B. Qualifications and Disqualifications

§ 3. Qualifications

The Constitution imposes certain qualifications on individuals seeking to become a Member of the House of Representatives.[1] The first such qualification is age: an individual must be at least 25 years of age in order to become a Member.[2] The second qualification is citizenship: an individual must have been a citizen of the United States for seven years.[3] The third qualification is inhabitancy: an individual must have been an inhabitant of the state in which they were elected at the time of the election.[4]

With respect to the first two qualifications, the Constitution does not specify the point at which the requirements must be met. However, it has been the practice of both Houses of Congress to admit individuals who meet those qualifications at the time at which the oath of office is administered and they formally assume all the rights and privileges of Members of Congress. Thus, where a Member–elect had not yet reached the required age at the opening of the Congress to which he was elected, the administration of the oath was delayed until the constitutional requirement had been met.[5] Similarly, where a Member–elect was a U.S. citizen, but not for the required seven years, the administration of the oath was delayed until the full seven–year period had elapsed.[6] With respect to the third qualification (inhabitancy), the Constitution does specify that the qualification must be met at the time of election.[7]

It has been held that the constitutional qualifications are "exclusive of others."[8] In other words, neither the states (which administer the election

1. U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."). See also *House Rules and Manual* §§ 9–13 (2021).
2. U.S. Const. art. I, § 2, cl. 2.
3. U.S. Const. art. I, § 2, cl. 2. The Constitution further defines citizenship as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1.
4. U.S. Const. art. I, § 2, cl. 2.
5. See 1 Hinds' Precedents § 418. For a similar case in the Senate, see Deschler's Precedents Ch. 7 § 10.2.
6. See Deschler's Precedents Ch. 7 §§ 9.2, 10.1.
7. U.S. Const. art. I, § 2, cl. 2 (Representatives must inhabit the state "when elected.").
8. 1 Hinds' Precedents § 414.

of Members), nor the House (which determines who is entitled to seats in the House) has the authority, under the Constitution, to impose additional qualifications on those seeking to become Members. With respect to states, early precedents demonstrate a clear reluctance on the part of the House to refuse to seat individuals who had not met state–mandated requirements for eligibility.[9] With respect to the House itself, in 1967, the House voted to exclude a Member–elect (Adam Clayton Powell of New York) based on alleged corrupt activities occurring in the prior Congress.[10] This action was challenged in Federal court,[11] and eventually led to a Supreme Court ruling in Powell's favor.[12] The Court held that, "Congress is limited to the standing qualifications prescribed in the Constitution . . . since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership."[13] Similar questions regarding the Senate's ability to exclude qualified individuals from the Senate for campaign violations were raised in the 1940s, though without definitive conclusions.[14]

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9. See, *e.g.*, 1 Hinds' Precedents §§ 414–417. It should be noted that, with respect to vacancies that occur in the Senate, the Constitution provides that "any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." U.S. Const. amend. XVII. This authorization would seem to allow state legislatures to impose additional qualifications on those appointed to the Senate to fill a vacancy. See Deschler's Precedents Ch. 7 § 9.7 (fn. 17) ("[a] state legislature may empower the state executive to make temporary appointments to the Senate in the event of a vacancy, with the legislature setting qualifications for appointees.").

10. See Deschler's Precedents Ch. 7 §§ 9.1, 11.1. The issue of the final right to the seat in question was investigated by a committee, which recommended seating Powell but subjecting him to fines and other disciplinary actions. This proposition was rejected by the House. Deschler's Precedents Ch. 7 § 9.3.

11. See Deschler's Precedents Ch. 7 § 9.4.

12. *Powell* v. *McCormack,* 395 U.S. 486, 489 (". . . petitioner Powell is entitled to a declaratory judgment that he was unlawfully excluded from the 90th Congress.").

13. *Id.* at 550. For the Court's analysis of constitutional provisions beyond age, habitancy, and citizenship that may be regarded as qualifications of the office, see *id.* at 520 (fn. 41).

14. *Parliamentarian's Note:* In 1941, Senator William Langer of North Dakota was accused of "campaign fraud and conduct involving moral turpitude." Deschler's Precedents Ch. 7 § 9.5. As Sen. Langer had already been sworn in at the time of the challenge, the Senate considered the matter as an expulsion rather than an exclusion, and the expulsion vote failed to achieve the necessary two–thirds majority. Deschler's Precedents Ch. 7 § 11.3. In 1947, Senator Theodore Bilbo of Mississippi was accused of "fraudulent campaign practices" and conspiracy "to prevent the exercise of voting rights of certain citizens." Deschler's Precedents Ch. 7 § 9.6. The issue was postponed due to Sen. Bilbo's

The House (and Senate) have debated the extent to which loyalty to the United States should be considered as a relevant factor in determining whether an individual is qualified to serve in Congress. During the Civil War, Congress enacted the so–called "test oath" (or "ironclad oath") for civil servants and other government employees.(15) The oath required takers to affirm that they had never "voluntarily borne arms against the United States"(16) —which had the intended effect of barring most ex–Confederates from government service. Congress eventually applied the "test oath" to its own Members, and used it to exclude from membership those who could not or would not take the oath.(17) The 14th Amendment to the Constitution, ratified in 1868, provided that anyone who had "engaged in insurrection or rebellion" or who had "given aid or comfort to the enemies" of the United States, was barred from membership in the House or Senate.(18) Congress, by a two–thirds vote of each House, could "remove such disability."(19)

In the aftermath of World War I, another loyalty case came to the House with the election of Victor L. Berger, who had been convicted by a Federal court under a wartime espionage act for distributing antiwar materials.(20) There was no question that Berger had been validly elected, but the House nevertheless chose to exclude Berger on the basis of disloyalty under the 14th Amendment. In the special election to fill the vacancy caused by Berger's exclusion, Berger was again elected, and the House again adopted a resolution to exclude him from membership.(21)

The House has, on occasion, investigated the citizenship status of a Member–elect in order to determine whether the individual has properly met the constitutional requirement.(22) The very first election contest to reach the House in the First Congress involved questions as to the citizenship of the

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ill health, and he died prior to any decision by the Senate. Deschler's Precedents Ch. 7 § 11.2.

15. 20 Stat. 502.

16. *Id.*

17. See 1 Hinds' Precedents §§ 442–453.

18. U.S. Const. amend. XIV, § 3. For election cases involving this provision, see 1 Hinds' Precedents §§ 454–463.

19. U.S. Const. amend. XIV, § 3. Statutes enacted in 1872 (17 Stat. 142) and 1898 (30 Stat. 432) removed such disability for certain groups.

20. For descriptions of the Berger cases in the 66th Congress, see 6 Cannon's Precedents §§ 56–59.

21. See 6 Cannon's Precedents § 59. In the 68th Congress, Victor Berger was again elected, and the House chose to seat him without challenge. Berger also served in the 69th and 70th Congresses.

22. See, *e.g.*, 1 Hinds' Precedents §§ 424–427. For similar citizenship qualification issues in the Senate, see 1 Hinds' Precedents §§ 428–430.

Member–elect.(23) Naturalized citizens meet the constitutional requirement, and there have been historical instances of the House investigating the date of naturalization in order to confirm eligibility.(24) In a 20th century case, the citizenship status of a Member–elect was challenged, and the House resolved the question by seating the Member–elect and referring the issue of the final right to the seat to a committee.(25)

The constitutional requirement of inhabitancy has also been the basis for challenges of, and investigations into, the qualifications of individuals elected to the House.(26) Typically, such cases involve individuals who maintain two residences, and the dispute is centered on which should be considered their primary place of habitation.(27) A distinction has been made between "actual" and "legal" residence for purposes of interpreting this constitutional mandate.(28) The House has generally declined to accept challenges where the individual was engaged in government service at some location (*e.g.*, a foreign country, or the District of Columbia) that was not their primary residence.(29) A contestant in an election contest has been found to be ineligible to pursue his claim due to lack of inhabitancy in the relevant jurisdiction.(30)

The positions of Delegate and Resident Commissioner are not constitutional offices, and therefore the qualifications for Members do not apply.(31) Instead, the qualifications for such positions are laid out in the statutes that create those offices.(32) Nevertheless, these qualifications typically mirror the

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23. See 1 Hinds' Precedents § 420.

24. See 1 Hinds' Precedents §§ 424, 425.

25. See Deschler's Precedents Ch. 7 § 10.3. No further action was taken in the case and the Member served his full term. See Deschler's Precedents Ch. 7 § 11.4.

26. For Senate cases involving the question of inhabitancy, see 1 Hinds' Precedents §§ 437–440.

27. See, *e.g.*, 1 Hinds' Precedents § 432.

28. See 6 Cannon's Precedents § 55 (newspaper correspondent living in D.C. nevertheless maintained his legal residence in Indiana, where he paid taxes and voted).

29. *See, e.g.*, 1 Hinds' Precedents §§ 433, 435. But see 1 Hinds' Precedents § 434 (State Department clerk disqualified due to lengthy habitation in D.C. and the abandonment of any true residence in his home state).

30. See 1 Hinds' Precedents § 436.

31. For more on Delegates and Resident Commissioners generally, see Deschler's Precedents Ch. 7 § 3; and § 2, *supra.*

32. See 2 U.S.C. § 25a; and 48 U.S.C. §§ 892, 1713, 1733, and 1753. In the 27th Congress, the House investigated the qualifications of a Delegate from the Florida Territory, and a committee concluded: "While not strictly or technically a Representative, yet, considering the dignity and importance of the office, the strongest reasons of public policy would require that he should possess qualifications similar to those required by a Representative." 1 Hinds' Precedents § 423.

constitutional qualifications for Members, including the three attributes of age, citizenship, and inhabitancy.(33)

Procedure; Distinguishing Other Requirements

A challenge to the seating of a Member–elect on the basis of qualifications is typically made on opening day of a new Congress.(34) If a Member–elect believes that another Member–elect lacks the requisite qualifications, an objection may be raised to administering the oath of office to the challenged Member–elect. The House may then resolve the issue by: not seating the challenged Member–elect; seating the Member–elect despite the challenge; or seating the challenged Member–elect, but referring the issue of the final right to the seat to a committee.(35) If the House determines that a Member–elect does not meet the constitutional qualifications, the oath of office is not administered, and the Member–elect is termed "excluded" from the House.(36)

An exclusion from the House should be distinguished from an expulsion from the House.(37) In an expulsion proceeding, the individual is already a sworn Member and there is no question as to the individual's right to the seat. Therefore, the constitutional requirement of a two–thirds vote in favor of expulsion applies.(38) By contrast, a proposition to exclude a Member–elect from the House may be adopted by a simple majority vote. This is the case even where the individual has been sworn, but the question as to the final right to the seat is still pending before the House.(39)

An exclusion from the House should also be distinguished from proceedings in the nature of an election contest.(40) Election contests occur

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33. For an earlier statute requiring Delegates from certain territories to be citizens of the United States, see 1 Hinds' Precedents § 431.

34. *Parliamentarian's Note:* If an individual were to be elected to a seat in the House via special election (to fill a vacancy), a qualifications challenge would be made when the Member–elect arrives to take the oath.

35. For more on challenges to seating Members–elect at the organization of a new Congress, see Precedents (Wickham) Ch. 2 § 4.

36. For an earlier treatment of exclusion from the House, see Deschler's Precedents Ch. 12 § 14.

37. For expulsion generally, see Deschler's Precedents Ch. 12 § 13; and Precedents (_____) Ch. 12.

38. U.S. Const. art. I, § 5, cl. 2.

39. Deschler's Precedents Ch. 12 § 14 ("[A]lthough a two–thirds vote is required to expel a Member, only a majority is required to exclude a Member who has been permitted to take the oath of office pending a final determination by the House of his right to the seat.").

40. For election contests generally, see Deschler's Precedents Ch. 9; and Precedents (Smith) Ch. 9.

when there is a dispute as to whether the individual in question was properly elected—not whether the individual meets the constitutional requirements for membership. However, the procedure is effectively the same: an individual determined by the House not to have been properly elected will be barred from taking a seat (*i.e.*, the administration of the oath of office will not be authorized). In cases where the contestant in an election contest bases their challenge on the claim that the contestee is ineligible to serve for lack of qualification, the House may treat the issue as one of exclusion rather than a contested election.(41) If a Member–elect is excluded from the House for failing to meet the constitutional requirements for eligibility, the candidate receiving the next highest number of votes cast is not entitled to the seat.(42)

Finally, the Constitution mandates other requirements (apart from qualifications) that individuals must meet in order to be admitted to membership in the House. For example, the individual must agree to take the oath of office, as required by article VI of the Constitution.(43) Further, the individual must not hold an "incompatible office"(44) at the time the oath of office is taken.(45) Lastly, if an individual is impeached by the House and convicted by the Senate, they may be subject to "disqualification" from "any Office of honor, Trust or Profit under the United States . . ."(46) Thus, such

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41. For examples of the House addressing issues of qualification in the context of an election contest, see, *e.g.*, Precedents (Smith) Ch. 9 §§ 15.4, 29.2, 30.1, and 31.5.

42. *Parliamentarian's Note:* Under early British practice, the opposite rule prevailed: where a candidate for a seat in the House of Commons was determined to be ineligible to serve, the candidate receiving the next highest number of votes would be entitled to the seat. However, in the United States, both Houses of Congress have declared that the determination that an individual elected to Congress is ineligible to serve results in the nullification of the election and a vacancy in the seat in question. See, *e.g.*, 1 Hinds' Precedents §§ 323, 326, 417, 424, 435, 450, 463, and 469; 6 Cannon's Precedents §§ 58, 59; and Deschler's Precedents Ch. 7 § 9.

43. "The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution . . ." U.S. Const. art. VI, cl. 3. The form of the oath is provided by statute. See 5 U.S.C. § 3331. As the oath requires individuals to swear or affirm that they will support and defend the Constitution, and "bear true faith and allegiance to the same," the taking of the oath necessarily involves issues of loyalty to the United States. However, the "House has not reached the question whether an express disavowal of the oath" could serve as a bar to membership. Deschler's Precedents Ch. 7 § 12. For earlier precedents regarding the relationship between the oath and qualifications, see 1 Hinds' Precedents §§ 441–463. The Senate (though not the House) has debated the question of whether competency to take the oath (*i.e.*, whether the individual is mentally capable of taking a meaningful oath) should be used as a factor in determining qualifications. See 1 Hinds' Precedents § 441.

44. "No Senator or Representative shall, during the Time for which he was elected, be appointed to any Civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2.

45. For more on incompatible offices generally, see § 4, *infra.* See also Deschler's Precedents Ch. 7 §§ 13, 14.

46. U.S. Const. art. I, § 3, cl. 7.

individuals may be precluded from membership in the House as a consequence of their prior impeachment and conviction.

§ 4. Incompatible Offices

The separation of powers principle inherent in the structure of the Federal government is manifested in a variety of constitutional provisions. One such provision is found in section 6 of article I,[1] and delineates restrictions on Members of Congress serving simultaneously in other government positions: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any Civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States shall be a Member of either House during his Continuance in Office." This provision ensures that powers delegated to the different branches of government are not commingled by being exercised by the same person.[2]

The prohibition described in this constitutional provision is two–fold. First, a Member of the House may not simultaneously serve in an "office" under the United States, such concurrent service being considered incompatible with service as a Member. Second, a Member may not be appointed to any office that was either created during the time the Member was serving in Congress, or whose compensation was increased during such time. This section discusses both prohibitions.

Definitions; Application

The Constitution does not precisely define an "office" for purposes of determining whether service in Congress is incompatible. Subsequent practice by the House (as well as case law laid down by the courts) has established certain guidelines for determining whether or not a Member may accept an additional office during their term. There has been broad consensus that the primary offices within other branches of the Federal government are incompatible with congressional service.[3] So, for example, Members of Congress

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1. U.S. Const. art. I, § 6, cl. 2; and *House Rules and Manual* §§ 96, 97 (2021).

2. In referring to this constitutional provision, an 1864 committee report evinced the view that "[t]he House has ever been awake to this constitutional guaranty of its independence." 1 Hinds' Precedents § 492. Even earlier, in 1816, Rep. John Randolph of Virginia "urged that the House should be very jealous of any invasion of these guaranties of the Constitution." 1 Hinds' Precedents § 506.

3. Similarly, simultaneous service in both Houses of Congress is impermissible. See fn. 6, *infra*.