intent, that is, the *intent* that a place be one's permanent home, the place where one intends to return after an absence, as such intent is "deduc[ed] from the facts."[84] Citing as support of the "inhabitancy" of a Member-elect, the Committee of Elections of the House in the case of *Bayley v. Barbour*, 47th Congress, for example, noted that

> Mr. Barbour testifies that he was a native of the state of Virginia; had always been a citizen of said State; never claimed to have lived elsewhere in a permanent sense or to have exercised citizenship in any other State or Territory ... and that while he had a temporary winter residence in the city of Washington, he had taken a house in Alexandria with his family, in September 1880, [before the November 1880 election].[85]

The majority of the House Committee on Elections in 1926, in ruling on whether a Member-elect of the House elected from Pennsylvania was an "inhabitant" of that State when elected, provided a cogent explanation of the concepts and factors to be considered in determining "inhabitancy":

> To be an inhabitant within the Constitution, it seems clear that one must have, first, a place of abode, and, second, that this place of abode be intended by him as his headquarters; the place where his civic duties and responsibilities center; the place from which he will exercise his civic rights. We think that a fair reading of the debate on this paragraph of the Constitution discloses that it was not intended that the word "inhabitant" should be regarded in a captious, technical sense. ... We think that a fair interpretation of the letter and spirit of this paragraph with respect to the word "inhabitant" is that the framers intended that for a person to bring himself within the scope of its meaning he must have and occupy a place of abode within the particular State in which he claims inhabitancy, and that he must have openly and avowedly by act and word subjected himself to the duties and responsibilities of a member of the body politic of the particular State.[86]

Cases in the Senate with regard to the "inhabitancy" qualification demonstrate an application similar to that of the House of something somewhat akin to a "domicile" concept of "inhabitancy." In 1809, in a challenge to the brief residency in Ohio of one selected to be a Senator from that state, the Senate accepted the declaration and certification of the governor of the state of Ohio that the individual selected was a "citizen of said state" since the "term of residence" was not "defined either by the constitution or the laws...."[87] In 1870, the credentials of Albert Ames to be selected as Senator from Mississippi were challenged based on the claim that he was not an "inhabitant" of the state of Mississippi when chosen. Mr. Ames, originally from Maine, was at the time of his selection stationed in Mississippi pursuant to military orders. It was argued by his opponents that he was not voluntarily in Mississippi, would merely have left and gone to another state upon other military orders, and had therefore not demonstrated nor expressed the requisite intent to make the state of Mississippi his permanent residence. It was argued that Mr. Ames did not declare his intention to resign his military commission and to make Mississippi his permanent home until after he was chosen as Senator, and therefore was not an

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[84] *Id.* at p. 421; *see* BLACK'S LAW DICTIONARY, at p. 501 (7th ed.), defining the term "domicile" to include "... a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."

[85] 1 HINDS' PRECEDENTS, *supra* at § 435, pp. 423-424.

[86] 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 174, at pp. 339-340.

[87] 1 HINDS' PRECEDENTS, *supra* at § 437, pp. 426-427; UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793-1990, *supra* at pp. 24-25 (Case 9).

"inhabitant" of the state at the time "when elected." Although the Judiciary Committee reported disfavorably upon the credentials of Mr. Ames, the Senate, after a long debate, found that he was eligible to be a Member of the Senate and allowed him to take the oath of office.[88] In affirming and recognizing Mr. Ames' stated intention to make Mississippi his permanent home, along with his presence there, as sufficient to establish his inhabitancy, the opinion of Chief Justice Shaw was cited:

> It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. In such a circumstance, the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home would be sufficient to turn the scale.[89]

In the 1899 Senate case of Nathan B. Scott, the challenge to Mr. Scott's qualifications as a Senator from West Virginia was referred to the Committee on Privileges and Elections. The challenge was based in part on the fact that Mr. Scott was actually residing in the District of Columbia at the time of his election to the Senate, and not in West Virginia, and therefore, it was argued, was an inhabitant of the District of Columbia and not West Virginia. The committee found, however, that Mr. Scott moved to the District of Columbia after his appointment by the President as Commissioner of the Internal Revenue; that he had resided since a young man in West Virginia; and came to Washington "with the intent to retain his residence, citizenship, inhabitancy, and domicile in Wheeling, W. Va."; and that "he claims to be an inhabitant of Wheeling, W. Va. and that he remained in Washington in the discharge of his official functions with intent to return to his home in Wheeling when his duties of office here ended." The committee stated that the term "inhabitant" is "a legal equivalent of the term 'resident,'" and noting that Mr. Scott also voted in West Virginia, unanimously found that despite his temporary physical absence from the state, he was entitled to his seat.[90]

In judging whether one was actually an "Inhabitant of the State for which he shall be chosen," both houses of Congress have thus employed several and varied considerations, depending on the questions before them that were to be determined. When an individual had lived in a state previously and then moved away, for example, considerations relevant to the question of whether one was an "inhabitant" of that first state might include whether one "had left there any of the insignia of a household establishment," whether a home was owned or occupied in the first or the new state, and what type of home (i.e., a permanent home or merely a vacation home); whether one retained a license in the first state to practice a profession; one's intention to return to the state, both stated and "deduc[ed] from facts"; whether one continued to exercise the responsibilities of citizenship in the first state, such as voting and paying taxes; one's physical presence or absence in the first state at the time of election; and the legal definition and requirements of state law for "residence" or inhabitance.[91] Whether someone who is in a new

[88] It appears that post-Civil War Reconstruction politics, more than constitutional interpretation, may have fueled much of the debate concerning Ames' credentials. See discussion in UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793-1990*, supra* at 150-152 (Case 53).

[89] 1 HINDS' PRECEDENTS*, supra* at § 438, p. 428, citing 17 Pickering 234.

[90] 1HINDS' PRECEDENTS*, supra* at § 439, p. 429. See also UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793-1990*, supra* at 258-260 (Case 87).

[91] See the 1824 election case of John Baily, 1 HINDS' PRECEDENTS, *supra* at § 434, pp. 419-422; the 1807 election case of Philip B. Key of Maryland, *Id.* at § 432, pp.417-419; the 1824 case of John Forsyth, *Id*. at § 433, p. 419. At least as far as the use of state law in determining constitutional qualifications for federal office, the precedents prior to the Supreme Court's clarifications in *Powell v. McCormack* and *U.S. Term Limits, Inc*., would now appear to be of (continued...)

state for a short period of time should be considered an "inhabitant" of that state similarly would look at such factors as one's purchasing or renting an abode with the intent to make that new state one's permanent residence. The House and the Senate have thus looked to the totality of the circumstances to determine what might be characterized as one's true "home," including where one's family resides, where one votes, the state in which one holds professional or business licenses and certifications, as well as considering the *intent* of the individual to return to and or to make a particular state his or her "home," evidenced and deduced by statements and facts.

# Constitutional Disqualifications

In addition to the three standing "positive" qualifications for congressional office in the U.S. Constitution—age, citizenship, and inhabitancy in the state when elected—there are certain "disqualifications" that are based on constitutional provisions.

## Insurrection or Rebellion, Aid or Comfort to Enemies

The Fourteenth Amendment to the U.S. Constitution provides, at Section 3, a disqualification to any public office, including congressional office, for one who had previously taken an oath of office to support the Constitution of the United States and had then "engaged in insurrection or rebellion" against the United States, "or given aid or comfort to the enemies thereof." The disability can be removed by Congress by a two-thirds vote of each house. The text of the constitutional provision reads as follows:

> **Section 3**. 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.

The provision was proposed by Congress in 1866, and ratified by the requisite number of states as an amendment to the Constitution in 1868, as a measure to deal with those who engaged in the rebellion or supported the rebellion against the Union during the Civil War. Although it was adopted in reference to the Civil War, the wording of the provision is clearly broad and general enough to reach other situations involving the acts of rebellion, insurrection, or of giving aid or comfort to the enemy. Congress has adopted legislation on several occasions lifting the disability regarding specified persons, and has twice adopted legislation by the requisite two-thirds majority to provide a general "amnesty" towards those who, up until the time of the adoption of that legislation, may have been disqualified for public office.[92]

(...continued)

marginal relevance and reliability.

[92] Note discussion in Congressional Research Service, Library of Congress, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. 108-17, at 2034-2035 (2004); and 17 Stat. 142 (1872), and 30 Stat. 432 (1898).

It is not precisely clear from the constitutional provision all of the acts or conduct which would constitute "insurrection or rebellion," or of giving "aid or comfort" to the enemy (as no applicable definitions are provided in the text of the Constitution), or what proofs of such conduct would be required to trigger the disqualification provision.[93] Early congressional precedents indicate that, prior to the adoption of the Fourteenth Amendment, the House in 1867 considered challenges to the seating of Members-elect from Kentucky who presented credentials, but who had been charged with giving "aid or countenance" to the rebellion, and who therefore, it was argued, could not "honestly and truly" take the oath of office to support the Constitution.[94] A majority of the committee report to the House, concerning Member-elect John D. Young, who was excluded by majority vote, offered the following conclusion as to the sufficiency of the acts involved to constitute actionable disloyalty during a period of active rebellion against the United States:

> [W]hile mere want of active support of the Government or a passive sympathy with the rebellion are not sufficient to exclude a person regularly elected from taking his seat in the House, yet whenever it is shown by proof that the claimant has by act or 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 and 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.[95]

Additionally, the mechanisms for enforcement or application of the provision are not specified in the Constitution, but it may be argued that for one already serving in the government, legislation applying the disability would have to be enacted by Congress to remove such officer based on disloyalty.[96] For Members-elect, Congress would need to take such action to "exclude" upon a challenge with respect to a particular individual.

In the one instance in Congress, other than the Civil War cases, where the constitutional disqualification provision has been applied to actually prevent the seating of a Member-elect (it was applied twice consecutively to this same individual), the House of Representatives formally voted to "exclude" Member-elect Victor Berger who had previously been convicted of a violation of the Espionage Act of 1917,[97] but whose appeal was still pending. Victor L. Berger was a socialist and pacifist from Wisconsin who had been elected to the House of Representatives originally in November of 1910, but was defeated for re-election in 1912 (serving until the end of the term on March 4, 1913). Berger became a prominent member of the Socialist Party, and a newspaper editor who wrote and inveighed against the United States' entry into World War I, was a signatory to a socialist manifesto against the war, and wrote against the draft, urging resistance, during that time period. The indictment of Berger and four others (on February 2, 1918) under the Espionage Act was made public during the time that Berger ran for Congress as a member of the

[93] Note early case applying the terms "engaged in insurrection or rebellion," as including only voluntary and not coerced acts (such as conscription), United States v. Powell, 27 Fed. Cas. 605 (C.C.D.N.C. 1871)(No. 16,079).

[94] Exclusion of Member-elect John D. Young, H.R. Rpt. No. 2, 40th Cong., 2d Sess. (1867), see 1 HINDS' PRECEDENTS, *supra* at § 448, p. 443.

[95] *Id.*

[96] Note Griffen's Case, 11 Fed. Cas. 7, 26 (C.C.D.Va, 1869)(No. 5815), finding that one appointed prior to the Fourteenth Amendment would be removed only by implementing legislation from Congress, and finding that decisions and official acts of such disqualified person would *not* be void, as the court applied a *de facto* officer concept.

[97] Pub. L. No. 24, 65th Cong., 40 Stat. 217 (June 15, 1917). The act has been amended several times and the current version is codified at 18 U.S.C. § 794.

Socialist Party in 1918.[98] Despite his indictment, Berger was elected, and certified by the state of Wisconsin as the winner of the November 1918 election to the House of Representatives from the fifth congressional district. By the time Berger presented himself for membership to the House of Representatives at the beginning in the 66th Congress in May of 1919, he had been convicted under the Espionage Act and sentenced to 20 years' imprisonment in Fort Leavenworth, but was out on bail pending appeal. Upon an objection by another Member, Berger was asked to stand aside during the taking of the oath of office by the rest of the Wisconsin delegation, and the question of whether he was entitled to the seat was referred to a special committee for recommendation.[99] The special committee took cognizance of, but did not believe that it was bound by, the jury conviction of Berger under the Espionage Act (which at that time was on appeal), and made what it considered an independent finding, based on the facts revealed in that case, that under the Fourteenth Amendment, Section 3, Berger was disqualified from the House for disloyalty and should not be seated.[100] The vote in the House of Representatives to "exclude" Berger from membership, which required only a majority vote (because it was an "exclusion" of a Member-elect for lack of qualifications, or disqualifications, and not an "expulsion" of a sitting Member for misconduct), was adopted by a vote of 377-1.[101] Pursuant to long-standing House precedent, the seat was declared vacant (the second-place vote getter was deemed *not* entitled to the seat under the "American Rule"),[102] and a special election was called by the governor of Wisconsin, which was won again by Berger, who was then again "excluded" by the House of Representatives and not seated because of the Fourteenth Amendment, Section 3, "disloyalty" disqualification, on January 10, 1920.[103] No further special election was called by the governor for the remainder of that term, and Berger then lost the next regularly scheduled biennial election for Congress in November of 1920.

It is interesting to note that in November of 1922, after Berger's conviction under the Espionage Act was overturned by the Supreme Court (in 1921) because of apparent bias of the lower court judge,[104] Berger once again won election to Congress, and this time was seated by the House of Representatives without objection.[105] Although the facts underlying the original conviction of Berger under the Espionage Act did not necessarily change in the overturning of his conviction on what might now be called a "technicality," it is possible that the apparent distinction in the later Congress in seating Berger may have been the lack of a current conviction of the Member-elect for "aiding or comforting" the enemies of the United States, and the fact that the United States decided against pursuing the charges after the Supreme Court's reversal of the original conviction.[106]

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[98] For a general discussion of the Berger matter, see Edward J. Muzik, *Victor L. Berger: Congress and the Red Scare*, WISCONSIN MAGAZINE OF HISTORY, Vol. 47, no. 4, at 309-318 (Summer 1964).

[99] See discussion of congressional actions in 6 CANNON'S PRECEDENTS, *supra* at §§ 56-59, pp. 52-63.

[100] H.R. Rpt. No. 413, 66th Cong, 1st Sess. (1919).

[101] 58 CONG. REC. 8219, 8261-8262 (November 10, 1919).

[102] 6 CANNON'S PRECEDENTS, *supra* at §58, p. 59, quoting from H.R. Rpt. 414, 66th Cong, 1st Sess. (1919).

[103] 59 CONG. REC. 1339, 1343-1344 (January 10, 1920).

[104] Berger et al. v. United States, 235 U.S. 22 (1921).

[105] 65 CONG. REC. 16-18 (68th Cong., 1st Sess., December 5, 1923).

[106] Some historians and commentators have argued that the diminishment of the "red scare" and the waning of the nationalist fervor of World War I contributed to the political climate which permitted Berger's seating in 1922. Muzik, *Victor L. Berger: Congress and the Red Scare*, *supra* at 318.

## Holding Other Federal Office

The Constitution provides at Article I, Section 6, clause 2, that "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." This provision is a classic prohibition on "dual office holding," and informs and enforces the separation of powers scheme inherent in the Constitution.[107] The provision is directed at an officer of the United States who may not also "be a Member of either House" during his or her tenure, and as such would not necessarily prohibit a federal officer merely from *running* for congressional office,[108] but would require someone who is an officer of the federal government to relinquish that office before being sworn in and seated in the House or the Senate.[109] The principal issues and questions under this clause have concerned whether a sitting Member of Congress may also accept a military commission or office without vacating his or her congressional seat.

## Impeachment

The provisions of the U.S. Constitution regarding impeachment in the House of Representatives and trial and conviction in the Senate, apply to "all civil Officers of the United States."[110] Article I, Section 3, clause 7, of the Constitution provides that judgment in a conviction in an impeachment trial in the Senate "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…." Precedents indicate that a conviction in the Senate under an article of impeachment would automatically result in removal from office, but that if disqualification from holding federal office is to be part of the judgment in an impeachment conviction, it must be *expressly* provided as part of that judgment, and must be agreed to in a separate (majority) vote on the conviction judgment.[111] A federal officer who is impeached and removed from office, when disqualification is included and approved by the Senate as part of the judgment upon conviction, will be disqualified from holding federal office, and could be subject to exclusion on this basis by the House or Senate, as appropriate.[112]

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[107] An earlier part of the same section of the Constitution prohibits a Member of Congress during the time of his term from being appointed to any federal office which had been created, or for which the emoluments had been increased, during his time in Congress. This conflict of interest provision is not a permanent bar, and is not applicable to a former Member after his or her term has expired.

[108] Such candidacy by federal executive branch officers and employees may be barred, however, under the provisions of the so-called "Hatch Act" which, if applicable, would require resignation from office to run for Congress, or to be a candidate in *any* partisan election. 5 U.S.C. § 7323(a)(3). The Hatch Act, applicable to personnel in the executive branch, does not apply to the President or Vice President.

[109] 1 HINDS' PRECEDENTS, *supra* at §§ 497-499, pp. 623-627.

[110] U.S. CONST., art. II, § 4.

[111] Note, for example, vote to disqualify Judge Robert W. Archibald, 49 CONG. REC. 1447-1448 (January 13, 1913); 6 CANNON'S PRECEDENTS, *supra* at § 512. See also Waggoner v. Hastings, 816 F. Supp. 716, 719 (S.D. Fla. 1993).

[112] There is no precedent where a former federal officer who has been convicted in an impeachment, and disqualified, has been elected to Congress. Although the term "civil Officer of the United States" in the impeachment clause in Article II, § 4, has been interpreted by Congress as *not* applying to Members of Congress (who are removed by the more simplified, one-house process of expulsion, see case of Senator William Blount of Tennessee, expelled on July 8, 1797, and who was found not subject to impeachment, 3 HINDS' PRECEDENTS, *supra* at §§ 2294-2318 ), the disqualification penalty uses the terms "any Office of honor, Trust or Profit under the United States" (Art. I, § 3, cl. 7), and thus might be seen to be broader than the meaning of "civil Officer" in Article II, and to thus include a Member of Congress within those offices from which one is disqualified. Note assumption in Waggoner v. Hastings, *supra* at 719-
(continued...)

## Oath of Office

The Constitution provides at Article VI, clause 3, that Senators and Representatives, as well as all other federal and state officers in the executive, legislative, and judicial branches, are required "by Oath or Affirmation to support this Constitution ...." The oath or affirmation that is taken by Members of Congress and other federal officials is now codified in federal law.[113] As discussed earlier in this report, a Member-elect or Senator-designate, is not yet a Member of Congress until such person has taken the constitutionally required oath of office and is seated by the House or Senate. When a Member-elect's failure or inability to take the oath of office is temporary, and not permanent, the House or Senate may wait to administer the oath to such person when able, or may in unusual instances authorize an officer of the House or Senate to travel to the Member-elect to administer the oath of office *in situ*.[114]

In some circumstances, however, if a Member-elect is absolutely unable to take the oath of office, or intentionally fails or refuses to take the oath of office, the House or Senate may declare by majority vote the seat "vacant." This has been done in the House when a Member-elect, while campaigning with a colleague, was lost in a plane crash shortly before the election, when his name remained on the ballot and he received the most votes at the election, but who was still missing and presumed dead at the beginning of the new Congress.[115] In another case of a Member-elect unable to take the required oath of office, Representative-elect Gladys Noon Spellman of Maryland, while a candidate in 1980, had a heart attack and fell into a deep coma that persisted through her election, and up to and beyond the time of the meeting of the new Congress. The House, through the offices of the Attending Physician of the Capitol, determined that that "the most recent medical information provided to the Speaker indicates that there is no likelihood that Representative-elect Gladys Noon Spellman will recover sufficiently to be able to take the oath of office and serve as a Member of this House," and then declared by simple resolution a "vacancy" in the House from that congressional district,[116] triggering the vacancy provision for the state of Maryland.

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720. The House or Senate, faced with this issue, could decide to exclude a Member-elect on this basis.

[113] 5 U.S.C. § 3331.

[114] The House has recognized *temporary* incapacities of Members-elect who can not attend the beginning of the session of Congress for swearing in because of illness or injury, by authorizing the Speaker, or "another than the Speaker," to administer the oath of office to the Member-elect "away from the House" (DESCHLER'S PRECEDENTS, *supra* at Ch. 2, § 5, p. 117), and the Senate has also authorized administration of the oath to an absent Senator-elect in his home State on "rare occasions." DESCHLER'S PRECEDENTS, *supra* at Ch. 2, § 5.24, p. 129

[115] Note presumption of death of Member-elect Hale Boggs of Louisiana, whose plane was lost in Alaska, along with Representative Nick Begich, on October 16, 1972. Boggs received the most votes in the November election the next month in his Louisiana district. At the beginning of the new Congress, the House adopted a resolution taking note of the crash and the judicial findings in Alaska concerning the other three victims of the crash, and concluding that it is assumed from the evidence that Member-elect Boggs also died in the crash or its aftermath, and therefore, the House formally "determines that there is a vacancy in the Ninety-third Congress in the representation from the Second Congressional District in the State of Louisiana because of the absence of Representative-elect Boggs." H.Res. 1, 93rd Congress, 119 CONG. REC. 15-16 (January 3, 1973). *See* also Wash. Post, November 9, 1972, at A25; Wash. Star, December 7, 1972, at A16; Wash. Post, December 8, 1972, at A7; N.Y. Times, December 13, 1972, at 48; 2 DESCHLER'S PRECEDENTS, Ch. 8, § 9.5; CQ, CONGRESS AND THE NATION, Volume III, 1969-1972, at 24.

[116] H.Res. 80, 97th Congress, 127 CONG. REC. 2916 - 2917, February 24, 1981.

# Additional Qualifications Found Prohibited

## Durational Residency Requirements

Although debated during the Federal Convention of 1787, there was no "durational" residency requirement included in the Constitution for congressional office, as the qualifications provisions merely provide that one be an "inhabitant" of the state "when elected." Therefore, even if a particular state law or state constitutional provision provided, for example, that one must be a "qualified elector" of the state as a qualification to hold a particular office, and that to be such a "qualified elector" one must have resided in the state for a particular amount of time,[117] such provision would have force and effect only as to state and local offices, and could not disqualify one from being chosen as a U.S. Senator or Representative.[118] In the Senate election case of Pierre Salinger in 1964, some Senators argued that he was not qualified to be chosen to fill the unexpired term of a Senator from California because, under the laws of the state of California, he had not resided in California long enough to meet the state's qualifications of being an "elector," which state law expressly required for a candidate for Congress. The Senate found, in accordance with the findings of the Privileges and Elections Subcommittee of the Committee on Rules, however, that state law cannot bind the Senate in determining the constitutional qualifications for office, and cannot, therefore, add a "durational" residency requirement to the qualification for Senator set out in the Constitution—an "inhabitant" of the state "when elected."[119]

Federal courts have also found that states may not add to the qualifications of those to be chosen to federal office by establishing durational residency requirements of various lengths as a qualification to be on the ballot or to be elected, and have overturned such provisions of state law when challenged.[120] Similarly, a federal court has found that a congressional candidate is not "disqualified" merely because that candidate has changed his lawful residence to another state sometime before the date of election because, as there is no durational residency requirement for Congress, that candidate could merely move back to the state and re-establish residency at any time prior to the election and thus qualify as an "inhabitant" of the state "when elected."[121]

## Living in Congressional District

There is no requirement in the U.S. Constitution that one be an inhabitant of, resident, or that one must otherwise live in the congressional district in which one is running for a seat in the U.S.

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[117] States have authority to establish qualifications for voting for federal office, as long as such qualifications are in conformance with the Constitution and are the same as voting for state office. Article I, Section 2, cl. 1.

[118] *See* discussion and findings in election case of Pierre E.G. Salinger, Case 134, UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793-1990, *supra* at 413; and S. Rpt. 1381, 88th Cong., 2d Sess. (1964).

[119] S. Rpt. 1381, *supra* at 4-6. Since a state may set qualifications for *electors*, but not for holding federal office, there may be the potential anomaly of someone (such as, for example, a very recent "inhabitant" of a state) who is qualified to run for the Senate under the United States Constitution, but is not qualified to vote for himself or herself under state law.

[120] Dillon v. Fiorina, 340 F. Supp. 729, 731 (N.M. 1972); Campbell v. Davidson, 233 F.3d 1229 (10th Cir. 2000), *cert. denied,* 532 U.S. 973 (2000); Schaefer v. Townsend, 215 F.3d 1031 (9th Cir. 2000), *cert. denied,* Jones v. Schaefer, 532 U.S. 904 (2000).

[121] Texas Democratic Party v. Benkiser, 459 F.3d 582, 585-588 (5th Cir. 2006), *Application for Stay to Supreme Court, denied*., No. 06-A-139 (2006).

House of Representatives, as the Constitution specifically requires only that a Member of the House be "an Inhabitant of that State in which he shall be chosen."[122] State statutes which had required residency in a congressional district were overturned as unconstitutional additional qualifications to congressional office in those cases in which that provision was challenged.[123]

## Convicted Felon

The conviction of a crime which constitutes a felony or a crime of "moral turpitude" does not constitutionally "disqualify" one from being a Member of Congress (unless, as discussed above, pursuant to the Fourteenth Amendment that conviction is for certain disloyal conduct after having taken an oath of office). Thus, the fact of a criminal conviction could not be used to keep a candidate for federal office off of the ballot under state law, either as a direct disqualification of convicted felons from holding or being a candidate for office, or as a disqualification of one who is no longer a "qualified elector" in the state.[124] Once a person meets the three constitutional qualifications of age, citizenship and inhabitancy in the state when elected, that person, if duly elected, is constitutionally "qualified" to serve in Congress, even if a convicted felon. Similar to the durational residency requirements, the fact that a state may set qualifications for the *electors* who may vote for House or Senate candidates,[125] but may not establish qualifications for holding federal office, may create the potential anomaly of someone, such as a convicted felon, who is qualified to run for Congress under the provisions of the U.S. Constitution, but is not qualified to vote for himself or herself under state law.

Similar to the fact of a felony conviction, the fact that an individual is in prison is also not necessarily a constitutional bar to or an automatic disqualification from running for and being elected to Congress. In fact, as early as 1798 a Member of the House was re-elected to Congress while imprisoned within his home state. Representative Matthew Lyon, an outspoken Republican critic of the Federalists, and particularly of President John Adams, was convicted and imprisoned on October 9, 1798, under the so-called "Sedition Act" for "libeling" President Adams.[126] While still in prison in Vergennes, Vermont, Lyon won re-election to Congress in a December 1798 run-off election. Upon Lyon's eventual arrival in Congress in Philadelphia after four months' imprisonment, a Federalist Member of the House offered a resolution of expulsion of Lyon, which failed of the required two-thirds vote.[127]

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[122] U.S. CONST. art. I, §2, cl. 2.

[123] Hellmann v. Collier, 141 A.2d 908, 911-912 (Md. 1958); Exon v. Tiemann, 279 F. Supp. 609, 613 (Neb. 1968); State ex rel. Chavez v. Evans, 446 P.2d 445, 448 (N.M. 1968). See also discussion and note (but not part of holding in) Kislov v. Rednour, 226 F.3d 851, 856 n.1 (7th Cir. 2000), *cert. denied,* McGuffage v. Kislov, 531 U.S. 1147 (2001).

[124] Application of Ferguson, 294 N.Y.S.2d 174, 176 (Super. Ct. 1968); Danielson v. Fitzsimmons, 44 N.W. 2d 484, 486 (Minn. 1950); State ex rel. Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918); In re O'Connor, 173 Misc. 419, 17 N.Y.S. 2d 758 (S. Ct. 1940).

[125] U.S. CONST. art. I, §2, cl. 1, and amend. XVII.

[126] Lyon had written that in President Adams he saw "every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice ...." McLaughlin, MATTHEW LYON, THE HAMPDEN OF CONGRESS, A BIOGRAPHY, at 344 (New York 1900).

[127] ANNALS OF THE CONGRESS OF THE UNITED STATES, 2959-2974, 5th Congress, February 22, 1799. Many years later, in 1840, after years of debate over the constitutionality and appropriateness of passing the Sedition Act, Congress passed a private bill reimbursing Lyon's heirs the fine and court costs associated with his conviction. H.R. 80, 26th Cong., 1st Sess., JOURNAL OF THE HOUSE OF REPRESENTATIVES 994 - 998, 26th Cong., May 23, 1840, and JOURNAL OF THE SENATE 447, 26th Cong., Tuesday, June 24, 1840.

## Congressional Incumbency; Term Limits

State efforts to enact absolute "term limits" on Members of Congress from their states, or to place disabilities or ballot disadvantages to long-term incumbents in an effort to indirectly effectuate term limits, have all been found to be unconstitutional as additional qualifications to congressional office from those established in the U.S. Constitution.[128] As noted in the federal cases reviewing such legislation, term limits for congressional office, or "rotation" as it was called in 1700s, had been discussed in the Federal Convention of 1787 but not adopted, and any additional qualification to hold congressional office, such as that one is currently not an incumbent of the office for a particular number of terms or years, would require a constitutional amendment to implement.

## Former State Officials Holding Congressional Office

Some provisions under the laws of various states had sought to prohibit an elected or appointed official of that state from holding or being eligible for another public office, including congressional office, not only while that person was in the state office, but also for the remainder of the term of that office (even if the official had resigned), or in some cases for a period of time, such as six months or a year, *after* the expiration of the term. These state statutory provisions were different from so-called "resign to run" laws which merely require a state official not to engage in partisan political activity while in office, and therefore would require that the official resign from state office before running for or campaigning for a congressional seat. These provisions, however, acted as an absolute bar to congressional office and candidacy imposed by the state for a certain period of time, whether the individual was currently a state officer or not, and have been found in several states, where they sought to restrict the eligibility of officials such as governors or judges to congressional office for particular periods of time, to be unconstitutional additional qualifications to congressional office.[129]

## Loyalty Oaths

State statutes which had required the taking of non-subversive loyalty oaths as a prerequisite to be on the ballot or to be eligible to public office, when such oaths were not contrary to the First or Fourteenth Amendment, were found to be an impermissible additional qualification to office when applied to congressional candidates. In Maryland, for example, the Court of Appeals found,

> While Section 15 of Chapter 86 might in its terms be broad enough to cover candidates for Congress, such a construction would bring it in conflict with the Federal constitution, and we think therefore it can not be properly so construed. Candidates for Federal offices must comply with state election laws before their names can be placed upon the ballot, *Vaughn v. Boone*, 191 Md. 515, 62 A.2d 351, but this does not authorize the State to include in the

[128] U.S. Term Limits, Inc. v. Thornton., 514 U.S. 779 (1995); Cook v. Gralike, 531 U.S. 510 (2001).; Thorsted v. Gregoire, 841 F. Supp. 1068, 1081 (WD Wash. 1994); Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992).

[129] Chandler v. Howell, 104 Wash. 175 P. 569 (1918); Eckwall v. Stadelman, 146 Ore. 439, 30 P. 2d 1037 (1934); Stockton v. McFarland, 56 Ariz. 138, 106 P. 2d 328 (1940); State ex rel. Johnson v. Crane, 65 Wyo. 189, 197 P. 2d 864 (1948); Buckingham v. State, 42 Del. 405, 35 A. 2d 903 (1944); State v. Zimmerman, 249 Wis. 237, 24 N.W. 2d 504 (1946); In re Opinion of Judges, 79 S.D. 585, 116 N.W. 2d 233 (1962).

> election or other laws of the State any requirement which would add additional qualifications to the office.[130]

# Permitted "Ballot Access" or Administrative Requirements vs. Additional Qualifications

Although the federal Constitution establishes the terms of federal offices and the qualifications of candidates eligible for those federal offices (and neither Congress nor any state unilaterally may alter them),[131] and each House of Congress remains the final judge of the elections and qualifications of its own Members,[132] the states have the express, primary authority to *administer* the elections for federal congressional offices that are held within their borders.[133] Under the express constitutional authority of the states to regulate the "Times, Places and Manner" of elections, the states may promulgate regulatory and administrative provisions over the mechanics and procedures of elections for federal offices held within their states.[134] This procedural and administrative authority extends to such things as the form of the ballots, voting procedures, counting votes and certifying winners, the nominating process, and may extend to reasonable requirements for a candidate's name to appear on the ballot, that is, so-called "ballot access" requirements for major party, new party, and independent candidates.

Legitimate "ballot access" rules are generally promulgated by states to prevent the proliferation of frivolous candidates, ballot overcrowding and voter confusion, election fraud, and to facilitate generally proper election administration.[135] Various "ballot access" procedures, including filing requirements, filing deadlines, a show of qualifying support by new or minor party or independent candidates, "sore loser" laws and other restrictions on cross-filing, have been found generally to be within the state's purview to "regulate[ ] election *procedures*" to serve the state interest of "protecting the integrity and regularity of the election process ... ," and when they are found to be within the state's administrative authority over elections, they would be deemed to be not impermissible additional qualifications for federal office even though they create certain procedural hurdles or requirements which a candidate must overcome.[136]

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[130] Shub v. Simpson, 196 Md. 177, 76 A.2d 332, 340 (1950). See also In re O'Connor, 173 Misc. 419, 17 N.Y.S. 2d 758, 760 (Super. Ct. 1940).

[131] Powell v. McCormack, *supra*; U.S. Term Limits, Inc. v. Thornton, *supra*; Cook v. Gralike, *supra*.

[132] Article I, Section 5, cl. 1.

[133] Article I, Section 4, cl. 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Additionally, the states, within constitutional parameters, have the authority to set the qualifications to vote for those federal offices, but such qualifications must be the same as those to vote for the "most numerous Branch of the State Legislature." Article I, Sec. 2, cl. 1.

[134] Article I, Section 4. Congress retains residual constitutional authority over time, place and manner of elections to federal office, except as to the place for electing Senators.

[135] Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); Bullock v. Carter, 405 U.S. 134, 145 (1972); Williams v. Tucker, 382 F. Supp. 381, 387-388 (M.D.Pa. 1974). Constitutionally acceptable "ballot access" provisions, in addition to the requirement that they impose no substantive, new qualifications to federal office, must not violate equal protection provisions of the Constitution by impermissibly discriminating against new or independent candidates, nor impermissibly infringe upon First Amendment rights of voters to associate freely and express their political opinions through support of their chosen candidates.

[136] See discussion in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-835 (1995), comparing legitimate "ballot (continued...)

The Supreme Court has generally distinguished impermissible additional qualifications for congressional office—such as term limits or prohibitions on candidacy of convicted felons—from permissible ballot access rules by the "purpose" and "effect" of such restrictions. For example, the Court noted that the purpose and effect of state-imposed term limits is "to prevent the election of incumbents" by barring them from the ballot.[137] The "purpose" and "effect" of prohibited additional qualifications to office will thus often involve absolute barriers or significant disadvantages to a class of persons based on their status, as opposed to procedural hurdles or limitations which may involve either a legitimate showing of support by independent or new party candidates, or those which will require a choice made by and within the control of the candidate as an avenue to the general election ballot.

## Signature, Petition Requirements

States generally provide differing routes to the general election ballot for independent or new party candidates for Congress, as opposed to major party candidates nominated by the major political parties. Major party candidates who are nominated, for example, at a party convention or caucus might, under state law, be placed on the general election ballot "automatically" when certified as the nominee by that political party; while independent candidates must often meet petition requirements to be placed on the ballot involving the gathering of a particular number of signatures based on an absolute number required, or a percentage of the electorate or voting age population.[138] Even when one is a candidate for the nomination of a *major* political party in a primary election, the state may routinely require that such candidate garner a particular number of signatures to appear on the primary ballot.

The petition-signature requirements for congressional candidates to appear on the ballot in various states have been challenged on both First Amendment and Fourteenth Amendment grounds. That there may be differing requirements for ballot access depending on whether one is the nominee of a major political party, a minor or new party, or an independent candidate, is not necessarily constitutionally impermissible under either the First or the Fourteenth Amendments as long as such methods do not "unfairly or unnecessarily burden" new, minor party, or independent candidates or their political supporters.[139] As noted by the Supreme Court, "The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates."[140]

When such signature gathering petition requirement was challenged as an impermissible additional qualification to office, the federal court upheld the statute by similarly finding such

(...continued)

access" provisions as in *Storer v. Brown, supra*, with impermissible additional qualifications for federal office, such as individual state-imposed term limits.

[137] *U.S. Term Limits, Inc* , 514 U.S. *supra* at 830.

[138] See, for example, survey of state filing and ballot access requirements for Senate elections in United States Senate, Committee on Rules and Administration, SENATE ELECTION LAW GUIDEBOOK 2010, Part III, at pp. 219-289.

[139] "[B]allot access must be genuinely open to all, subject to reasonable requirements." Lubin v. Panish, 415 U.S. 709, 716, 719 (1974)(filing fees); Burdick v. Takushi, 504 U.S. 428, 432-434 (1992)(prohibition on write-in votes); Jenness v. Fortson*, supra* at 439 (1971); McCarthy v. Briscoe, 429 U.S. 1317 (1976); Williams v. Rhodes, 393 U.S. 23 (1968).

[140] Anderson v. Celebrezze, 460 U.S. 780, 788-789, n. 9 (1983), citing to Jenness v. Fortson, 403 U.S. 431 (1971) and American Party of Texas v. White, 415 U.S. 767 (1974).

requirement to be a reasonable "ballot access" procedural or administrative provision which sought to require and assure a modicum of public support to be on the ballot to prevent the overcrowding of the ballot with fringe or frivolous candidates.[141]

## "Sore Loser" Laws

Certain states have statutory provisions that have become known as "sore loser" laws. "Sore losers" have been described by one U.S. Court of Appeals as follows: "'Sore losers' are candidates who lose a major party primary but insist on running on a minor party ticket" or as an independent in the general election.[142] The laws in several states now prohibit one who has run and lost in a primary, from obtaining a place on the ballot in the general election as an independent or as a minor party candidate.

In early state litigation, in 1902, a Minnesota statutory scheme preventing an unsuccessful congressional candidate at a primary election from having his name printed on the general election ballot as an independent for the same congressional office was upheld against a challenge that it created an additional qualification to office, as long as the candidate could run in a write-in campaign.[143] Similarly, in 1934, a Nebraska Supreme Court ruled that a candidate who was defeated in the primary election for the office of governor could not by petition have his name printed on the general election ballot even for another office (that of U.S. Senator), since the statutory scheme preventing those defeated at the primary from being on the ballot in the general election did not create an additional qualification for congressional office.[144] In the only case found voiding a "sore loser" law's application to a congressional candidate, the North Dakota Supreme Court in 1942 ruled that the state statute was inapplicable to congressional candidates on the basis that it impermissibly created an additional qualification for congressional office.[145]

The clear trend in litigation in federal courts has been favorable to state "sore loser" laws as a species of "ballot access" provisions that help states maintain the integrity of the nominating and election process by preventing "interparty raiding," carrying "intraparty feuds" into the general election, "unrestrained factionalism," ballot clutter, and voter confusion.[146] In *Williams v. Tucker*, a three-judge federal district court upheld the provisions of the Pennsylvania election code which worked to require a candidate to choose between a primary nomination or an independent petition route to the general election, and which barred both state and federal candidates who lost in the primary election from running again in the general election as independent candidates.[147] The court in *Williams v. Tucker* relied significantly on the Supreme Court decision and reasoning in *Storer v. Brown*, in justifying certain state regulations on the nomination, ballot, and general election procedures. The court there found that the laws in question, "which have the combined

[141] Cartwright v. Barnes, 304 F.3d 1138, 1143 (11th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003): ".... we conclude that Georgia's 5% [signature] requirement is likewise an election procedure and not a substantive qualification."

[142] Patriot Party v. Allegheny City Dept. of Elections, 95 F.3d 253, 265 (3rd Cir. 1996). The court in *Patriot Party* found that the state prohibition on cross-party nominations by small parties was not a "sore loser" law, and did not narrowly promote a sufficient interest to overcome constitutional objections of burdening First and Fourteenth Amendment rights of free association. *Id*. at 264.

[143] State ex rel. McCarthy v. Moore, County Auditor, 87 Minn. 308, 92 N.W. 4 (1902).

[144] State ex rel. O'Sullivan v. Swanson, 257 N.W. 255 (Sup. Ct. Neb. 1934).

[145] State ex rel. Sundfor v. Thorson, 6 N.W. 2d 89, 90-92 (Sup. Ct. N.D. 1942).

[146] Storer v. Brown, 415 U.S. at 731, 735, 736; Patriot Party v. Allegheny City Dept. of Elections, 95 F.3d at 264-265.

[147] 382 F. Supp. 381, 387-388 (M.D.Pa. 1974).

effect of preventing a candidate defeated in the primary from obtaining a position on the general election ballot as the candidate of a political body, do not for this reason violate the first amendment or the equal protection clause of the fourteenth amendment."[148]

## Disaffiliation Laws

In California, the statutory scheme upheld by the Supreme Court, in *Storer v. Brown, supra,* worked to prevent a ballot position to an independent candidate not only if that candidate had run in and been defeated in a primary election of a political party (a so-called "sore loser" provision), but also if that person had "voted in the immediately preceding primary" or "had a registered affiliation with a qualified political party at any time within one year prior to the immediate preceding primary election."[149] This so-called "disaffiliation" requirement, along with the "sore loser" provision, were found by the Supreme Court to further important and compelling state interests:

> A candidate in one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have associated with another political party for a year prior to the primary. ... The direct primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The state's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.
>
> Section 6830(d)(Supp. 1974) carries very similar credentials. It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidates prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.
>
> ... California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. The Federalist, No. 10 (Madison).[150]

## "Fusion" Candidates

In a somewhat similar vein as the disaffiliation laws, the Supreme Court upheld a Minnesota statute which prohibits, as do the laws of many other states, a candidate from appearing on the

[148] *Id.* at 387.

[149] *Storer v. Brown*, 415 U.S. at 726.

[150] *Storer v. Brown*, 415 U.S. at 734-736. See also Van Susteren v. Jones, 331 F.3d 1024, 1027 (9th Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004).

ballot as the candidate of more than one political party, often referred to as "fusion" candidacies. While the Court noted some potential burden on the First and Fourteenth Amendment rights of association and speech of a political party and its supporters in such anti-fusion laws, the Court found the burdens to be "not severe," as the laws "do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like," nor do they "directly limit the party's access to the ballot."[151] As such, the Court found that the state's interests "to reduce election - and campaign- related disorder," and the interests put forward by the state of "avoiding voter confusion, promoting candidate competition (by reserving limited ballot space for opposing candidates), preventing electoral distortions and ballot manipulations, and discouraging party splintering and 'unrestrained factionalism,'"[152] were sufficient state interests promoted by this ban.

## Filing Fees

Filing fee requirements for federal candidates are, as a general matter, permissible for the state to impose to cover administrative costs of elections. In *Biener v. Calio*, the United States Court of Appeals found that filing fees required by the parties in a primary election administered by the state for a political party were not considered to be an additional qualification because this was not one of those types of qualifications "that were inherent in the candidate."[153] It should be noted, however, that *significant* filing fees, when not reasonably connected to a state's legitimate interest, such as to cover administrative costs, have been struck down (for example, a filing fee for United States Senator of 6% of a year's salary for that office) as a violation of the equal protection component of the Fourteenth Amendment, as it "restricts the exercise of the franchise through a classification based on wealth ... ," and was not shown to be "reasonably necessary to the accomplishment of legitimate state objectives." [154]

## "Resign to Run," or Other "Hatch Act" Type Restrictions

Laws in certain states have been characterized as "resign to run" laws because they bar partisan political activity by current state officials, including a prohibition on campaigning for partisan elective office while a state official, or being a candidate or holding another public office during one's tenure, and would require that a state officer resign his or her office to run in a campaign for another office, including congressional office. Federal law currently has a provision which also generally bars employees in the executive branch of government from being candidates in a partisan election, thus requiring, in effect, that such employees resign from federal service before being candidates in a partisan election.[155]

[151] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997).

[152] *Timmons*, 520 U.S. at 358, 364.

[153] Biener v. Calio, 361 F.3d 206, 212 (3rd Cir. 2004), citing *U.S. Term Limits, Inc.*, 514 U.S. *supra* at 800. See also Fowler v. Adams, 315 F. Supp. 592, 594 (M.D. Fla. 1970), *appeal dismissed*, 400 U.S. 986 (1971).

[154] Dillon v. Fiorina, 340 F. Supp. 729, 730 (D.N.M. 1972), citing Bullock v. Carter, 405 U.S. 134 (1972).

[155] 5 U.S.C. § 7323(a)(3). A provision of the federal "Hatch Act" also prohibits state or local government employees whose salaries are "paid completely, directly or indirectly, by loans or grants made by the United States or a federal agency" from being candidates in a partisan election, including a congressional election. 5 U.S.C. §§ 1501, 1502(a)(3).

Although some earlier cases had found that the state resign to run laws were a violation of the Qualifications Clause as an additional qualification to congressional office,[156] more recent cases have found such provisions to be a legitimate regulation of the conduct of public officials, and not, in any event, an absolute disqualification of the person to be elected. In a case dealing with the federal Hatch Act's restriction on current postal workers running for congressional office, the U.S. Court of Appeals for the Third Circuit found in 2003 that the law did not add an additional qualification to congressional office:

> The Act allows a citizen a choice. It does not disqualify any individual from running for public office, but rather provides for the removal or suspension from public employment of any *federal employee* who runs "for the nomination or as a candidate for election to a partisan political office." 5 U.S.C. § 7323(a)(3). This distinction, between laws that bar potential candidates from running for elected office and laws that bar potential candidates from continuing to work for state or federal governments (so-called "resign to run" laws), is significant for the purpose of the Qualifications Clause. The former "imposes additional qualifications on candidates and therefore violates the Qualifications Clause, while the latter category is constitutionally acceptable since it merely bars state officeholders from remaining in their positions should they choose to run for federal office."[157]

States laws, similar in effect to the federal Hatch Act, which have barred running for Congress while a state judge, or as any state official, have also been upheld in federal court as not violating the Qualifications Clause.[158]

## Dual Candidacies

Most states have statutory provisions which bar or restrict "dual candidacies" in their elections, that is, statutory provisions which prohibit an individual from appearing on the ballot for more than one office in the same election. Some of the state statutory provisions exempt—and therefore allow—one to be a candidate for President and for another office at the same time,[159] while other provisions might apply only to dual candidacies for state and local offices, but not federal.[160] However, in many cases the dual candidacy restrictions of a state would prohibit one who is running, for example, for a state or local office or for President or Vice President from being on the ballot as a candidate for the United States Senate or House of Representatives.

No case law has been found which has struck down any of the numerous state provisions barring dual candidacy on the ground that it adds an additional qualification for federal office. Rather, when such a provision has been upheld (against First Amendment and Fourteenth Amendment challenges), the court found that the provision was a reasonable "ballot access" limitation which

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[156] Stack v. Adams, 315 F. Supp. 1295 (N.D.Fla. 1970); State ex. rel. Johnson v. Crane, 65 Wyo. 189, 197 P. 2d 864 (1948).

[157] Merle v. United States, 351 F.3d 92, 97 (3rd Cir. 2003), *cert. denied* 541 U.S. 972 (2004), quoting Joyner v. Mofford, 706 F.2d 1523, 1528 (9th Cir. 1983).

[158] Signorelli v. Evans, 637 F.2d 853 (2nd Cir. 1980)(New York state law regarding judges); Joyner v. Mofford, *supra* (Arizona constitutional provision applicable generally to state officials).

[159] See, for example, Official Code of Georgia, § 21-2-136; New Mexico Statutes, § 1-10-7; Ohio Revised Code, § 3513.052; Texas Statutes and Codes, § 141.033(c); West Virginia Code, § 3-5-7(h); Wisconsin Statutes, § 8.03(2).

[160] See, for example, Arkansas Code of 1987, § 7-5-111; Delaware Code, Title 15, § 4108; General Laws of Rhode Island, § 17-14-2(b).

sought to prevent voter confusion, helped to eliminate ballot overcrowding, and promoted restrictions and prohibitions on dual office holding.[161]

Since (under dual office holding prohibitions) an individual could generally not hold two elected offices simultaneously, such a ballot restriction would diminish the need for and expense of a future "special election" to fill a vacancy if the individual's candidacies were successful for both offices. In the interests of good election administration and associated public policy goals, therefore, the dual candidacy restriction may work to diminish the probability of "electing a vacancy"—which would leave the citizens of the state or district without representation for a period of time, and would require a future special election (in which, historically and traditionally, fewer citizens participate than in general elections). In a somewhat similar manner as the "sore loser" laws, "disaffiliation" rules, and the resign-to-run laws, the dual candidacy prohibition, rather than having the purpose or effect of excluding an entire category of candidates because of their status (that is, because of some characteristic that was "inherent in the candidate"[162]), would appear to have the effect of requiring a candidate to make a choice within the candidate's control to effectuate the state's legitimate public policy purposes.

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[161] Levy v. Jansen, 285 F.Supp.2d 710, 716-717 (E.D.Va. 2003).

[162] Biener v. Calio, 361 F.3d *supra* at 212.