IN THE

Supreme Court of the United States

October Term, 1968

No. 138

ADAM CLAYTON POWELL, JR., et al.,
Petitioners,

v.

JOHN W. McCORMACK, et al.,
Respondents.

APPENDIX D TO BRIEF FOR RESPONDENTS

THE EXCLUSIVE CONSTITUTIONAL POWER OF EACH HOUSE OF CONGRESS TO JUDGE THE QUALIFICATIONS OF ITS MEMBERS: THE INTENT OF THE FRAMERS

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INTRODUCTION

This case presents to the Court the problem of interpreting the constitutional power of each house of Congress to judge the qualifications of its members and the related power to expel a member upon a two-thirds vote, both of which are granted by article I, section 5 of the Constitution. To determine the intent of the Framers, we have undertaken a review of the pertinent original sources and principal commentators, the results of which are set forth in this Appendix.

Our research has led us to the following conclusions:

1. That at the time the Constitution was drafted, there existed a widely accepted understanding, both in this country and in England, that the power of a legislative body to judge the qualifications of its members encompassed the power to exclude or expel a member on the ground that he was unfit to serve, because of his individual character or conduct, even though he met the general standards for membership imposed by law;

2. That the exercise of that power by the legislative body was final and was not reviewable by any court;

3. That the power of a single house of the legislature to judge the qualifications of its members was separate and distinct from the power of the entire legislature to create by statute "standing incapacities" which operate prospectively to exclude groups or classes of people from eligibility for membership;

4. That the Constitutional Convention, while apparently depriving Congress of the power to create new "standing incapacities", took no action which indicates an intent to limit the House and Senate respectively in their exercise of the power to judge the qualifications of their members, as that power was then understood, but instead deliberately rejected provisions which would have had that effect, thereby evincing an intent to adhere to the traditional interpretation of the "judge qualifications" language; and

5. That there is no basis for conjecturing that the Constitution containing the power to judge qualifications so interpreted would not have been ratified.

The material which has led us to these conclusions is set forth below. We begin with the background against which the Framers wrote. We first explore the English precedents which formed the body of prior law from which the American Colonies drew in setting up their colonial, state and then federal governments. We then examine the treatment given those precedents by the Framers, who were anxious both to conserve the best and to avoid repeating the worst of the English traditions. We then discuss the pertinent debates and actions of the Constitutional Convention, as illuminated by the historical background, and the relevant events of the ratification campaign.

I. The State of the Law As of 1787

A. The English Practice.

The roots of the powers to judge qualifications and to exclude or expel a member extend far back into English history. They start when the House of Commons first began to recognize its own importance and to see the necessity of obtaining control over its own composition and internal proceedings. The Commons in that early period found that it had to wrest the power to judge the election of its members (which, as we shall show, included the power to judge the qualifications or capacity of its members) from the

Court of Chancery. That struggle culminated in 1604, when James I acquiesced in the Commons' position that they, and not the Chancellor, were the proper judges of the election of their members. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 333 (11th ed. Plucknett 1960) [hereinafter TASWELL-LANGMEAD]. Thereafter,

> "It was fully recognized as their exclusive right by the court of Exchequer Chamber in 1674, by the House of Lords in 1689, and also by the courts of law in 1680 and 1702. Their right was further recognized by the Act 7 & 8 William 3, c. 7, which declared that 'the last determination of the House of Commons of the right of election' is to be pursued." *Ibid.* (footnotes omitted).

A study of the history of the powers to judge qualifications and to exclude or expel a member, therefore, may best proceed by a review of the struggle between Parliament and the courts for jurisdiction over matters pertaining to elections, the manner in which the House of Commons exercised the power, with particular reference to the *Wilkes Case,* and the summary of the law conveniently provided by Blackstone.

1. The Struggle for Jurisdiction.

The authority of the English Parliament to judge the elections and qualifications of its members was neither asserted by nor attributed to that body at its inception in the reign of Edward I, which ended in 1307.* Throughout

* The earliest period ascribed for the emergence of the *communes* as a permanent and constitutionally required branch of Parliament is the reign of Edward I. 2 STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND § 244, at 316 (1880) [hereinafter STUBBS]. There is some dispute over when the *communes* became a critical part of Parliament. *See* CAM, *Stubbs Seventy Years After*, in LAW FINDERS AND LAW MAKERS IN MEDIEVAL ENGLAND 188, 196-98 (1962); 3 STUBBS § 426; JOLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 349-51 (4th ed. 1961); *cf.* MAITLAND, *Introduction to Memoranda de Parliamento, 1305,* in SELECTED HISTORICAL ESSAYS 52 (Cam ed. 1957).

the fourteenth century, the knights of the shire and the burgesses (*i.e.*, county and borough members) were summoned by writs of election, issued by and returnable to the King. The writs prescribed the qualifications* of those who could be elected, and the sheriff was responsible for assuring that those returned met the sometimes amorphous standards set forth in the writs. In the attainment of those standards, or in furtherance of his own or his patrons' interests, the sheriff often abused his influence. 3 STUBBS §§ 419-20. Moreover, election to Parliament was viewed more as a burden than a privilege, both to the elected and to the electors who had to provide subsistence for their representatives.

> "On any theory the conclusion is inevitable that the right of electing was not duly valued, that the duty of representation was in ordinary times viewed as a burden and not as a privilege; that there was much difficulty in finding duly qualified members, and that the only people who coveted the office were the lawyers who saw the advantage of combining the transaction of their clients' business in London with the right of receiving wages as knights of the shire at the same time. . . . [T]he power of the sheriff, and of the crown exercised through him, was almost uncontrolled in peaceful times, and in disturbed times the whole proceeding was at the mercy of faction." 3 STUBBS 440 (footnote omitted).

In an apparent attempt to restrain the exercise by the sheriffs of an undue influence on the composition of the

* The qualifications prescribed varied from king to king and parliament to parliament. On some occasions the writs specified that knights of the shire were limited to belted knights (*"gladiis cintos"*), but in the later part of the century that provision was omitted. 3 STUBBS 430. In 1404 Henry IV caused considerable strife by excluding lawyers from his parliament, *id.* at 433, but the bar has had its revenge, for history has known that body as the "lack-learning parliament" (*"indoctum parliamentum"*). *See* 4 COKE, INSTITUTES *47; *cf.* JACOB, THE FIFTEENTH CENTURY 51 (1961).

lower house, an act was passed in 1406 requiring the writ of election to be returned to Chancery, and a statute in 1410 granted the judges of assize authority to inquire into undue returns. 3 STUBBS 457. But membership in the lower house remained unattractive throughout the reign of the Plantagenets (which ended in 1485), with the consequence that election disputes were infrequent. 3 STUBBS 454-55.

As the institution of Parliament began to assume more importance in the Tudor period (1485-1603), membership in the Commons became more attractive and, consequently, the results of elections were more often disputed, KIER, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN: 1485-1951, at 140 (6th ed. 1961) [hereinafter KIER]. The Commons then began to assert jurisdiction over the disputes, and in 1553, in one of its first recorded cases, decided

> ". . . that Alex. Nowell, being prebendary [*] in Westminster, and thereby having voice in the Convocation House, cannot be a member of this House; and so agreed by the House, and the Queen's writ to be directed for another burgess in that place." 1 JOURNAL OF THE HOUSE OF COMMONS 27 (1803) [hereinafter C.J.]. *See also* KIER 151.

But the Chancery and the judges were not easily deposed from what had become their traditional jurisdiction over the elections and qualifications of members. In 1586, in connection with a dispute over the election of a member from Norfolk, the Chancellor informed the Commons that an election dispute was "a thing in truth impertinent for this House to deal withal." A COMPLEAT JOURNAL OF THE VOTES, SPEECHES AND DEBATES OF THE HOUSE OF LORDS AND HOUSE OF COMMONS THROUGHOUT THE WHOLE REIGN OF QUEEN ELIZABETH, OF GLORIOUS MEMORY 393 (D'Ewes ed. 1693) [hereinafter D'EWES JOURNALS]. The Commons re-

* A canon or member of the chapter of a cathedral or collegiate church who is the recipient of a stipend or "prebend" of maintenance, granted out of the estate of the church.

torted "that albeit they thought very reverently . . . of the said Lord Chancellor and Judges, and know them to be competent Judges in their places; yet in this case they took them not for Judges in Parliament in this House", *id.* at 398. In 1593, the Commons appointed a standing committee to "examine and make report of all such Cases touching the Elections and Returns of any of the Knights, Citizens, Burgesses and Barons of this House, and also all such Cases for priviledge as in any wise may occur". *Id.* at 471; KIER 151.

The final round in the struggle between the Commons and the Chancery occurred in 1604, at the inception of the Stuart dynasty, when James I met the first of many rebuffs at the hands of that "body without a head", DAVIES, THE EARLY STUARTS 17 (1952) [hereinafter DAVIES]. Sir Francis Goodwin had been returned as the duly elected knight of the shire for the County of Bucks. However, Goodwin had been adjudged an outlaw some years earlier, and the proclamation summoning the Parliament had specifically commanded that no outlaws be elected. The Chancery ordered a new election, as a result of which Sir John Fortescue, a member of the King's Privy Council, was returned. The Commons investigated the matter and ordered Goodwin seated. James' experience with the moribund Scottish Parliament had not prepared him for dealing with the kind of independence (in his eyes, impertinence) which he was to find in the more viable English body. He therefore peremptorily informed the Commons that the determination of election disputes belonged to the Court of Chancery, and the Commons had no right to interfere. But the Commons was adamant. The dispute continued for some time, and finally James commanded the Commons, "as an absolute King", that they confer with a committee of judges and his Council over the matter. This ultimately led to a conference with the King at which he acknowledged that the Commons were the proper judge of elections, but

requested as a personal favor that neither Goodwin nor Fortescue be allowed to sit and that a new election be held.*

> "The apparent compromise was in effect a victory for the Commons, whose right to decide upon the legality of returns, and the conduct of returning officers in making them, was thenceforth regularly claimed and exercised." TASWELL-LANGMEAD 333.

Moreover, this case together with other grievances prompted the Commons in 1604 to address the famous *Apology or Satisfaction concerning their Privileges* to the King, in which they reasserted their exclusive jurisdiction over election disputes:

> "6thly, and lastly, We avouch that the House of Commons is the sole proper judge of Returns of all such Writs, and of the Election of all such Members as belong unto it, without which the freedom of election were not entire. And that the chancery, though a standing court under your maj. be to send out those writs, and receive the returns, and to preserve them, yet the same is done only for the use of the parl. Over which neither the chancery, nor any other court, ever had, or ought to have any manner of jurisdiction." 1 PARLIAMENTARY HISTORY OF ENGLAND 1033 (1813) [hereinafter PARL. HIST. ENG.]. *See also id.* at 1037.

2. *The Disclaimer of Jurisdiction by the Courts.*

Goodwin's Case was the last attempt by a monarch or his chancellor to interfere with the power or, as it came to be

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* The discussion of *Goodwin's Case* is based upon GLANVILLE. REPORTS OF CERTAIN CASES DETERMINED AND ADJUDGED BY THE COMMONS IN PARLIAMENT lxxii-lxxxiii (1776) [hereinafter GLANVILLE]; 1 HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 299-302 (1881); and TASWELL-LANGMEAD 332-33. *See also* DAVIES 3; KIER 175. Glanville was Chairman of the Commons' Committee of Elections in 1623 and 1624, GLANVILLE 1, and the cases which he reported were those "concerning elections", a phrase which he interpreted, as indicated by his inclusion of *Goodwin's Case* and similar cases discussed below, as including questions as to the *qualifications* of those elected.

denominated, the privilege of the House of Commons to judge the elections, returns and qualifications of its members. In the 17th century, the common law courts likewise acquiesced in the exclusive jurisdiction of the Commons over elections and, in the absence of a clear statutory mandate, disclaimed the power to interfere.

An early indication of the courts' attitude is the decision in *Nevill v. Strode.* An action was brought against a sheriff for a false return in 1655, and £1500 damages were awarded to the plaintiff by the jury. However, before judgment, the Court of King's Bench adjourned the case into the House of Commons, as the only proper judges in cases concerning elections, because of the difficulty of determining whether such an action would lie.*

Barnardiston v. Soame, 6 How. St. Tr. 1063 (1674), merits more extensive discussion.** Sir Samuel Barnardiston claimed that Sir William Soame, while sheriff of Suffolk, "falsely and maliciously" made a double return on the writ for the election for a knight of the shire from Suffolk. The return stated that both Barnardiston and his opponent, Huntingtowre, were elected, whereas in fact Barnardiston had carried the election by 78 votes. As a result, Huntingtowre sat in the Commons until it was determined that Barnardiston and not Huntingtowre had been elected. Following a trial in the Court of King's Bench, Barnardiston recovered £1,000 in damages. On writ of

*No report of *Nevill's Case* has been found, but it was repeatedly referred to by the parties and the courts in subsequent election cases. A synopsis of it is found at 14 How. St. Tr. 717n. *See also,* the discussions of the case in the report in *Barnardiston v. Soame,* 6 How. St. Tr. 1063, 1069, 1086, 1104 (1674), from which it appears that *Nevill's Case* was never resolved.

**The case is also reported in 84 Eng. Rep. 769 and 89 Eng. Rep. 283, but the fullest account appears in STATE TRIALS. *See also* Sharwood, *Barnardiston v. Soame: A Restoration Drama,* 4 MELB. U. L. REV. 502 (1964).

error, the Court of the Exchequer Chamber* reversed, Lord Chief Justice North writing for a majority of six.

The "Arguments" of Judges Ellis and Atkins, the two judges who dissented and voted to affirm in the Exchequer Chamber, were delivered first. They are significant for the concessions which they make.

Thus Judge Ellis, in response to the objection that the matter in issue is one to be determined in Parliament, conceded that "as to the right of election [,] that is determinable there". He distinguished the case before him on the grounds that "1. Here is no action brought against a member. 2. No action brought for any thing done in parliament." *Id.* at 1073.

Similarly, Judge Atkins first canvassed the matters concerning Parliament as to which "the judges of Westminster-hall have in all times, and must meddle, and take cognizance of them". *Id.* at 1082. Under this head he listed such matters as (a) what constitutes a Parliament, for the purpose of determining the validity of alleged Acts of Parliament ("For though the king and parliament make acts, yet the courts in Westminster-hall put those acts in execution, and therefore must first satisfy themselves"); (b) when a Parliament begins, for the purpose of determining damages in a suit for expenses in attending Parliament; and (c) whether an individual is entitled to parliamentary privilege from arrest. *Id.* at 1082-83. Next he canvassed those matters which the courts have discretion to determine or to refer to Parliament for determination. Finally, he listed those matters "wherein the courts of Westminster-hall must not intermeddle, but the jurisdiction belongs to the parliament only." *Id.* at 1083. Judge Atkin's remarks as to those matters are particularly pertinent since they reflect his understanding that the predecessor of the Speech or Debate

*For the jurisdiction of this intermediate court of appeal, see 4 COKE, INSTITUTES *103-116, *119.

Clause* barred judicial interference with parliamentary disposition of questions pertaining to members. He pointed out that

> "By the statute of 4 H.8.c.8, though all in that act that concerns one Richard Strode is a private act, yet there is one clause which is a general act, and is declaratory of the ancient law and custom of parliament, viz. It is enacted, 'That all suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, charges, and impositions, at any time from thenceforth, to be put or had upon any member, for any bill, speaking, reasoning, or declaring of any matter concerning the parliament, to be communed or treated of, be utterly void and of none effect.'" *Id.* at 1083.

"This is the reason", he said, relying upon Coke (2 COKE INSTITUTES *15):

> ". . . that judges ought not to give any opinion of a matter of parliament, because it is not to be decided by the common laws used in other courts, but 'secundum legem et consuetudinem parliamenti.'" *Id.* at 1084.

Among the matters listed by Judge Atkins as those in which the courts "must not intermeddle" is the determination by the House of Commons of questions concerning election of their members. After a brief discussion of the history of that jurisdiction, Judge Atkins said,

> "But we know that the House of Commons is now possessed of the jurisdiction of determining all questions concerning the election of their own members; so far at least, as is in order to their being admitted or excluded from sitting there." *Id.* at 1083-86.

Lord Chief Justice North, writing for a majority of six, noted that "it is admitted, that the Parliament is the only proper judicature to determine the right of election",

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*Cf. *United States v. Johnson*, 383 U.S. 169, 182 n.13.

id. at 1098. He then adduced a number of reasons why this action would not lie, each of which is bottomed upon a desire to avoid a conflict between the courts and Parliament:

> "I can see no other way to avoid consequences derogatory to the honour of the parliament, but to reject the action; and all other that shall relate either to the proceedings or privilege of parliament, as our predecessors have done." *Id.* at 1110.*

After the Revolution of 1688, Barnardiston brought his writ of error into the House of Lords, where on June 25, 1689, the decision of the Exchequer Chamber was affirmed. *Id.* at 1120.**

To be sure, these cases did not specifically present the issue whether the Commons had exclusive jurisdiction over disputes concerning the qualifications of their members. No judicial decision prior to the American Revolution has been found where that question was specifically in issue.† But in each of the opinions in *Barnardiston,* it is assumed — *a fortiori* — that the Commons had exclusive jurisdiction over "all questions concerning the election of their own members (in the language of Atkins, J., 6 How. St. Tr. 1086) in

*The report of the case in *State Trials* indicates that Lord Chief Justice Vaughan and Lord Chief Baron Turner, both deceased, agreed with the majority decision, 6 How. St. Tr. 1117. Presumably their opinions were obtained prior to their demise.

**To the same effect was the decision in *Onslow's Case,* 83 Eng. Rep. 561, 86 Eng. Rep. 294 (K.B. 1681). Thereafter it was provided by statute, 7 & 8 Wm. III, c. 7 (1695), that an action might be brought by the person grieved against a sheriff or other officer making a false return and double damages recovered. The statute was held to vest jurisdiction in the courts notwithstanding that the Commons were the only proper judges of the elections of their members "because it is certain that an Act of Parliament may give the Courts at Westminster a jurisdiction in cases of this nature, though they had none at common law, because the House of Commons is party to every Act and therefore is bound by it." *Myddleton v. Wynn,* 125 Eng. Rep. 1339, 1344 (Ex. Ch. 1745).

†*But see Bradlaugh v. Gossett,* 12 Q.B.D. 271 (1884), discussed p. 25 *infra.*

so far as those questions affected the right of a member-elect to sit. As *Goodwin's Case* illustrates, the term "judge the elections" was often used in the seventeenth and eighteenth centuries in a manner which necessarily included the power to judge the qualifications of the elected.* And the language used by Ellis ("the right of election [,] that is determinable [in the Commons]", 6 How. St. Tr. 1073) and North ("[P]arliament is the only proper judicature to determine the right of election," *id.* at 1098) is broad enough to support an inference that they assumed the Commons to be the sole judge of the qualifications of its members.

Furthermore, as will be shown, the Commons acted in a manner which implies that they at least believed themselves to be the exclusive arbiters of disputes over qualifications and that they did not believe the scope of their inquiry to be limited to the qualifications prescribed by statute. Moreover, the House of Lords, the pinnacle of the judiciary,** agreed.

Before turning to those precedents, it should be observed that the English courts in the seventeenth and eighteenth centuries drew a clear distinction between jurisdiction over disputes as to the election of members of parliament (which they steadfastly maintained that they lacked) and jurisdiction to determine the qualifications of an elector to vote (which they readily assumed). That distinction was first recognized in Holt's dissent in *Ashby v. White*, 92 Eng. Rep. 126 (Q.B.), *rev'd*, 1 Eng. Rep. 417 (H.L. 1703). Matthias Ashby brought an action against the Constables of the Bor-

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*See, e.g., the debate in the *Wilkes Case* at 16 PARL. HIST. ENG. 594 (1813), quoted pp. 21-22 *infra*. In *Goodwin's Case*, pp. 6-7 *supra*, the language used was "judge of the Returns ... and ... Election" although the question was whether an outlaw was qualified to sit in the House. *Apology of 1604*, quoted p. 7 *supra*.

**The legislative and judicial functions of the Lords were not clearly distinguished until the end of the eighteenth century. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 201 (1961).

ough of Aylesbury for refusing to count his vote for the two burgesses for that borough who were elected to Parliament, although he was "a burgess and inhabitant of the borough aforesaid, and not receiving alms there or any where else then or before". Following a jury trial, the verdict was rendered for plaintiff. Thereafter, it was moved in arrest of judgment that the action was not maintainable and three of the four justices of the King's Bench before whom it was argued agreed. Chief Justice Holt, however, dissented and it was upon his opinion that the House of Lords reversed. In disposing of the objection that the judges could not pass upon the matter because it touched upon Parliament, Holt pointed out that the matter could never come in question in Parliament since the persons for whom plaintiff had voted had been elected and seated. Holt very carefully pointed out the distinction between jurisdiction over the right to vote and jurisdiction over the candidate's right of election:*

> ". . . Was ever such a petition heard of in Parliament, as that a man was hindred of giving his vote, and praying them to give him remedy? The Parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.
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> ". . . If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections. . . ." 92 Eng. Rep. at 138.

The reasoning of the Lords is not set forth in the report of the appeal, but it may be inferred from their report of a

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*In *Prideaux v. Morris*, 91 Eng. Rep. 430 (K.B. 1701), Chief Justice Holt had held that, since the courts of law lacked jurisdiction to determine the right of a candidate to sit in Parliament, even under the statute 7 & 8 Wm. III, c. 7 (1695) (*see* p. 11 note ** *supra*), a candidate's collateral attack upon the return in an action against a sheriff for damages for a false return was beyond the jurisdiction of the courts, where there had been no prior determination in Parliament. *Contra, Myddleton v. Wynn*, 125 Eng. Rep. 1339 (Ex. Ch. 1745).

conference with the lower house resulting from debates in the Commons over the Lords' decision:

> "It was admitted, that the House of Commons exercise a jurisdiction, in determining the right of election of their own members; and though the time may be assigned, when that jurisdiction was exercised in another place, yet there has been a usage long enough to hinder that point from being drawn in question, especially after the sanction given to it, by the act made in the seventh year of king William's reign.
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> "But though it be true, that the merit of the election of a member, be a proper subject for the House of Commons to judge of, because they only can give the proper and most effectual remedy, by excluding the usurper, and giving possession of the place to him who has the right; yet there is a great difference between the right of the electors, and the right of the elected; the one is a temporary right to a place in parliament, *pro hac vice,* the other is a freehold, or a franchise: . . . a man has right to his freehold by the common law, and the law having annexed his right of voting to his freehold, it is of the nature of his freehold, and must depend upon it. The same law that gives him his right, must defend it for him, and any other power that will pretend to take away his right of voting, may as well pretend to take away the freehold, upon which it depends." *The Report of the Lords Committees,* 14 How. St. Tr. 778, 792 (1704).

3. *The Exercise of the Powers by the House of Commons.*

In the exercise of its exclusive jurisdiction over disputes concerning the qualifications of its members, the House of Commons often inquired into matters beyond those established by statute or *lex parliamenti* as prerequisites for membership. Almost invariably these concerned the character or conduct of the individual member. We have already

seen an instance of this in *Goodwin's Case.* Further examples merit discussion.

(a) *Early Cases.*

In 1623 and 1624* the Commons passed upon two disputes "concerning elections" which dealt with the qualifications of the elected. In *Steward's Case,* the committee on elections decided that "an alien born, only made denizen by letters patent, but not naturalized by act of parliament, is not, by law, eligible to serve as a burgess amongst the commons in parliament," GLANVILLE 120, 122. The House agreed and ordered a new election although it waited until the day before the session was to end before doing so, thereby allowing Steward to serve *de facto, id.* at 123.** In *Huddleston's Case,* the House again had presented to it the question whether an outlaw could sit. The committee considered the case at some length, searching the precedents, but reported the case to the House without recommending a decision. The House thereupon resolved that Huddleston "was a person eligible and well returned" and allowed him to take his seat. GLANVILLE 124, 127.

On several occasions, the Commons coupled a resolution of expulsion with the determination that the member was, because of the expulsion, incapable of being re-elected, thereby judging his qualifications in advance. The first recorded example occurred in 1586, D'EWES JOURNALS 352. In 1628, the House committed Sir Edmund Sawyer to the Tower, expelled him from the House and declared "him to

*Glanville ascribes no particular dates to the cases considered by the Committee on Elections during his tenure as Chairman. But in the copy of his work which we have used (from the Library of Congress) there is a notation in ink, in a hand that appears to be from the eighteenth century, of a date for each case. March 10, 1623 is ascribed for *Steward's Case* and May 28, 1624 for *Huddleston's Case.* GLANVILLE 120, 124.

**Subsequently, by statute, 12 & 13 Wm. III, c. 2 (1700), it was enacted that aliens, even those naturalized, were ineligible to sit in the Commons. 1. BLACKSTONE, COMMENTARIES *163.

be unworthy ever to serve as a Member of this House" because he had sought to induce a witness not to refer to certain matters pertaining to Sir Edmund during the witness's testimony before the House, 1 C.J. 917. And in 1641, at the inception of the "Long Parliament", the House resolved that "Mr. *Wm. Taylor* shall be expelled this House; be made incapable of ever being a Member of this House; and shall be forthwith committed a Prisoner to the *Tower*" for having "reflected" outside the House upon the proceedings against Strafford, at a time when even discussion of the business of the House outside its halls was considered a high breach of parliamentary privilege, 2 C.J. 158-59. In the same year, the House expelled a Mr. H. Benson and declared him "unfit and uncapable ever to sit in Parliament, or to be a Member of this House hereafter" because he had abused the privileges of Parliament by selling "Protections" to various persons, thereby cloaking them with parliamentary immunity, 2 C.J. 301.

In 1642, as the conflict between Parliament and the King became more heated and the line dividing Parliament's men and King's men became more clearly drawn, the House expelled a number of its members (including Edward Hyde, later Earl of Clarendon) and held each of them "disabled to sit any longer a Member of this House, during this Parliament", for reasons which do not appear in the *Journals*, 2 C.J. 703, 704, 708, 711, 715, 716. In 1660, after the restoration of Charles II, the House expelled one Robert Wallop and held him "incapable of bearing any Office, or Place of publick Trust, in this Kingdom", apparently for having participated in the execution of Charles I, 8 C.J. 61.

Those cases demonstrate that Parliament exercised the power, not only to expel, but also to exclude particular members for the duration of that Parliament, even in advance of their seeking admission, for reasons beyond the "standing incapacities", the reason here being that they had been expelled. If Parliament had lacked the power to exclude for reasons other than the "standing incapacities",

the power to expel a member for misconduct would have been a meaningless one, since the expelled member could avoid its effect simply by being re-elected to fill the vacancy created by his expulsion.

So far as our research reveals, the first instance of an expelled member being re-elected to the Parliament from which he was expelled occurred in the case of Robert Walpole. In January 1712, the Commons committed Walpole (who subsequently became the first "prime minister" of England) to the Tower and expelled him from the House for receiving, while Secretary at War, kickbacks from "Two Contracts for Forage of her Majesty's Troops" 17 C.J. 28-30. Two months later, while still incarcerated in the Tower, Walpole was re-elected by the constituents of the Borough of Kings Lynn. The House resolved that he be excluded:

> ". . . That *Robert Walpole* Esquire, having been, this session of Parliament, committed a Prisoner to the *Tower of London,* and expelled this House, for an high Breach of Trust in the Execution of his Office, and notorious Corruption, when Secretary at War, was, and is, incapable of being elected a Member to serve in this present Parliament . . . . " 17 C.J. 128.

The House then resolved that the re-election of Walpole was a "void Election" and ordered a new election held, *ibid.,* at which he was not re-elected. 1 COSTIN & WATSON, THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS, 1660-1914, at 208 (1952) [hereinafter COSTIN & WATSON].

(b) *The Wilkes Case.*

By far the most notorious expulsion case in the House of Commons prior to the American Revolution was that of John Wilkes. Its notoriety stemmed from an unusual coalescence of times, personalities and issues. The times were the late 1760's when the metropolis of London was experiencing labor pains in spawning both the in-

dustrial revolution and the radical movement which ultimately produced the parliamentary reform bill of 1832; when the price of bread in London had risen to 2d. a pound; and when the Scots were hated and the favorite courtier of young George III was Lord Bute, a Scottish peer. Thus, "the London crowds who in 1768 gaily smashed their opponents' windows and assaulted their property to shouts of 'Wilkes and Liberty!' may have been as filled with anger at the high price of bread and hatred of the Scots as with enthusiasm for the cause of John Wilkes." RUDÉ, WILKES AND LIBERTY 14 (1962) [hereinafter RUDÉ]. *See generally id.* at 1-16. Those were also the times when the American Colonies were resisting the mother country's attempts to require the colonials to pay part of the cost of the late war against the French. The Stamp Act had been passed in 1765 and repealed in 1766; the Townsend Acts were passed in 1767, and the colonies were vehemently resisting their enforcement. WATSON, THE REIGN OF GEORGE III, 1760-1815, at 106, 116, 127 (1960) [hereinafter WATSON].

It was in those times that "there burst on London that remarkable phenomenon, John Wilkes." RUDÉ 16. The well-educated second son of a prosperous businessman, he had the innate ability to convert a personal grievance into a transcendent constitutional issue; the wit to make members of the court party appear as buffoons, although in most instances they needed little help in that regard; the oratory to inflame the London mob; and the courage — or temerity — to make unrestrained attacks on the government and the Crown. He was, however, completely lacking in morals even when judged by the loose standards of his age, a man whom Benjamin Franklin described as "an outlaw and exile of bad personal character, not worth a farthing." *Id.* at 41 n.2. On the other hand, the court party, the insipid and obsequious products of bribery, favor and Newcastle's electioneering (*see generally* NAMIER, ENGLAND IN THE AGE OF THE AMERICAN REVOLUTION (2d ed. 1961)) were completely

lacking in experience or ability to cope with the problems epitomized by the rise of Wilkes.

The issues on which Wilkes rose to fame were two: the freedom of the subject to criticize the government and the legality of general warrants. Those same issues were commanding the attention of the American colonists during the same period, and that fact, together with the fact that Wilkes was in opposition to the king and the court party, resulted in the colonial leaders rallying to the support of Wilkes, partly in the hope that he would reciprocate.* POSTGATE, THAT DEVIL WILKES 173-78 (1929) [hereinafter POSTGATE].

In 1763, an information had been lodged against Wilkes charging him with seditious libel in connection with No. 45 of the *North Briton,* his anonymous opposition paper, in which he had described a statement in the King's speech to Parliament as a falsehood. The government proceeded under a general warrant (which was subsequently held illegal) to obtain evidence against Wilkes. After several preliminary hearings, but prior to his trial, Wilkes fled to Paris. Before his departure he had generated great support among the radical elements of the metropolis. He had also developed considerable backing from a more "respectable" element, the independent and opposition members of Parliament (many of whom defected from him when the government brought to light an obscene essay authored by him). He had also proven the government leaders to be inept bunglers. RUDÉ 22-36.

In 1768, Wilkes returned from his self-imposed exile, after scurrying around Europe just ahead of his continental creditors. Following an unsuccessful candidacy in the parliamentary elections in the City of London, he was elected as Member of Parliament for Middlesex. He was

*By 1771, however, even the more radical American leaders became disillusioned with Wilkes and began increasingly to realize that they must stand alone against "British tyranny". MILLER, ORIGINS OF THE AMERICAN REVOLUTION 325 (1943).

then convicted in the court of King's Bench on the original charge of libel and sentenced to imprisonment. WATSON 129-31; *Proceedings in the Case of John Wilkes,* 19 How. St. Tr. 1075, 1124 (K.B. 1768).

While in prison and before taking the parliamentary oath, Wilkes petitioned the House of Commons, asserting that he was a member of the House and requesting that it grant him speedy redress of his grievances. 16 PARL. HIST. ENG. 533-35 (1813). Wilkes alleged, among other things, that Lord Mansfield had altered certain records in his case and that some of the testimony used against him in the libel action had been obtained by bribery. *Id.* at 533-35.

During the course of the debate on Wilkes' petition, Wilkes admitted having published derogatory comments about a letter written by Lord Weymouth to the justices. The Commons resolved that the comments constituted "an insolent, scandalous and seditious libel...." *Id.* at 534.

On February 3, 1769, the House resolved:

> "... That John Wilkes, esq., a member of this House, who hath at the bar of this House confessed himself to be the author and publisher of what this House has resolved to be an insolent, scandalous, and seditious libel, and who has been convicted in the Court of King's Bench, of having printed and published a seditious libel, and three obscene and impious libels, and by the judgment of the said Court, has been sentenced to undergo 22 months imprisonment, and is now in execution under the said judgment, be *expelled* this House." *Id.* at 545 (emphasis added).

A new election was then ordered by the Commons, and on February 17, 1769, Wilkes was unanimously returned to the House by the electors of Middlesex. *Id.* at 577-78. The Commons then resolved,

> "... That John Wilkes, esq., having been in this session of parliament, expelled this House, was, and is,

> incapable of being elected a member to serve in this present parliament;..." 16 PARL. HIST. ENG. 580.

The election was declared void and a new election ordered, *Ibid.*

On March 17, 1769, the same scene was replayed, the electors of Middlesex having returned Wilkes unopposed. The election was again declared void and a new election ordered. *Id.* at 580-81.

On April 14, 1769, the Middlesex electors, to the further embarrassment of the Commons, again returned Wilkes. However, Henry Lawes Luttrell had run against Wilkes and, although his 296 votes were a poor second to Wilkes' 1,143, a motion was made that Luttrell ought to have been returned to parliament by the County of Middlesex. On May 8, 1769, after the Commons had considered the petitions of Luttrell and of freeholders from Middlesex with respect to the election, the motion was resolved in the affirmative. *Id.* at 583-90. In the course of the debate on that motion, it was pointed out that the Commons possessed exclusive jurisdiction in cases of election:

> "That the House of Commons is the sole court of judicature in all cases of election. That this authority is derived from the first principles of our government; viz. the necessary independence of the three branches of the legislature [*i.e.*, King, Lords and Commons]. Did any other body of men possess this power, members might be obtruded upon the House, and their resolutions might be influenced under colour of determining elections. They have therefore an exclusive jurisdiction, and must be in all these cases the dernier resort of justice. That the House in the present case is the competent judge of disability, and that their decision on it is final; that if in this or any other instance, its decisions were found to be attended with prejudice, the united branches of the legislature in their supreme and collective capacity, might interpose, and by pass-

> ing a law regulate such decisions for the future; but that nothing less could restrict their authority." 16 PARL. HIST. ENG. 594.

Although Wilkes had now effectively been excluded from the Commons and Luttrell seated instead, the debate on the propriety of the Commons' action did not cease. On January 25, 1770, a motion was made that the Commons, "in the exercise of its Judicature in Matters of Election, is bound to judge according to the Law of the Land and the known and established Law and Custom of Parliament, which is part thereof," *id.* at 786. The motion was passed only after it had been amended by adding that the expulsion and incapacity of Wilkes was in accord with the law of the land. *Id.* at 797-98.

On January 31, 1770, a second motion was proposed, but rejected, to the effect that only by law of Parliament, and not by resolution of the House of Commons, could a person be incapacitated from sitting in the Commons. Blackstone's speech during the course of the debate on that motion is particularly pertinent:

> "Mr. *Blackstone:*
>
> "Sir: I think it incumbent upon me to declare, that in my opinion, this House is competent in the case of elections, and that there is no appeal from its competence to the law of the land. There are cases in which the other House is competent: if the House of Lords in these laws should determine contrary to the law of the land, what is the remedy? and what is the remedy if the privy council, or the court of delegates should make such a determination? If such resolutions of the Lords, the Council and the Delegates are final, why not the resolutions of this House? As to the question whether expulsion does of itself imply incapacity, I have never answered it in the affirmative, neither have I ever declared to the contrary. I did not vote in the

> question last year, and I shall not, by any vote that I may now give, be included in that question." 16 PARL. HIST. ENG. 802-03.

A similar motion was made in the House of Lords on February 2, 1770, *id.* at 814. It was acknowledged that had the resolution passed it would have been merely declaratory and would have had no legal effect upon the seating of Wilkes or Luttrell. Yet the House of Lords refused to interfere even that far with the jurisdiction of the Commons and the resolution was voted down, *id.* at 820. In its stead, the Lords resolved,

> "That any Resolution of this House, directly or indirectly, impeaching a Judgment of the House of Commons, in a matter where their Jurisdiction is competent, final, and conclusive, would be a violation of the Constitutional Rights of the Commons, tends to make a breach between the two Houses of Parliament, and leads to a general confusion." *Id.* at 823-25.

Wilkes was re-elected a member of the next Parliament and allowed to sit. On five subsequent occasions, Wilkes and his supporters sought to have the resolutions expelling him and declaring him incapable of re-election for the duration of that Parliament expunged from the record. Finally, in 1782, after the fall of Lord North's ministry in the turmoil following the defeat of Yorktown, Wilkes succeeded in having the resolutions expunged from the record, in the language of Wilkes' motion, "as being subversive of the Rights of the whole Body of Electors of this Kingdom." 1 COSTIN & WATSON 235.

By this time, Wilkes and the Middlesex elections were no longer a *cause celebre,* and Wilkes had become unpopular with the groups which had previously constituted his power base. POSTGATE 223. Whatever interest the passage of this resolution aroused in England (in Wilkes himself it

stirred "a faint interest", *id.* at 237), it apparently went unnoticed in America.*

(c) *Subsequent Parliamentary Practice.*

Notwithstanding the broad language of Wilkes' motion to expunge from the record the resolutions expelling him, Parliament continued to exercise the power to judge mem-

*While we recognize that proving lack of knowledge of the existence of a fact is an impossible burden to meet, we think it significant that we have been unable to uncover any evidence that the resolution was a matter of general knowledge in America at the time of the 1787 Convention. There is no reference to it in several contemporary sources where one might expect to find some mention of it, if it were known. For example, neither the Marquis de Chastellux nor his translator mentions it, though both were traveling in America in 1782; both supported Wilkes; and both discussed Wilkes with Americans while on their respective journeys. 1 CHASTELLUX, TRAVELS IN NORTH AMERICA IN THE YEARS 1780, 1781 and 1782, at 6, 30, 354 (Grieve trans. 1963); 2 *id.* at 654.

Similarly, in the Report of the Pennsylvania Council of Censors in 1784, where both Wilkes' and Walpole's cases were discussed, and where those on one side of the issue being considered could have furthered their argument by citing the passage of this resolution, there is no mention of it. PROCEEDINGS RELATIVE TO . . . THE [PENNSYLVANIA] CONSTITUTIONS OF 1776 AND 1790, at 89 (1825), discussed pp. 43-44 *infra*. Indeed, there is no mention whatever of the *Wilkes Case* in the reported debates in the Federal Convention of 1787, 4 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 227 (rev. ed. 1966).

That the Wilkes resolution of 1782 may not have come to the attention of the colonists would not be surprising under the circumstances. At the time it was passed, the American coast was still under blockade by the British (the French fleet which had assisted the Americans at Yorktown was badly mauled by the British in April 1782) and the Royal troops continued to occupy New York and a number of other strategic points, 1 MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 227 (5th ed. 1962), factors which exacerbated the already poor communications between the warring nations. Nor is there any reason to believe that the fact of the resolution's passing would have been communicated to these shores after the conclusion of hostilities, but prior to the Constitutional Convention of 1787. The two best sources of information on such matters did not become available until after the turn of the century: the *Journals of the House of Commons* were not published until 1803, and Cobbett's *Parliamentary History* first appeared in 1813.

bers unqualified for reasons other than the "standing incapacities". *See* TASWELL-LANGMEAD 585-86.

In *Bradlaugh v. Gossett,* 12 Q.B.D. 271 (1884), an excluded member sought to enlist the aid of the courts in obtaining his seat, by bringing an action against the Sergeant-at-Arms of the House. Although the plaintiff, an avowed and vocal atheist (which was then equated with a total lack of morality and principle), had been excluded from the Commons on four occasions for reasons touching his religion (*see* ARNSTEIN, THE BRADLAUGH CASE 53-62, 73, 96, 114-15, 129 (1965)), the court held that it lacked the power to inquire into the circumstances surrounding and the reasons motivating the exclusions and, assuming for the purposes of argument that the exclusions were illegal, nevertheless held that it was without jurisdiction over the matter.

4. *Blackstone's Summary of the Law.*

The state of the law with respect to the power of the House of Commons was conveniently summarized by Blackstone, shortly before the American Revolution. He first listed the "standing incapacities" for membership in either house, enacted by statute and the law and custom of Parliament (*"lex et consuetudo parliamenti"*): ". . . no one shall sit or vote in either House, unless he be twenty-one years of age . . . no member shall vote or sit in either House, till he hath in the presence of the House taken the oath of allegiance, supremacy, and abjuration . . . no alien, even though he be naturalized, shall be capable of being a member of either house of Parliament." 1 BLACKSTONE, COMMENTARIES* 162-63. Significantly, each of the prerequisites he lists are stated negatively.

In his fourth edition, Blackstone added a proviso reflecting the parliamentary decision in the *Wilkes Case* and his own investigation of the precedents supporting that decision:

> "And there are not only these standing incapacities; but if any person is made a peer by the king, or elected

> to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member: and this by the law and custom of parliament." 1 BLACKSTONE, COMMENTARIES *163 (4th ed. 1770 [and subsequent editions])* (footnotes omitted).

He then turned specifically to the prerequisites for membership in the House of Commons. He again first listed, in negative form, those which were "standing restrictions or disqualifications" by statute of by the law and custom of Parliament. They covered age, citizenship, office, inhabitancy, property ownership and attainder of treason or felony. *Id.* at *175-76. Again he noted that for reasons beyond the "standing restrictions or disqualifications" a person could be disqualified:

> "But, subject to these standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible *for that parliament* by a vote of the house of commons, or *for ever* by an act of the legislature." *Id.* at *176 (emphasis in original; footnotes omitted).

Blackstone subjected the *Wilkes Case* to more extensive analysis in his pamphlet, *The Case of the Late Election for the County of Middlesex Considered on the Principles of the Constitution, and the Authorities of Law* [hereinafter *Middlesex Election*], which was reprinted, together with other papers, by Robert Bell, the publisher of the first

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*The first American edition of *Blackstone* was printed by Robert Bell in Philadelphia in 1771-72 (*see* James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, in HARVARD LEGAL ESSAYS 159, 170 (1934)). It was taken from the fourth English edition (*see* 1 BLACKSTONE, COMMENTARIES xxv-xxvi (Hammond ed. 1890)), and therefore reflects the changes made by Blackstone in that edition. 1 BLACKSTONE, COMMENTARIES *163, *176 (1st American ed. 1771).

American edition of the *Commentaries,* in a compilation entitled *An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England* (Philadelphia 1773). In this pamphlet Blackstone canvassed a large number of precedents, including most of those discussed above as well as a number of others, some of which he discussed in considerable detail.

The specific purpose of *Middlesex Election* was to demonstrate the historical support for the proposition that an expelled Member was incapable of being re-elected to the Parliament from which he had been expelled. Blackstone's research and reflection on that issue had led him to conclude that expulsion encompassed incapacity and therefore exclusion:

> "EXPULSION clearly, *ex vi termini,* signifies a total, and not a partial, exclusion from the society or parliament from whence he is removed. If a member is excluded during pleasure, or for a certain time only, that is, properly speaking, a SUSPENSION, and not an EXPULSION: And the House themselves, as has been shown, have made the distinction in many cases, by making use of the word *suspended,* where they meant the exclusion to be temporary; that is, either during pleasure, or for the session, or till some end be attained. But when a member is *expelled,* he is not excluded from the meeting of that day, or of that session, but from *that* parliament; that is, from that body of which he is a member." *Middlesex Election* 70 (emphasis in original).

Moreover, Blackstone reasoned that the opposite view would relegate the expulsion power to the status of a vain and useless act, for if the electors could override the House's decision by simply re-electing the expelled member, "the determinations of the *house* of *commons,* which is a court of judicature, from whence there lies no appeal, would in fact become of less weight and authority than the lowest court now existing." *Id.* at 71.

Blackstone also pointed out in his pamphlet that the power of the House to declare a Member incapable of being elected to that Parliament was not, as Wilkes' supporters had argued, in effect a command to the electors as to how they should vote:

> "THOUGH the house cannot, and God forbid they ever should, say whom the electors shall choose, yet they may declare who by law are *not to be chosen:* And by expelling a member, they declare, without saying more, that he is incapable of being elected for that parliament." *Id.* at 72.

Finally, Blackstone addressed himself to the argument, advanced by Wilkes' proponents, that if there were no appeal from a finding of incapacity by the House, the power to exclude a member would be arbitrary and lawless:

> "THERE must, in all cases, ultimately be a power of judicature some where, without appeal; and wherever the constitution has thought proper to vest it, it is not supposed that it will, or ever can, be exercised against the express letter of the law." *Id.* at 117.

B. THE COLONIAL PRACTICE.

The embryonic legislatures of the English Colonies early asserted and continuously exercised the exclusive power to judge the qualifications of their members. Like Parliament, they did not believe themselves limited by the disqualifications for membership set forth either in the organic acts which brought them into existence or in parliamentary or colonial statutes. They considered the legislative body to have the inherent power to judge the broad capacity or fitness of its members.

The first legislative body to appear in the new world was the House of Burgesses of Virginia, and it provides an excellent illustration of the exercise of the power. It first convened on July 30, 1619, and on that date commenced to judge the qualifications and elections of its members. At

its first meeting, each burgess was called upon by name to take the Oath of Supremacy and enter the assembly, but at the name "Captain Warde" the speaker took exception, and Warde was asked to absent himself. The ground for the exception was that Warde did not possess a commission for his plantation from the Virginia Company. The Journal of the House records that "after muche debate" the burgesses resolved that Captain Warde might take the oath and be seated provisionally, notwithstanding the infirmities of his position, because, among other things, he "had brought home a goode quantity of fishe to relieve the Colony by waye of trade" and "the Commission for authorizing General Assembly admitteth of two Burgesses out of every plantation without restrainte or exception."* He was admitted, conditioned on his obtaining a proper commission before the next general assembly. JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1619-1659, at 4 (1915).

Captain Warde having been seated, the next order of business raised by the House was whether the two burgesses from Captain Martin's plantation "shoulde have any place in the Assembly." It was pointed out that, in the patent for his plantation, Captain Martin had a clause which exempted him from the provisions of the charter of the colony and the laws which might be made by the assembly. The two burgesses from Captain Martin's plantation were, after some discussion, excluded from the assembly until Captain Martin made his personal appearance before them. If Captain Martin "woulde be contente to quitte & give over

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* It is probable that the provision in the commission referred to was similar, if not identical, to the corresponding provision in the *Ordinances for Virginia* of 1621, 7 THORPE, FEDERAL AND STATE CONSTITUTIONS 3810 and n.*a* (1909) [hereinafter THORPE]:

> "IV. THE other Council, more generally to be called by the Governor, once yearly, and no oftener, but for very extraordinary and important occasions, shall consist, for the present, of the said Council of State, and of two Burgesses out of every Town, Hundred, or other particular Plantation, to be respectively chosen by the Inhabitants: Which Council shall be called THE GENERAL ASSEMBLY . . . ." *Id.* at 3811.

that parte of his Patente, and . . . woulde submitte himselfe to the generall forme of governmente . . . then his Burgesses should be readmitted, otherwise they were utterly to be excluded. . . ." *Id.* at 4-5.

By 1692, the House of Burgesses appears to have established a more or less permanent committee for elections and privileges. The House convened on April 1, 1692, and on April 2, the "Committee for Elections and Priviledges" was appointed. On the same day it commenced its report, which was not completed until April 4. The *Journal* reports that the sheriffs of several counties had not made due returns of the writ for elections. The *Journal* does not reveal the particulars of the sheriffs' returns but, upon a reading of the report of the committee, the following resolution was adopted by the House:

> "*Resolved nemine Contradicente* that the house of Burgesses are the Sole & only Judges of the Capacity or incapacity of their owne members, and that any Sherriff or other person whatsoever pretending to be a Judge of ye capacity or incapacity of any member of the House of Burgesses does thereby become guilty of a Breach of the Priveledges of the said House of Burgesses." JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1659-1693, at 379-81 (1914).

The recurrent struggles between the royal governors and the colonial assemblies are reflected in the address in 1736 by John Randolph, as speaker-elect of the House of Burgesses, to Governor Gooch. Randolph duly instructed the governor as to the privileges which the House of Burgesses claimed as its undoubted right, among which were

> ". . . a Power over their own Members, that they may be answerable to no other Jurisdiction for any Thing done in the House; and a sole Right of determining all Questions concerning their own Elections, lest contrary Judgments, in the Courts of Law, might

thwart or destroy Theirs." JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1727-1740, at 242 (1910).

Further instances of the exercise by the House of Burgesses of its power to judge the elections and qualifications of its members are found in the *Journal* of the House's session of 1742. On May 21, the committee on privileges and elections reported that, upon investigation, it had found, contrary to the return of the writ of election, one Andrews had received more votes than the sitting member, Douglas. Douglas was declared not duly elected; Andrews was declared elected and the writ was amended accordingly.

On the next day, however, the House was informed that Andrews "has been guilty of many male [*sic*; mal-?] and scandalous Practices, in the Office of an Inspector," whereupon the information was referred to the committee on privileges and elections. On May 24, the chairman reported that the committee had found

> ". . . That the said *Andrews*, whilst he was Inspector, was guilty of very enormous Misdemeanours and male Practices [malpractices?] in that Office, in Breach of his Oath, and the Duty of his said Office: And that he was by the Governor and Council turned out of the said Office, for the same; and ordered to be left out of the Commission of Peace for *Accomack* County: And had come to several Resolutions thereupon, which he read in his Place, and afterwards delivered in at the Table: Where the same were again read, and agreed to, by the House, as follows:
>
> "*Resolved*, That the said Mr. *William Andrews* having been guilty of very enormous Misdemeanours and male Practices in the Office of an Inspector, in Breach of his Oath, and the Duty of his said Office, is unworthy to sit as a Member in this House.
>
> "*Resolved*, That the said Mr. *Andrews*, for his said Misdemeanours, be expelled this House.

"*Resolved,* That the said Mr. *Andrews* be disabled to Sit and Vote, as a Member in this House, during this present General Assembly.

"*Ordered,* That an Address be made to the Governor, to order a new Writ to issue for Electing another Burgess to serve in this present General Assembly in the County of Accomack, in the Room of the said *William Andrews,* who is expelled this House. And that Mr. *Scarburgh* do attend the Governor with the said Address." JOURNALS OF THE HOUSE OF BURGESSES of VIRGINIA: 1742-1747, at 31-33 (1909).

In the same session the House had found that one Henry Downs, a sitting member, had 21 years previously been convicted of the felony of stealing one sheep, whereupon the House, "*Nemine Contradicente,*"

"*Resolved,* That the said *Henry Downs* having been convicted of Felony and Theft, and punished, as aforesaid, is unworthy to sit as a Member in this House.

"*Resolved,* That the said *Henry Downs,* for the Causes aforesaid, be expelled this House.

"*Resolved,* That the said *Henry Downs* be disabled to Sit and Vote as a Member of this House, during the present General Assembly." *Id.* at 11.

These last two examples are denominated expulsions rather than exclusions, but it is clear that the grounds for the expulsions were matters which affected the qualifications of the member. They did not deal with misconduct in the capacity of a member and therefore were not disciplinary in the strict sense of the term. Moreover, the words "expel", "exclude" and "seclude" seem to have been used interchangeably in the 17th and 18th centuries without any sharp distinction between them. Thus, the resolution in the *Wilkes Case* in 1769 purported to "expel" Wilkes from the Commons even though he had never been sworn or seated in that Parliament, *supra,* pp. 20-21.

An incident which occurred in the New Jersey legislature, in 1771, indicates that the colonial legislatures considered the power to expel as stemming from the power to judge qualifications, not from their power to discipline their members for misconduct *qua* members. Governor William Franklin refused to seal a writ for a new election to fill a vacancy created when the New Jersey Assembly accepted the resignation of a member who had become insolvent. The Governor felt that to acknowledge the Assembly's power to accept resignations would result in allowing them to dissolve themselves through that means without the Governor's approval, "[b]ut the Assembly contend that in such a Case, if a Member does not resign, that they have the right to expel him, as being the sole Judges of the Qualifications of the Members." 10 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 307-08 (1886) [hereinafter NEW JERSEY ARCHIVES]. Further examples of the use of the word "expel" where we might today use the word "exclude" are found in connection with the 18th century state constitutions. *See* pp. 39-44 *infra*.

The New Jersey colony, particularly during the administration of Lord Cornbury, provides several illustrations of the struggles between the colonial assemblies and the royal governors over the power to judge qualifications. In 1705 proprietors of the Western Division of the Province of New Jersey petitioned the Lords Commissioners for Trade and Plantations, complaining among other things of the interference of Lord Cornbury in the assembly's power to judge the qualifications of its members. 3 NEW JERSEY ARCHIVES 88.* The proprietors' complaint prompted the Lords Commissioners to remonstrate to Lord Cornbury that

> "We think, your Lordship will do well to leave the Determination about Election of Representatives to

* The governor had refused to allow three members a seat in the assembly until he was persuaded that they possessed the requisite amount of land, even though the assembly had reached a determination in their favor. 3 NEW JERSEY ARCHIVES 88, 90.

> that House, and not to intermeddle therein, otherwise than by Issuing of Writs for any New Election." *Id.* at 100.

Subsequently, in 1707, Lord Cornbury himself complained to the Lords Commissioners that the assembly had expelled a member for refusing to take an oath which the assembly had no power to administer. *Id.* at 227. The Assembly replied,

> "We expell'd that member for several contempts; for which we are not accountable to your excellency, nor no body else in this province: We might lawfully expel him; and if we had so thought fit, might have rendered him incapable of ever sitting in this house; and of this many precedents may be produced. We are the freeholders representatives; and how it's possible we should assume a negative voice at the election of ourselves, is what wants [but] little explanation to make it intelligible." *Id.* at 265-66.

The annals of the Rhode Island Colony provide further examples of the assertion and exercise by the legislative assembly of the power to exclude or expel members who were found to be unfit. In connection with the election of members to the Rhode Island assembly in 1650 it "was . . . ordered that in case any member, upon complaint and trial, should prove to be unfit to hold his seat, the Assembly might suspend him and choose another in his place." 1 ARNOLD, HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 229-30 (1859). In 1683 the assembly exercised that power by expelling a member who contumaciously refused to appear in court upon being summoned.

> "Voted: Whereas, Mr. John Warner was by the town of Warwick chosen to be a Deputy in this Assembly, and being from time to time called, and not in Courte appearing, and there haveing been presented to this Assembly such complaints against him, that the Assembly doe judge, and are well satisfied, he is an un-

> fitt person to serve as a Deputy; and therefore see cause to expel him from acting in this present Assembly as a Deputy." Quoted in *id.* at 289.

A similar situation prevailed in Massachusetts where "the house was the sole judge of its membership. The representatives might settle order and purge' their house and 'make necessary orders for the due regulation thereof.' They expelled a member in 1715 for scandalous immoralities, and at times excluded military officers." SPENCER, CONSTITUTIONAL CONFLICT IN PROVINCIAL MASSACHUSETTS 51 (1905) (footnotes omitted).

And, at the inception of its session in 1726, the Massachusetts House of Representatives excluded a member who had been expelled from the House on three previous occasions:

> *"Whereas the Town* of Tiverton *have made Choice of Mr.* Gershom Woodle *to Represent them in this Great and General Court of Assembly, who has by his repeated Misdemeanours been three several times expelled, and still continues in an obstinate refusal of making an Acknowledgment of his Faults, whereby he has rendered himself unworthy to be a Member of the House of Representatives,*
>
> *"Voted,* That Mr. Speaker Issue out a Precept under his Hand and Seal, directed to the said Town of *Tiverton,* requiring them to Assemble the said Town, and choose a Representative in the room of the said *Gershom Woodle,* and make return thereof on or before the 13th day of *June* next." 7 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 4-5, 15, 68-69 (1926).

The examples discussed above indicate that the colonial legislatures, as had Parliament, often coupled resolutions of expulsion with a determination that the member expelled was "incapable" or "unfit" to be a member, either for the duration of the present legislature or for a longer period.

The records of the colony of North Carolina provide an example of the enforcement of that type of determination.

In 1758 the Assembly expelled Francis Brown, a member from Currituck County, for perjury, and rendered him "incapable to serve as a Member for any County or Town in this Province to Sit and Vote in this or any future Assembly thereof for the Reasons alleged in the above Report." 5 COLONIAL RECORDS OF NORTH CAROLINA 1058 (1887) [hereinafter N. C. RECORDS]. In 1760 Perquimons County reelected Brown, and the House on April 30 of that year, "on hearing Mr. Francis Brown regarding his Capacity to sit and vote in this present Assembly and fully and maturely having Considered the same—Resolved That the said Francis Brown is Incapable to sit and vote in this Present Assembly . . ." and ordered a new election. 6 N.C. RECORDS 375 (1888).

Brown was again re-elected, pursuant to the writ for a special election, and on November 12, 1760, the House again ordered a new writ of election issued, "as no person hath been duly returned Elected Representative for the said County in Virtue of the former." *Id.* at 474. He was later elected to the Assembly of 1761 and was then allowed to sit and vote. *Id.* at 662-63, 672-73.

The "constitutions" or charters of several of the colonies expressly provided that the assembly should possess the power to judge the qualifications of its members. Thus, paragraph 9 of the *Fundamental Orders of Connecticut* (1638) provided that the deputies could "examine their owne Elections, whether according to the order, and if they or the gretest p[a]rt of them find any election to be illegall they may seclud such for pr[e]sent fro[m] their meeting. . . ." 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 24 (Trumbull ed. 1850). The New York *Charter of Liberties and Privileges of 1683* provided,

> "That the said representatives are the sole judges of the qualifications of their own members, and like-

> wise of all undue elections, and may from time to time purge their house as they shall see occasion during the said sessions." 9 ENGLISH HISTORICAL DOCUMENTS 229 (Jensen ed. 1955).

William Penn's *Charter of Liberties of 1701* provided that

> "there shall be an Assembly Yearly Chosen by the freeman thereof, to Consist of four persons out of each Country of most note for Virtue, Wisdom & Ability . . . [who] shall be Judges of the Qualifications and Elections of their own members . . ." 2 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 58 (1852).

Significantly, the New York Charter sets forth no qualifications or prerequisites for membership whatsoever, and the Pennsylvania charter refers only to being "of most note for Virtue, Wisdom & Ability", which seems to have been merely a precatory admonition to voters.

The foregoing discussion does not purport to contain a complete catalogue of the instances in which the colonial legislatures claimed and exercised the power to judge qualifications and to be "answerable to no other Jurisdiction for any Thing done in the House," JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1727-1740, at 242 (1910). But the illustrative examples set forth above confirm the conclusions of Professor Clarke, a student of the colonial legislatures, who conducted an exhaustive search of the colonial records in this country and in England, in both published and manuscript form. After discussing a number of additional examples of the exercise of the power to judge qualifications, Professor Clarke stated:,

> "It is thus apparent that the assembly not only claimed the right to judge of the commonly recognized qualifications, such as age, residence, and property holding, but placed further restrictions on the voters' rights of representation by the reaction of the assembly itself to the personal conduct of individual men.

> The wide-spread acceptance of the belief that such power belonged to the legislature was as great in the colonies as in England." CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 198 (1943) [hereinafter CLARKE].

Professor Clarke also concluded that the exercise of the power by the colonial legislatures was not infrequent:

> "Records are not sufficiently complete to give accurate figures, but it seems reasonable to state that at least a hundred persons were expelled for one reason or another from the assemblies in the continental colonies." CLARKE 195 n. 58.*

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* To the same effect, see GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 198-99 (1963) [hereinafter GREENE]:

> "Cases of expulsion were much more rare [than reprimand], although a few occurred in every colony. The grounds for expulsion varied. The Virginia House of Burgesses expelled two members as early as 1652 and five in the eighteenth century for moral and religious reasons. It also expelled Thomas Osborne in 1736 and William Andrews in 1742 for committing misdemeanors as tobacco inspectors, Henry Downs in 1742 for having been convicted of a felony in Maryland twenty years earlier, William Clinch in 1757 for extorting a receipt and release from a debt from an old man, and William Ball in 1758 for counterfeiting treasury notes. The Georgia Commons ejected four members for writing a seditious letter at its inaugural session in 1755 and later in the same session a fifth for failing to take his seat. The South Carolina Commons excluded James Graeme in December 1733 for bringing an action against Speaker Paul Jenys, who had signed a warrant against Rowland Vaughn at the Commons' command. The North Carolina Lower House does not appear to have exercised the power of expulsion until 1757, when it ejected James Carter for misappropriating public funds. More famous was its expulsion of Harmon Husband, leader of the North Carolina Regulators, in December 1770. The period of exclusion after expulsion varied from colony to colony. The Georgia Commons excluded the members expelled in 1755 only until the end of the session. In the cases of Graeme in South Carolina and Osborne, Andrews, and Downs in Virginia, exclusion continued until the dissolution of the House that expelled them. Permanent exclusion occurred in Virginia in 1757 with William Clinch and in North Carolina in 1758 with the perjurer Francis Brown." (footnotes omitted).

C. THE EARLY STATE CONSTITUTIONS AND PRACTICES.

With this colonial background, it is hardly surprising to find that in nine of the 11 state constitutions adopted prior to the Constitutional Convention of 1787, the houses of the state legislatures were expressly, or by implication, given the jurisdiction to judge the elections and qualifications of their members.* The other two of those eleven state constitutions, like the colonial charters in the two remaining states, had no provision whatsoever on this matter, arguably indicating an intent not to depart from the Anglo-American practice described above.**

In only two of those constitutions—Massachusetts and New Hampshire—were provisions included which directly limited the assembly's power to judge qualifications. The Massachusetts constitution of 1780 provided that "the house of representatives shall be the judge of the returns, elections, and qualifications of its own members, *as pointed out in the constitution* . . . ." MASS. CONST. ch. I, § III, art. V

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* These were Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania and South Carolina. *See* 1 THORPE 563; 3 *id.* at 1692, 1694, 1897-99; 4 *id.* at 2460; 5 *id.* at 2595, 2631-32, 2790, 3084-85; 6 *id.* at 3252. The relevant portions of those constitutions are set forth in Appendix B to Respondents' Brief.

In all but South Carolina, the grant was express. In South Carolina, the constitution of 1778 granted to the two houses of the legislature the "privileges which have at any time been claimed or exercised" by the lower house of the colonial legislature, 6 THORPE 3252, among which was the power to judge elections and qualifications and to exclude or expel members, GREENE 193-98.

** The constitutions of Virginia and Georgia then in effect did not contain any provision regarding these powers, 7 THORPE 3812; 2 *id.* at 777, but the colonial legislatures of both states had traditionally judged qualifications and excluded or expelled members, *see* pp. 28-32 *supra*; GREENE 198, and the legislature of Virginia continued to do so after the Declaration of Independence, *see* p. 44 *infra*.

Connecticut and Rhode Island, on the other hand, did not adopt constitutions until 1818 and 1842, respectively, but continued to operate under their colonial charters, 1 THORPE 536; 6 *id.* at 3222. Rhode Island's colonial legislature had exercised those powers prior to the Revolution, *see* pp. 34-35 *supra*, and Connecticut had provided for "seclusion" of a member under its *Fundamental Orders* of 1638, *see* p. 36 *supra*.

(1780) (emphasis added). The constitution of New Hampshire, which appears to have been copied from Massachusetts, contains language substantially similar to that of Massachusetts. N. H. CONST. part II (1784). As can be seen from this language, the lower houses of Massachusetts and New Hampshire, in judging the qualifications of their elected members, were restricted to those specifically enumerated in their constitutions.*

While we do not have any legislative history regarding the New Hampshire constitution,** what legislative history we have† concerning the drafting of the Massachusetts constitution indicates that the inclusion of this language was a deliberate and conscious act on the part of the convention, and raises the implication that at least some of its members then shared the understanding that, absent the express limitation italicized above, the provision would have empowered each house of the legislature to go beyond the qualifications set forth in the constitution in judging the fitness of its members. Such an interpretation is, as we have seen, consistent with prior colonial practice.

The proceedings of the Massachusetts Convention also provide a further indication of the understanding in the

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* It should also be noted that the Massachusetts constitution provided, "And no person shall ever be admitted to hold a seat in the legislature . . . who shall, in the due course of law, have been convicted of bribery or corruption in obtaining an election or appointment." 3 THORPE 1910. New Hampshire had a substantially similar provision. 4 *id.* at 2470.

** *See* 9 NEW HAMPSHIRE STATE PAPERS 842 (1875).

† The journal of the convention at which the Massachusetts Constitution was drafted is, like most eighteenth-century journals, simply a record of motions made and their disposition. JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT OF THE STATE OF MASSACHUSETTS BAY (1832) (hereinafter MASS. JOURNAL). Accordingly we have no record of the debates and thus no express indication of the motivation behind the insertion of the italicized language. But the journal does reveal that that language was added by the convention to a clause submitted to it by a drafting committee, *id.* at 147. Similar language had earlier been added by the convention to a corresponding provision with respect to the Senate, *id.* at 73.

eighteenth century of the relationship between the power to expel and the power to judge qualifications. On February 8, 1780, the convention "*Voted*, that the Committee, upon the powers and privileges of the House of Representatives, take into consideration the privileges of the Senate, with their power of expelling their own members." MASS. JOURNAL 88. Neither in the draft then before the convention, *id.* at 199-201, nor in the constitution as adopted, *id.* at 230-33, was any express power given to the Senate (or the House) to expel a member. But in the draft then being considered, the Senate had been given the power to judge qualifications whereas the House had not, *id.* at 200, 201-04. Subsequently (on February 28), a drafting committee reported a new clause concerning privileges of the House which gave to it the power to judge the qualifications of its members. *Id.* at 147. As amended (to add the italicized language) that provision was adopted. *Id.* at 148. Thus the quoted resolution, suggesting inclusion of the power to expel, would seem to have had reference to the power to judge qualifications.

The early constitutions of three other states—Pennsylvania, Delaware and Maryland—contained restrictions on the power to expel, which arguably had the effect of limiting the exercise of the power to judge qualifications. The Pennsylvania Constitution of 1776 provided that "[t]he members of the house of representatives . . . shall have power to . . . judge of the elections and qualifications of their own members; they may expel a member, but not a second time for the same cause . . .", PENN. CONST. ch. II, § 9 (1776). Similarly, the Constitution of Delaware provided that ". . . each house shall . . . judge of the qualifications and elections of its own members. . . . They may also severally expel any of their own members for misbehavior, but not a second time in the same sessions for the same offense, if re-elected . . .", DEL. CONST. art. 5 (1776). The Maryland

constitution contained substantially the same language, MD. CONST. art. X (1776).*

The journals of the Pennsylvania, Delaware and Maryland conventions do not give us any indication of the objective sought to be achieved by permitting only one expulsion for the same reason. PROCEEDINGS RELATIVE TO . . . THE [PENNSYLVANIA] CONSTITUTIONS OF 1776 AND 1790 (1825) [hereinafter PENN. CONST. PROC.]; PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE, 1776, at 26 (1927); PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND (1836). But it seems reasonable to surmise that it was the intent of the framers of those constitutions to prevent the legislatures from disqualifying an expelled member from re-election, as Parliament and the colonial legislatures had done. In doing so, they may well have had in mind the *Wilkes Case,* which was at that time relatively recent.

The eleven years between the Declaration of Independence and the 1787 Philadelphia Convention were turbulent ones, and fewer of the records of legislative proceedings during that period have been published. We have found reference to only two cases in that period considering the power to judge qualifications.

One of these cases is of particular interest because of the attention given it by the first Pennsylvania Council of Censors and because of its propinquity, both geographically and chronologically, to the Constitutional Convention. The Pennsylvania Council of Censors was a short-lived in-

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* A similar provision was written into the first constitution adopted by Connecticut. CONN. CONST. art. III, § 8 (1818). The journal of the Connecticut convention reflects no debates on that provision, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF CONNECTICUT, 1818 (1873). The Connecticut Constitution of 1818 sets forth no qualifications for membership except that the member be an elector. CONN. CONST. art. VI, § 4. The selectmen and the town clerk were given the power to "decide on the qualifications of electors . . . in such manner as may be prescribed by law". *Id.* at § 5.

stitution, unique in conception. The final article of the Pennsylvania Constitution of 1776 provided:

> "Sect. 47. In order that the freedom of the commonwealth may be preserved inviolate forever, there shall be chosen by ballot by the freemen in each city and county respectively, [in 1783] and . . . in every seventh year thereafter, two persons in each city and county of this state, to be called the COUNCIL OF CENSORS; . . . whose duty it shall be to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are entitled to by the constitution . . ."

Pursuant to this mandate, the first Council of Censors met in 1783. Their report, which was adopted by a vote of 12-9 in 1784, PENN. CONST. PROC. 413-14, contained a section in which they discussed instances which the majority believed to represent abuses or violations of the constitution. One such instance, which generated a dissent by the minority, was the unanimous expulsion of a member by the general assembly in 1783 for frauds committed while a commissioner of purchases, an office which he held prior to becoming a member of the assembly. The majority's argument is summarized at the outset of the discussion:

> "Section 9. 'The house of representatives shall have power to judge of the qualifications of their own members.'
>
> "It is the opinion of this committee, that the general assembly has no right to expel one of its members, charged with crimes not committed as a member, but as a public officer or in his private capacity, *until* he shall be convicted thereof before his proper judges." *Id.* at 88-89 (emphasis added).

The issue which divided the Council was thus not whether the house had the power to adjudge a member unfit for reasons not specified in the constitution (although both *Walpole's Case* and the *Wilkes' Case* were discussed, *id.* at 89), but whether, in cases where the member was charged with committing a crime, it had the power to do so before a court had convicted him. The majority's principal concern was over the problem of prejudicing the jury in any criminal trial that might be had. *Ibid.*

When the constitution was revised in the 1790's, however, no change was adopted to prevent a repetition of the action found to be an abuse by the Council of Censors. The power to judge qualifications was retained unchanged; the power to expel was limited by requiring a two-thirds vote, as in the Federal Constitution. PENN. CONST. art. I, §§ XII, XIII (1790).

In the other case, the Virginia Assembly in 1780 excluded John Breckenridge on the ground that he was a minor, WARREN, THE MAKING OF THE CONSTITUTION 423 n.1 (1928) [hereinafter WARREN]. This was done even though there were no provisions in the Virginia Constitution requiring members of the state legislature to have attained their majority, nor expressly empowering the houses of the legislature to judge their members' qualifications.

D. SUMMARY.

Before turning to the Constitutional Convention of 1787, it seems useful to pause and to review briefly the state of the law at that time with respect to the power of a legislative body to judge the qualifications of its members.

As discussed above, the House of Commons had asserted and gradually established its exclusive jurisdiction to judge the qualifications of its members, and the Chancellor, the courts of law and the House of Lords had each ultimately disclaimed the power to inquire into the qualifica-

tions of members of the Commons. In practice, the Commons judged qualifications other than those described in statutes or the law and custom of Parliament and excluded or expelled members for reasons of character or conduct which it was believed rendered them unfit to assume that high office. The most widely known cases were those of Robert Walpole and John Wilkes, in which the Commons expelled them (although Wilkes had not been sworn or seated) and declared them incapable of sitting in the Commons during that Parliament. Moreover, it was pointed out several times in the course of the debates in the *Wilkes Case* that only the House of Commons had the power to judge the qualifications of its members, and the resolutions of both the Commons and the Lords affirmed this principle.

Blackstone, in his *Commentaries*, had provided a convenient synopsis of the law as to the power of the House of Commons to judge the qualifications of its members. He set forth what he termed "standing incapacities" enforced by statute or the law and custom of Parliament, each phrased in a negative form, and then went on to point out that for reasons beyond those "standing incapacities" a member could be held disqualified by the House of Commons for the duration of that Parliament. 1 BLACKSTONE, COMMENTARIES *163, *176.

Blackstone's *Commentaries* were widely read in the colonies, not by lawyers alone, but by educated laymen as well.* As one scholar has noted, in the late colonial period and after, "Blackstone was to American law what Noah Webster's blue-back speller was to be to American literacy." BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 202

* Blackstone's *Commentaries* found such a reception by the colonists that, almost before the ink was dry on the pages of the first edition, they were being quoted on this shore. *See* BAILYN, PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 554, 559, 736 (1965) (first edition of *Commentaries*, published at Oxford in 1765, quoted by James Otis in pamphlet published in Boston in March of that year).

(1958), and as Edmund Burke pointed out to the House of Commons in 1775, in his speech *On Conciliation With America,*

> ". . . The greater number of the deputies sent to the [continental] congress were lawyers. But all who read, and most do read, endeavour to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. . . ." 1 WORKS OF EDMUND BURKE 222, 230 (1855).

Moreover, the first American edition of Blackstone's *Commentaries,* which was sold by subscription, sold 1500 copies,* and in the final volume the publisher, obviously encouraged by the popular response to his endeavors, advertised that he already was taking orders for a second edition (which, however, did not appear). Significantly, among the subscribers for the first American edition were nine men who subsequently were members of the Constitutional Convention of 1787.** 4 BLACKSTONE, COMMENTARIES (1st Amer. ed. 1772) (subscribers' list preceding title page). Unfortunately, no subscribers' list has been found for *Middlesex Election*, Blackstone's more detailed

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* As might be expected, many of the subscribers were public officials or lawyers and a number of sets were sold to printers and booksellers, apparently for resale. But a very large number of subscribers were merchants, farmers or just "gentlemen", and sets were purchased by ministers, medical doctors, military officers, millers, a shoemaker, a "comedian", a cabinet-maker, a silversmith and a Professor of History and Languages, as well as representatives of other occupations. 4 BLACKSTONE, COMMENTARIES (1st Amer. ed. 1772) (subscribers' list preceding title page).

** Gunning Bedford, Jr., David Brearly, John Dickinson, William Livingston, Thomas Mifflin, Gouverneur Morris, Robert Morris, Roger Sherman and Robert Yates. *Ibid.*

exposition of the precedents for the House of Commons' action in the *Wilkes Case,* which was published by the publisher of the first American edition of the *Commentaries,* in Philadelphia in 1773. We are left, therefore, to conjecture as to the breadth of circulation and the influence of that work in this country.

On this side of the Atlantic, colonial legislatures began to judge the qualifications of their members as soon as they came into being, beginning with the first session of the first legislative body in the new world, the Virginia House of Burgesses, and continuing throughout their life as colonial legislatures. They found members disqualified on a number of grounds, many of which were not found in their organic charters or colonial acts. The Charters of Liberties of both Pennsylvania and New York specifically delegated to the respective colonial legislatures the power to judge the qualifications of their members, exclusive of any other jurisdiction. As John Randolph, speaker-elect of the Virginia House of Burgesses, admonished Governor Gooch, the House claimed the sole right to judge the qualifications of its members "lest contrary judgments, in the Courts of Law, might thwart or destroy Theirs." JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1727-1740, at 242 (1910). When the colonists proclaimed their independence and promulgated in their new constitutions a framework for self-government, they almost invariably delegated to each house of the state legislature the power to judge the qualifications of its own members. However, in five of those constitutions, the power was limited in some manner which repudiated, in whole or in part, the parliamentary action in the *Wilkes Case* and the colonial precedents.*

Thus, as of 1787, the phrase "judge the qualifications", without express language of restriction, had become a term

* There was no similar provision in the Articles of Confederation. As has been noted, the delegates to the Continental Congress were in effect "ambassadors of twelve distinct nations". JENSEN, THE ARTICLES OF CONFEDERATION 56 (1963); ART. OF CONFED. art. V, cls. 1, 5.

of art with a well-defined and widely understood meaning. That meaning included a delegation exclusively to the legislative body of a broad discretion in excluding or expelling members who, by reason of personal character or conduct, had demonstrated themselves unfit to undertake the responsibilities of membership in a public body of such high order. It remains to be seen whether the framers at the Constitutional Convention of 1787 took any action or wrote into the Constitution any language which expressly, or by implication, indicated an intent either to depart from or to adhere to the well-established meaning of that phrase.

II. The Constitutional Convention of 1787.

The Convention which was to draft the Constitution of the United States convened in Philadelphia on May 25, 1787. On May 29, Edmund Randolph of Virginia proposed the resolutions which history knows as the Virginia Plan. 1 Farrand, Records of the Federal Convention of 1787, at 20 (rev. ed. 1966) [hereinafter Farrand]. Randolph's resolutions with respect to the legislature provided that the members should be of a certain age (to be determined by the Convention) and ineligible to any other state or national office, *ibid.* There was no clause empowering the legislature or any other body to judge elections or qualifications or to expel a member.

On the next day, the Convention resolved itself into a committee of the whole house and commenced debate upon Randolph's resolutions. *Id.* at 29-30. The Convention continued to operate, almost without interruption, as a committee of the whole until July 16, 1787, during which time it considered not only Randolph's resolutions but also plans presented by other members.

On July 24, the Convention appointed a committee of detail, composed of John Rutledge, a lawyer and delegate from South Carolina; Edmund Randolph, a lawyer and delegate from Virginia; Nathaniel Gorham, a merchant and delegate from Massachusetts who had been a member of

the Massachusetts constitutional convention of 1779-80;* Oliver Ellsworth, a lawyer and delegate from Connecticut; and James Wilson, a lawyer who "was certainly one of the best-educated men in America" (1 THE WORKS OF JAMES WILSON 9 (McCloskey ed. 1967)) and a delegate from Pennsylvania. 2 FARRAND 97. It was the mandate of the committee of detail to draft a constitution conforming to the resolutions which had been adopted by the Convention. *Id* at 85.

A. THE STANDING INCAPACITIES.

Before the committee of detail commenced its work, however, the Convention considered a resolution which had not been proposed by the committee of the whole. George Mason, of Virginia, moved on July 26, 1787, that the committee of detail provide a clause "requiring certain qualifications of landed property & citizenship" and disqualifying persons with unsettled accounts or who were indebted to the United States from being elected to the membership in the legislature. *Id.* at 121.

The proposed clause produced considerable debate. Gorham thought the matter ought to be left to the legislature. Madison thought the proposition a good one, but that it should be "new modelled". Gouverneur Morris was opposed to "such minutious regulations in a Constitution". *Id.* at 122. Dickinson of Delaware "was agst any recital of qualifications in the Constitution. It was impossible to make a compleat one and a partial one would by implication tie up the hands of the Legislature from supplying the omissions. . . ." *Id.* at 123. Madison then moved to strike out the word "landed" with respect to property, because of the difficulty of defining a uniform standard which would suit the different circumstances prevailing in the various

* Gorham had been quite active in the Massachusetts convention. He was a member (probably chairman) of the first committee appointed by that convention, MASS. JOURNAL 24, a member of the committee which prepared the first draft of the constitution, *id.* at 26. 28, and a member of a number of other drafting committees, *id.* at 31, 77, 79, 144.

states. *Id.* at 123-24. His motion was carried. Thereafter, the clauses relating to persons having unsettled accounts and to public debtors were stricken. *Id.* at 126.

The Convention adjourned on July 26, 1787, after referring its proceedings to the committee of detail. *Id.* at 128. It was in the committee of detail that the language of article I, section 2, clause 2 began to take shape. *See id.* at 178. Unfortunately, no minutes of the proceedings of the committee of detail are extant. However, Edmund Randolph apparently made an outline for discussion in committee of the provisions which the Constitution should contain, based upon the resolutions of the Convention. Each item in the document is either checked off or crossed out, indicating that it was used in the preparation of subsequent drafts. *Id.* at 137 n.6. The item dealing with qualifications of members of the House of Representatives reads as follows (matter in italics crossed out; matter in parentheses represents changes made by Randolph):

> "5. The qualifications of (a) delegate(s) shall be the age of twenty five years at least, and citizenship: *and any person possessing these qualifications may be elected except"* *Id.* at 139.

Had the italicized language been adopted, it would have suggested an intention to repudiate the legal basis for the parliamentary and colonial decisions, including the *Wilkes Case,* heretofore discussed. However, when reported to the Convention by the committee of detail the clause had taken the following form:

> "Sect. 2. Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of [in] the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen." *Id.* at 178.

Thus, the committee of detail considered and rejected language which probably would have imposed a limitation

upon the power to judge qualifications, as that power had been interpreted in England, the colonies and the states.

The only changes which were made in the clause by the full Convention were the extension of the prerequisite citizenship to seven years and the change of the word "resident" to "inhabitant", *id.* at 216-19, and the clause remained in that form when it was submitted to the committee of style on September 10, *id.* at 565. However, when the committee of style reported out the clause on September 12, it had been recast in the negative form in which it now appears, *id.* at 590.

We have no records of the deliberations of the committee of style and thus are left to surmise as to why this change was made. According to Madison, it was the pen of Gouverneur Morris, a lawyer from Pennsylvania and member of the committee of style, *id.* at 553, which gave "[t]he *finish* . . . to the style and arrangement of the Constitution", 3 FARRAND 499. Morris, who therefore may be assumed to have been the person who changed the language, stated that he had "rejected redundant and equivocal terms" so as to make the Constitution "as clear as our language would permit". *Id.* at 420. It is, therefore, noteworthy that he recast that clause into the negative form which Blackstone used when listing the "standing incapacities", expressly pointing out that the House of Commons could adjudge a member incapable of sitting for other reasons. 1 BLACKSTONE, COMMENTARIES *163, *176 (4th ed. 1770) [and subsequent editions].* If it had been the intent of the Framers to limit the House's power to that of judging the "qualifications" set forth in article I, section 2, then the change made by the committee of style, particularly in light of the wide circulation of Blackstone's *Commentaries* in America, made the language more—not

* We know that Gouverneur Morris owned a copy of *Blackstone. See* 4 BLACKSTONE, COMMENTARIES (1st Amer. ed. 1772) (subscribers' list preceding title page).

less—equivocal. We believe it to be a fair inference that this change was effected to make clear that the Framers intended only to prescribe the standing incapacities without imposing any other limit on the historic power of each house to judge qualifications on a case by case basis.

The committee of detail had also reported out a provision which would enable the legislature to establish uniform qualifications for membership with regard to property. 2 FARRAND 179. It is largely upon the disposition of this provision by the convention that Professor Warren bases his conclusion that a single house can judge only those qualifications expressly set forth in the Constitution. WARREN 420. "For", states Warren, "certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress". *Id.* at 421. But an analysis of the action taken by the Convention on this clause, in light of the English and colonial background against which the Framers were writing, leads to the conclusion, we believe, that in voting down the clause the Convention was merely depriving Congress of the power to create new "standing incapacities" and that the Convention's action is not inconsistent with granting each house broad power to judge the character and conduct of its members.

On August 10, Charles Pinckney of South Carolina moved that the clause be changed to provide for the ownership of a specific quantum of property as a prerequisite for office. Rutledge, a member of the committee of detail, seconded the motion and explained that the committee had omitted any specific qualification because the committee could not agree among themselves. Pinckney's motion was rejected.* 2 FARRAND 248-49. The Convention then re-

* Presumably because, as earlier debates in the Convention revealed and the committee of detail concluded, the disparate economic conditions of mercantilist-commercial New England and plantation-agricultural southern tidewater precluded the construction of an acceptable uniform standard.

turned to consideration of the clause as reported out by the committee of detail, *i.e.*, that Congress be empowered to establish prospective "uniform qualifications . . . with regard to property." It is at that point that Madison's oftenquoted speech appears:

> "Mr. [Madison] was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. This was one of the former cases. It was as improper as to allow them to fix their own wages, or their own privileges. It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised by the stronger in order to keep out partizans of a weaker faction." *Id.* at 249-50 (footnotes omitted).

Thus, when read in the context in which it was made (Warren, it should be noted, takes this speech out of context and places it after Morris' motion, discussed below, WARREN 420), it seems clear that Madison was directing his argument against the proposition that Congress should have the unlimited power to establish "standing incapacities" in an area which had traditionally been the subject of such legislation in both England and the colonies. *See* 1

BLACKSTONE, COMMENTARIES *176; WARREN 416-17. When it is recalled that the motion under discussion was to allow Congress to establish uniform property qualifications—a motion which was ultimately defeated—it seems clear that, in speaking of the threat of converting a republic into "an aristocracy or oligarchy", Madison's reference was to the property requirements which had been imposed as restrictions upon membership in Parliament. For, as Blackstone candidly notes, those requirements, unlike the power to judge qualifications, had been used to keep "an aristocracy or oligarchy" in power.*

After, not before (*cf.* WARREN 420), Madison's speech, a motion was made by Gouverneur Morris to strike out "with regard to property" in the proposed clause giving Congress the power to establish "uniform qualifications". 2 FARRAND 250. It was in response to this motion, which was subsequently defeated, that Madison gave his observations on the British Parliament:

> "Mr. [Madison] observed that the British Parliamt. possessed the power of *regulating* the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." *Ibid.* (emphasis added).

Once again, Madison's remarks were addressed to a clause which, if enacted, would have given to Congress the power to establish, without limitation, any new "standing incapacity" which the majority of the moment thought desirable. It would also seem from his speech that it was

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* "That every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities: *which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men . . .*", 1 BLACKSTONE, COMMENTARIES *176 (emphasis added).

Parliament's abuse of this power, not its use of the power to judge individual qualifications, that he was referring to. High on the list of those abuses in Madison's mind must have been the Parliamentary Test Act (30 Car. II st. 2, c. 1 (1678)) which had excluded Catholics as a group from Parliament.* It seems more probable that this Act, rather than, as Warren suggests, the *Wilkes Case*, was the "lesson" to which Madison referred. *Cf.* WARREN 420. Since the power to "establish" standing restrictions on membership and the power to "judge" qualifications had traditionally been treated as two separate and distinct powers, and since the House of Commons in expelling Wilkes had acted under its power to "judge", stripping the Congress of the power to "establish" standing restrictions would impose no limitation upon the power of either house to deal with any future "*Wilkes Case*"; only a limitation on the power of each house to judge qualifications or to expel a member** could have that effect. All of these factors taken together suggest that Professor Warren's connection of Madison's speech and the *Wilkes Case* lacks substantial justification.

It was also in this context that Williamson made his observation that

> "Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body." 2 FARRAND 250.

The language of Williamson's speech likewise indicates that he was concerned about the possibilities of abuse if Congress were given an unlimited power to establish new

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* That such statute was in the minds of the Framers is indicated by the prohibition contained in article VI, section 3, which was not contained in the draft reported out by the committee on detail, 2 FARRAND 188, but was introduced by Pinkney on August 20, *id.* at 342, ten days after Madison's speech.

** Thus, the two-thirds requirement for expulsion, proposed by Madison, may reflect concern over the *Wilkes Case, see* pp. 57-58 *infra.*

"standing incapacities," rather than if a house had the right to consider the qualifications of its members on an individual basis.

B. The Power to Judge Qualifications.

The provision giving to each house the power to judge the qualifications of its members was not contained in the resolutions of the Convention which were referred to the committee of detail. *Id.* at 129-33. It first appeared in a draft prepared by James Wilson, which apparently was used in the course of deliberations by the committee of detail. *Id.* at 155. It is well to recall here that Gorham, a member of the committee, had been quite active in the Massachusetts constitutional convention, and that the Massachusetts convention had adopted a provision which limited the power of the legislature to judging those qualifications "pointed out in the constitution". Moreover, we have the testimony of another member of the committee, Edmund Randolph, that "the Constitution of Massachusetts was produced . . . in the grand Convention." 3 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 368 (1876). But the limitation contained in the Massachusetts Constitution was not adopted even though knowledge of its existence and of the presumed necessity for it, at least in the eyes of Massachusetts, if the *Wilkes Case* and the colonial practice was to be repudiated, must be imputed to at least two members of the committee. Nevertheless, the "judge qualifications" clause was reported out of the committee of detail in the form in which it now appears in the Constitution, 2 Farrand 180, and was adopted by the Convention "nem. con.", *id.* at 254.

C. The Power to Expel.

The resolutions referred by the Convention to the committee of detail also lacked a provision giving to the houses of Congress the power to expel members. That provision

was first referred to in the outline for discussion prepared by Edmund Randolph:

> "13. (quaere. how far the right of expulsion may be proper.) The house of delegates shall have power over its own members." *Id.* at 140.

Such a provision was first set forth in the draft prepared by Wilson, referred to above, in the following language:

> "Each House may expel a Member, but not a second Time for the same Offense." *Id.* at 156.

It should here be kept in mind that James Wilson was from Pennsylvania and that the Pennsylvania Constitution contained a clause which prohibited the expulsion of a member of the state legislature a second time for the same offense. In the next draft prepared by Wilson,* the provision appeared in the following form (parentheses indicate matter crossed out; italics indicate matter added):

> "Each House (shall have Authority to) *may* determine the Rules of its Proceedings, (and to) *may* punish its (own) Members for disorderly Behaviour. (Each House) *and* may expel a Member, (but not a second Time for the same Offense)." *Id.* at 166.

The effect of the omissions and additions indicated in that draft is to cast the clause into the form in which it was reported out by the committee of detail (except for capitalization and punctuation), *id.* at 180. Thus, it appears that the committee of detail considered and rejected yet another provision which would have limited the power of each house of Congress in a manner which would have repudiated in part the decision in the *Wilkes Case* and in

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* This draft contains emendations in Rutledge's hand, so we know that it was considered by at least one other member of the committee. 2 FARRAND 163 n.17.

the colonial cases.* The only change made in the clause by the Convention was the insertion, on Madison's motion, of the phrase "with the concurrence of ⅔" between the words "may" and "expel". *Id.* at 254. As so amended, the clause was agreed to "nem.con.". *Ibid.*

Although, as we have pointed out above, there seems to be no reason for concluding that Madison had the *Wilkes Case* in mind when speaking in opposition to the proposal to allow Congress to create new standing incapacities, as Warren suggested, it is entirely possible that he was thinking of that and similar cases here. This becomes clear when it is recalled that Wilkes was initially *expelled* from the Commons and that Pennsylvania, Delaware and Maryland had limited the expulsion power, apparently as a reaction to the *Wilkes Case.*

D. Summary.

Thus the Convention considered and rejected at least two clauses, and possibly a third (the Massachusetts variant), which would have repudiated, in whole or in part, the English and colonial precedents, including the *Wilkes Case.* On the other hand, the acts of the Convention in rejecting provisions which would have given to Congress the power to create new "standing incapacities" do not, in our analysis, really bear on the question whether each house was denied power to judge qualifications of individual members.

III. The Ratification Period.

There remains for consideration whether any further light was cast on the Framers' understanding of the mean-

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* Neither "Wilkes" nor *"Wilkes Case"* appears in the index to Farrand (4 Farrand 127, 226), although other names mentioned in the debates do, *e.g.*, "Blackstone", "Bolingbroke", and "Bowdoin" (*id.* at 134-35). Presumably, therefore, to the extent that our present records are complete, Wilkes was not discussed in the Convention.

ing of the "judge qualifications" clause during the period of the ratification conventions (1787-1789).

Our review of the convention proceedings in the several states, as set forth in *Elliott's Debates*, has not revealed any discussion of article I, section 5, or of the scope of the power to judge qualifications or to expel conferred thereby. Moreover, our research has not disclosed any discussion of the precise point by any of the leading public commentators of the period.

There was, however, considerable public concern when the Constitution was proposed that the upper-class members of the Convention had been able subtly to manipulate the mechanics of representation so as to exclude from a voice in Congress those who were not members of their own class. That concern was evidenced by a debate which occupies some of the most frequently-cited pages of *The Federalist.*

One of the most sophisticated and articulate spokesmen for the anti-Federalist faction in New York was "Brutus," thought to be the political pseudonym for Robert Yates.* He speculated that by deft execution of the power given to Congress in article I, section 4 to regulate the times, places and manner of electing Members of Congress, the "rich and well-born" might be preferred:

> "It is clear that, under this article, the federal legislature may institute such rules respecting elections as to lead to the choice of one description of men. The weakness of the representation, tends but too certainly to confer on the rich and *well-born,* all honours; but the power granted in this article, may be so exercised, as to secure it almost beyond a possibility of controul." *Brutus No. IV*, N. Y. Independent Journal, Nov. 29, 1787.

It was to meet this argument that Hamilton wrote *The Federalist* No. 60. Article I, section 4 is the only clause of

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* KENYON, THE ANTIFEDERALISTS 323 (1966).

the Constitution he discussed in that number, except in an aside where he referred to the lack of a congressional power to prescribe qualifications with respect to property:

> "The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are unalterable by the legislature." THE FEDERALIST No. 60, at 408-09 (Cooke ed. 1961) [all subsequent references are to this edition unless otherwise indicated].

Hamilton's statement standing alone could be interpreted as expressing the belief that a house of Congress may consider only those qualifications specified in the Constitution. But when his statement is read in context, it is seen that he was directing his comments to another issue, *i.e.*, the proper interpretation of the "Times, Places and Manner" clause, while reiterating that Congress could not prospectively impose qualifications, applicable to all seeking election, in addition to those specified in the Constitution.*

Madison's statement in *The Federalist* No. 52, which probably was the "other occasion" referred to by Hamilton,

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*It is sometimes forgotten that *The Federalist* is "a piece of very special pleading" which "worked only a small influence upon the course of events during the struggle over ratification. Promises, threats, bargains, and face-to-face debates, not eloquent words in even the most widely circulated newspapers, won hard-earned victories for the Constitution in the crucial states of Massachusetts, Virginia, and New York." THE FEDERALIST xi, xv (Rossiter ed. 1961) (introduction).

seems similarly directed to the lack of power to create new "standing incapacities":

> "The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States, must at the time of his election, be an inhabitant of the State he is to represent, and during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Id.* at 354-55.*

Madison seems here to be arguing against the existence of any power in Congress to create, by legislation, new prerequisites with respect to matters of religion, property, birth or profession, matters which had traditionally been the subject of legislatively created "standing incapacities", by Parliament, 1 BLACKSTONE, COMMENTARIES *163, *175-76, by colonial legislatures, CLARKE 151-52, and by the states, WARREN 416-17. He was meeting the charge that "the House of Representatives . . . will be taken from that class of citizens which will have least sympathy with the mass

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* In *The Federalist* No. 57, Madison reiterated his conclusions in No. 52:

> "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." *Id.* at 385 (emphasis added).

of the people", THE FEDERALIST No. 57, at 384, by correctly pointing out that, in so far as the standing prerequisites for office were concerned, the House of Representatives was more democratic than most state legislatures. So far as appears from the text, he did not purport to discuss in any detail the power of the houses of Congress to judge the qualifications of their respective members. His statement that "the door . . . is open to *merit* of every description" (emphasis added) may well indicate that he held the view that each house possessed the power to inquire into the individual fitness or capacity of its members and to exclude or expel an individual for unfitness *i.e.*, the very power which the English, colonial and state legislatures had exercised and which both houses of Congress subsequently exercised.

In light of the long history of colonial and state practice underlying the power to judge qualifications, interpreted to encompass the power to inquire into the individual character and conduct of the member, we cannot subscribe to petitioners' suggestion that the Constitution would not have been ratified if such had been the intent of the Framers. Br. 46-47. We have found no discussion of the issue either in the state ratification conventions or in the principal pamphleteers and commentators of the period. The general statements in the conventions of New York, Pennsylvania and Virginia to which petitioners refer were directed to other issues. Significantly, the constitutions and practices of those states placed no restriction on the power of legislative bodies to adjudge an individual as unqualified because of his personal misconduct and to exclude or expel him (although in Pennsylvania, he could not be expelled a second time for the same offense). *See* pp. 28-32, 36-37, 41-44, *supra;* Appendix B. The power was not discussed, we believe, simply because the "wide-spread acceptance of the belief that such power belonged to the legislature was as great in the colonies as it was in England", CLARK 198, and the power was therefore not controversial.

IV. Conclusion

When the Framers wrote into article I, section 5 of the Constitution the power of each house of Congress to judge the qualifications of its members and granted the power to expel a member upon a two-thirds vote, they were not writing upon a blank slate. They were writing against a background of some 160 years of colonial and state experience, coupled with several centuries of parliamentary practice, during which time the words used by the Framers had attained a precise, well-defined and widely accepted meaning. The language chosen, absent express limitation, encompassed an exclusive, unreviewable power on the part of the legislative body to judge the individual fitness or capacity of the member, unrestricted by the standing prerequisites for office.

At the Constitutional Convention, the Framers took no action and wrote into the Constitution no language (with the exception of the two-thirds vote limitation on the power to expel) which evinced an intent to repudiate the experience with which they were familiar. The debates relied upon by Warren and others were directed to quite a different issue: whether Congress should have the power to create new standing incapacities. Moreover, the Convention deliberately rejected several proposals which would quite clearly have imposed restrictions upon the power as traditionally interpreted.

Finally, given the wide acceptance on this side of the Atlantic of the power to judge a member's individual fitness, the absence of any discussion of the power during the ratification campaign and the absence of any evidence or basis for conjecturing that the *Wilkes Case* was in the forefront of the public mind nearly twenty years after it occurred, we see no basis for speculating that the Constitution would not have been ratified if the power to judge qualifications had been so understood.