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

H. RES. 128

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

§ 12. Loyalty

Loyalty to the United States or to its government is not listed as one of the standing qualifications for membership in Congress.(13) The Supreme Court decided in 1969 that Congress could not add to the constitutional qualifications for Members, and could only adjudge the absence or lack of the standing qualifications of age, citizenship, and residency.(14) The Powell case did not specifically discuss, however, the constitutional provisions which are related to loyalty and which could be construed as qualifications for membership.

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

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12. For a similar resolution reported in a preceding Congress but not considered in the House, see H. Res. 933, 92d Cong.

13. The congressional precedents on loyalty all arose prior to 1936 (see 1 Hinds' Precedents §§ 449, 451, 457, 459, 620). The last House debate on exclusion for disloyalty occurred in 1919 through 1921 (see 6 Cannon's Precedents §§ 56–58).

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

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

15. U.S. Const. art. VI, § 3. The form of the oath which is taken appears at 5 USC § 3331. For detailed information on the evolution of the oath of office, see Ch. 2, supra.

16. See 1 Hinds' Precedents § 221, where the Senate allowed a Senator-elect to

The House has not reached the question whether an express disavowal of the oath to support the Constitution by a Member-elect would prohibit him from taking office. In a recent case the Supreme Court denied to state legislators the power to look behind the mere willingness of a legislator-elect to swear to uphold the Constitution, in order to test his alleged sincerity in taking the oath.(17) The court did however distinguish the facts before it from a hypothetical situation where a legislator might swear to an oath pro forma while declaring or manifesting his disagreement with or indifference to the oath being taken.(18)

be sworn after satisfying itself that he had the mental capacity to take the oath.

17. *Bond* v *Floyd*, 385 U.S. 116 (1966). The state legislature had attempted to exclude Mr. Bond because he had voiced objections to certain national policies. The main argument proposed by the Georgia state legislature for excluding him was that since the taking of the oath was an enumerated qualification for office, and since the legislature had the sole power to judge the meeting of qualifications, the body had the power to look beyond the plain words of the oath and the simple willingness to take it, in order to adjudge the state of mind of the legislator taking it.

18. *Id.* at p. 132.

The 14th amendment to the Constitution imposes a further test of loyalty on Representatives, by prohibiting the taking of office by any person who has engaged in insurrection or given aid or comfort to the enemies of the United States after previously having taken the official oath to support the Constitution.(19) Early in this century, the House denied a seat to a Member-elect under the provisions of the 14th amendment.(20)

In the period immediately following the Civil War, the Congress added a statutory qualification to those enumerated in the Constitution by requiring a loyalty "test oath" of Members-elect.(1) A number of persons were

19. U.S. Const. amend. 14, § 3. Congress may, by a vote of two-thirds, remove such disability for any person. The disabilities arising from Civil War activities were generally removed by the Act of June 6, 1898, Ch. 389, 30 Stat. 432. For congressional determination of the meaning of "aid and comfort" to enemies, as used in the 14th amendment, see 6 Cannon's Precedents §§ 56–58.

20. See 6 Cannon's Precedents §§ 56–58. When the Member-elect in that case, Mr. Victor L. Berger (Wisc.) was excluded, his conviction for espionage was presently being appealed in the federal courts. After the Supreme Court voided his conviction, *Berger et al.* v *U.S.*, 255 U.S. 22 (1921), Mr. Berger was elected to succeeding Congresses.

1. Act of July 2, 1862, 20 Stat. 502, termed the "iron-clad" or "test" oath

denied seats in the House by virtue of that provision.(2)

Cross References

Administration of the oath and challenges to the right to be sworn, see Ch. 2, supra.

Administration of the oath to officers, officials, and employees, see Ch. 6, supra.

Conduct, punishment, censure, and expulsion, see Ch. 12, infra.

§ 13. Incompatible Offices

The Constitution prohibits service as a Member of Congress to one holding an office under the United States during the continuancy thereof; it also prohibits any Member from being appointed during his term to any civil office under the United States which was created or the emoluments of which were increased during his term.(3) The first prohibition, against holding incompatible offices, was designed to avoid executive influence on Members of Congress and to protect the principle of the separation of powers.(4) The latter prohibition attempts to ensure the disinterested vote of Members of Congress in creating civil offices and in increasing the salaries and privileges of such offices.(5) To bar

because of its exhaustive definition of disloyalty. See the extensive discussion at 1 Hinds' Precedents § 449 on whether that oath was unconstitutional, the House finding that it was not, despite a decision by the Supreme Court that the oath was unconstitutional as applied to lawyers, since it operated to perpetually exclude persons from a profession in an ex post facto manner. See *Ex parte Garland*, 4 Wall. 333 (1866). The minority opposition in the House to the 1862 oath argued that the oath was unconstitutional for two reasons: first, it was an ex post facto law, punishing individuals, without a trial, for offenses committed before the enactment; second, it purported to add qualifications to those enumerated in the Constitution for Members.

2. See 1 Hinds' Precedents §§ 449, 451, 459, 620.

3. Art. I, § 6, clause 2.

4. See The Federalist No. 76 (Hamilton), Modern Library (1937), and Story, *Commentaries on the Constitution of the United States* §§ 866–869, Da Capo Press (N.Y. repub. 1970). There was little discussion of this provision at the Constitutional and Ratifying Conventions, its purpose being self-evident.

5. "The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the Representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the ex-