

Report for Congress

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Congressional Candidacy, Incarceration, and the Constitution's Inhabitancy Qualification

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Summary

The issue of whether one is permitted to run for and hold office in the House of Representatives either after a felony conviction, and/or while incarcerated in prison, specifically involves a question of the qualifications, or disqualifications, to be a Representative in Congress. There are three, and only three “positive” qualifications for Representative in Congress set out in the United States Constitution: (1) age (25 years); (2) citizenship (7 years); and (3) inhabitancy (one must be an “inhabitant” of the State from which chosen “when elected”).

It is now well-settled that these three qualifications for office in the Constitution are the *exclusive* qualifications for Congress (and are not merely “minimum” qualifications), and that they are fixed and may not be supplemented by Congress nor by any State unilaterally. Specifically, there is no qualification in the Constitution that one *not* be a convicted felon (nor a “disqualification” for offenses other than in the 14th Amendment for certain treasonous conduct by those who have taken an oath of office). Similarly, there is no qualification in the Constitution that a person, when elected to Congress, *not* be in prison. Furthermore, no State could permissibly implement such additional qualifications for *federal* office through election laws or ballot procedures. The Framers of the Constitution intentionally implemented a representative scheme whereby significant discretion is given and deference provided to the judgment and choice of the people as to whom they wish to have represent them in Congress. In this respect, the adage of the French political philosopher Joseph de Maistre might apply: “Every nation has the government it deserves.”

The existing constitutional qualifications do require one to be an “inhabitant” of the State from which chosen “when elected.” Does being placed in a prison facility outside of the State in which one is a candidate disqualify one from being an “inhabitant” of that first State? Congressional precedents, as well as the provision’s enactment history, indicate that “inhabitancy” is not to be interpreted in an overly strict or legalistic sense, but rather was meant to assure a real connection to the State from which elected. The development of the concept of “inhabitancy” in House qualifications cases indicates that the term appears to be somewhat akin to the legal concept of “domicile,” encompassing not only actions taken which evidence the establishment of a principal “home” in a State, but also recognizing a person’s intent. Physical presence in the State at the time of election is, of course, a significant factor for consideration, but is not necessarily the determining factor. When an individual had lived in a State previously but then had physically been away from that State, considerations relevant to determining “inhabitancy” in that first State might include whether one “had left there any of the insignia of a household establishment”; whether one retained a business in the first State; the location of one’s family; one’s intent to establish residency in the new State; one’s intent to return to the first State, both stated and “deduc[ed] from facts”; as well as physical presence or absence in the first State at the time of election. When one is out of one’s “home State” *involuntarily* at the time of election, that may certainly be a significant consideration in determining one’s intent with regard to inhabitancy.

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Congressional Candidacy, Incarceration and the Constitution’s Inhabitancy Qualification

In the wake of the recent expulsion of a Member from the House of Representatives, the conviction and incarceration of that expelled former Member, and that former Member’s filing and intention to run for Congress in the next general election in the State of Ohio, questions have arisen as to the permissibility or possibility of a candidate running for and being elected to Congress while in prison. This report examines those questions and specifically addresses whether a candidate for the House of Representatives who at the time of the election is imprisoned in a penal institution outside of the State from which he is running may still be considered an “inhabitant” of that first State, as required by the qualifications provision of the United States Constitution.

Qualifications for Congress

The questions concerning the permissibility of running for Congress while imprisoned, or after a felony conviction, specifically and necessarily concern the “qualifications” or possible disqualifications of one to be a Representative in the United States Congress. The qualifications to hold the federal office of United States Representative are established in the United States Constitution, are the *exclusive* qualifications for office, and are unalterable by the Congress alone, or by any State unilaterally.¹ There are only three “positive” qualifications for Representative in Congress set out in the United States Constitution, and those three qualifications are as follows:

- Age — one must be at least 25 years old.
- Citizenship — one must be a citizen of the United States for at least 7 years.
- Inhabitancy — one must be an “inhabitant” of the State from which chosen “when elected.”²

Exclusivity of Constitutional Qualifications

Although there may in our history have been some legitimate debate and credible minority argument concerning the ability of Congress or the States to set additional or different qualifications for federal office other than those set out in the

¹*Powell v. McCormack*, 395 U.S. 486 (1969); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

²Article I, Section 2, cl. 2: “No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” For qualifications of United States Senators, see Article I, Section 3, clause 3.

Constitution, it is now well-settled that the three qualifications established in the United States Constitution are the *exclusive* qualifications for congressional office (and are not merely “minimum” qualifications), and that such qualifications are fixed and may not be changed, added to, or subtracted from by the United States Congress nor by the State legislatures, other than by an amendment to the United States Constitution.³ The Supreme Court of the United States found that it is clear from the constitutional record that “the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby ‘divested’ States of any power to add qualifications.”⁴ The history of the adoption of the qualifications provisions within the Constitution demonstrates a philosophic commitment of the Framers to minimal qualifications for congressional office, fixed in the Constitution, so as to empower the electorate and to promote the “fundamental” democratic principle that in the new republic “the people should choose whom they please to govern them.”⁵

In our system of federalism there is a division of authority with respect to elections to federal office. The States do have a significant role in federal elections, including the express function of establishing the qualifications to *vote* in federal elections (as long as such qualifications are the same as those to vote in State elections for the most numerous house of the State legislature);⁶ and the broad administrative authority over the *procedures* of federal elections, that is, authority over the “Times, Places and Manner” of federal elections (unless Congress

³*Powell v. McCormack, supra; U.S. Term Limits, Inc. v. Thornton, supra; Cook v. Gralike, supra.*

⁴*U.S. Term Limits v. Thornton, supra* at 800-801; *Cook v. Gralike, supra*. Whatever authority States have over *federal* officers and elections must be a “delegated” authority from the Constitution and could not possibly be a “reserved” power of the States (under the 10th Amendment), since the States could not “reserve” a power relative to something which did not exist before the Constitution. *U.S. Term Limits, Inc., supra* at 802-805; *Cook v. Gralike, supra* at 522: “Because any state authority to regulate election to ... [federal] offices could not precede their very creation by the Constitution, such power ‘had to be delegated to, rather than reserved by, the States.’”

⁵*Powell v. McCormack, supra* at 547, quoting Alexander Hamilton at the New York ratifying Convention, 2 *Eliot's Debates* 257. In warning against an “uncontrollable power over the elections to the federal government” either in the state legislatures or in the Federal Government itself, Hamilton explained in the *Federalist Papers* that: “The qualifications of the persons who may ... be chosen ... are defined and fixed in the Constitution, and are unalterable by the legislature.” *The Federalist Papers*, No. 60. Similarly, James Madison argued at the Constitutional Convention for minimal required qualifications for Congress that “ought to be fixed by the Constitution,” as a means to prevent infringement on the free choice of the people, and as a way of preventing “an aristocracy or oligarchy ... by limiting the number capable of being elected.” 2 Farrand, *Records of the Federal Convention of 1787*, 249-250. See also Madison, *The Federalist Papers*, Nos. 52 and 57.

⁶United States Constitution, Article I, Section 2, clause 1. The constitutional authority of the States over voting eligibility in federal elections, but not over the establishment of qualifications for federal office, leads to the very real possibility of having one who can be a candidate in a congressional election, but who can not vote for himself in that election.

designates otherwise).⁷ The States' authority over voting qualifications and over the procedures of federal elections, however, does not include the authority to establish new or additional qualifications of candidates for (and thus one who may hold) congressional office. State laws which have attempted to place requirements on a candidacy to Congress that have been deemed to constitute additional qualifications for election to federal office, such as, for example, State requirements of residency in a congressional district, disqualification of convicted felons, or disqualification for certain long-term incumbents (term limits), have all been found to be unconstitutional when challenged.⁸

Conviction of a Crime; Imprisonment

Since the United States Constitution sets out the only three qualifications for congressional office (age, citizenship and inhabitancy), the conviction of a crime which constitutes a felony, can not constitutionally “disqualify” one from being a Member of Congress (unless that conviction is for certain treasonous conduct after having taken an oath of office).⁹ Furthermore, since a State does not have the authority to add qualifications for *federal* offices, the fact of conviction, even for a felony offense, could not be used to keep a candidate off of the ballot under State law either as a direct disqualification of convicted felons from holding or being a candidate for office, or as a disqualification of one who is no longer a “qualified elector” in the State.¹⁰ Once a person meets the three constitutional qualifications of age, citizenship and inhabitancy in the State when elected, that person, if duly elected, is constitutionally “qualified” to serve in Congress, even if a convicted felon.

Similar to the fact of a felony conviction, the fact that an individual is in prison, in and of itself, is also not necessarily a constitutional bar to or an automatic disqualification from running for and being elected to Congress.¹¹ In fact, as early

⁷Article I, Section 4, clause 1.

⁸District residency requirements: *Hellmann v. Collier*, 141 A.2d 908, 911 (Md. 1958); *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (N.M. 1972); *Exon v. Tiemann*, 279 F. Supp. 609, 613 (Neb. 1968); *State ex rel. Chavez v. Evans*, 446 P.2d 445, 448 (N.M. 1968); restrictions on convicted felons: *Application of Ferguson*, 294 N.Y.S.2d 174, 176 (Super. Ct. 1968); *Danielson v. Fitzsimmons*, 44 N.W. 2d 484, 486 (Minn. 1950); *State ex rel. Eaton v. Schmahl*, 167 N.W. 481 (Minn. 1918); disqualification of incumbents (term limits): *U.S. Term Limits, Inc. v. Thornton*, *supra*; *Cook v. Gralike*, *supra*; *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1081 (WD Wash. 1994); *Stumpf v. Lau*, 839 P.2d 120, 123 (Nev. 1992). Impermissible “additional qualifications” to office may not be masqueraded by a State as merely permissible, administrative “ballot access” provisions. *Term Limits, Inc. supra* at 832-835, distinguishing *Storer v. Brown*, 415 U.S. 724 (1974).

⁹The Fourteenth Amendment to the Constitution, Section 3, provides a disqualification for one who, having taken an oath of office to support the Constitution, “engages in insurrection or rebellion against,” or aids or abets the enemies of, the United States. *Note* exclusion cases of Victor Berger, discussed also in *Powell v. McCormack*, *supra* at 545, n.83.

¹⁰*Application of Ferguson, supra*; *Danielson v. Fitzsimmons, supra*; *State ex rel. Eaton v. Schmahl, supra*.

¹¹This report does not discuss the action which the House may or may not take if a Member-
(continued...)

as 1798 a Member of the House was re-elected to Congress while imprisoned within his home State. Representative Matthew Lyon, an outspoken Republican critic of the Federalists, and particularly of President John Adams, was convicted and imprisoned on October 9, 1798, under the so-called “Sedition Act” for “libeling” President Adams.¹² While still in prison in Vergennes, Vermont, Lyon won re-election to Congress in a December 1798 run-off election. Upon Lyon’s eventual arrival in Congress in Philadelphia after four months imprisonment, a Federalist Member of the House offered a resolution of expulsion of Lyon, which failed of the required two-thirds vote.¹³

Inhabitancy in the State From Which Elected

While imprisonment at the time of election, in itself, does not constitutionally disqualify one from being a Member of Congress if one is duly elected by his or her constituents, the question still remains whether, under constitutional qualifications for congressional office, a person who is incarcerated at the time of the election in a State *other* than the one from which he is a candidate still qualifies as being, “when elected,” an “Inhabitant of that State in which he shall be chosen.”

It should be noted initially that the United States Constitution expressly provides that each House of Congress is to be the judge of the qualifications for office of its own Members: “Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members”¹⁴ The Supreme Court of the United States has explained that each House of Congress has the “sole authority under the Constitution to judge of the elections, returns and qualifications of its members ...” and “to render a judgment which is beyond the authority of any other tribunal to review.”¹⁵ The congressional precedents interpreting the constitutional qualification

¹¹(...continued)

elect is imprisoned and unable to appear to take the oath of office and be seated at the convening of the new Congress.

¹²Lyon had written that in President Adams he saw “every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice” McLaughlin, *Matthew Lyon, the Hampden of Congress, a Biography* (New York 1900), at 344.

¹³*Annals of the Congress of the United States 2959 - 2974*, 5th Congress, February 22, 1799. Many years later, in 1840, after years of debate over the constitutionality and appropriateness of passing the Sedition Act, Congress passed a private bill reimbursing Lyon’s heirs the fine and court costs associated with his conviction. H.R. 80, 26th Cong., 1st Sess., *Journal of the House of Representatives* 994 - 998, 26th Cong., May 23, 1840, and *Journal of Senate* 447, 26th Cong., Tuesday, June 24, 1840.

¹⁴Article I, Section 5, clause 1. Questions of a Member-elect’s qualifications for office may be raised by any other Member-elect prior to taking the oath of office. *Deschler’s Precedents of the House of Representatives*, Chapter 2 § 6, and Chapter 12, § 14, p. 181; Brown, *House Practice*, “Oaths,” § 3, , pp. 611-612 (1996).

¹⁵*Barry v. Cunningham*, 279 U.S. 587, 613, 619 (1929). *See also Seville v. Elizalde*, 112 F.2d 29, 38 (D.C. Cir. 1940): “We are cited no cases, and we find none, in which the Federal courts have ever been asked to determine the qualifications of a member of Congress.

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of “inhabitancy,” when questions of seating a Member-elect have arisen, provide, therefore, the relevant precedential guidelines for examining the constitutional provision.

There is, it should be emphasized, no precise constitutional definition of the term “inhabitant.” The word “inhabitant” was substituted for the term “resident” at the Constitutional Convention, an amendment supported, and seconded, by James Madison who believed that although both words were “vague,” the term “inhabitant” might protect one’s right to be chosen from a State even though that person may have temporarily *not* resided in the State because of an occasional absence, even for a “considerable” period of time, on public or private business.¹⁶ Some delegates objected to any inhabitancy or residency requirement, believing that people would “rarely chuse a nonresident,” and noting that there were great disputes in some State colonial legislatures over technical and legal definitions of the term “which were decided by the arbitrary will of the majority,”¹⁷ or as noted by Madison, “determined more according to the affection or dislike to the man, than any fixt interpretation of the word.”¹⁸ George Mason, however, argued for some requirement of inhabitancy or residency, to preserve a knowledge and understanding of the State and to prevent wealthy interlopers from neighboring States:

If residence be not required, Rich men of neighbouring States, may employ with success means of corruption in some particular district and thereby get into the public Councils after having failed in their own State. This is the practice in the boroughs of England.¹⁹

The apparent constitutional concern of the Framers who debated this provision was thus to craft a term that was not so overly technical that it could be applied in a strict, capricious fashion by a political majority to their advantage, but rather to express a requirement of an actual connection to the State as one’s home. The mere absence of physical presence from the State for a particular duration, or presence for any period of continual duration, was obviously not to be the definitive or conclusive concept, since “so strict an expression might be construed to exclude the members

¹⁵(...continued)

Apparently, it has been fully recognized that that power is lodged exclusively in the legislative branch”; see also *Reed v. County Commissioners*, 277 U.S. 376, 388 (1928); *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934).

¹⁶2 Farrand, *Records of the Federal Convention of 1787*, at 217. Madison noted specifically as to the terms “resident” and “inhabitant” that “both were vague, but the latter least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business.”

¹⁷*Id.* at 217, Governor Wilson.

¹⁸*Id.* at 217.

¹⁹*Id.* at 218, Mason. The delegates expressly rejected any period of a “durational” residency requirement, however, rejecting various durations of previous residence of one year, three years or seven years, apparently agreeing with Mr. Williamson who stated that “new residents if elected will be most zealous to Conform to the will of their constituents, as their conduct will be watched with a more jealous eye.” 2 Farrand, *supra* at 218.

of the Legislature, who could not be said to be actual residents in their States whilst at the Seat of Genl. Government.”²⁰

Early congressional decisions on inhabitancy might have appeared, at first glance, to have borne out to some extent some of the Framers’ concerns about overly technical definitions, but upon examination show a more reasoned conclusion. In the case of John Bailey in the 18th Congress, for example, the House of Representatives found a Member-elect from Massachusetts not to be an “inhabitant” of that State, when he had left the State to work for the Federal Government and reside in the District of Columbia for a number of years. Even in this seemingly strict interpretation, however, the Committee and the House noted that it was a voluntary action on the part of Bailey to “abandon” his domicile and establish residency in the District of Columbia, that he had lived “exclusively” in the District for a period of over 6 years, that he had in the District “married a wife and established a family of his own, thereby leaving his natural or original domicile in his father’s house,” and that, significantly, “Mr. Bailey had no domestic establishment or estate in Massachusetts.”²¹ Noting that one “may acquire inhabitancy in the District of Columbia in the same way as in any of the States,” the House and Committee on Elections, as reported in *Hinds’ Precedents*, specifically concluded:

If the residence of Mr. Bailey here [the District of Columbia] had been transient and not uniform; had he left a dwelling house in Massachusetts in which his family resided a part of the year; had he left there any of the insignia of a household establishment; there would be indication that his domicile in Massachusetts had not been abandoned. It had been urged that the expressed intention to return to Massachusetts should govern. But the law ascertained intention in such a case by deducing from facts. ... The committee did not contend that a Member must be actually residing in a State at the time of his election.²²

The concept of “inhabitancy” that evolved in congressional decision making and has traditionally been employed in congressional consideration, alluded to in the 1824 case of John Bailey, appears to be somewhat akin to the understanding of the legal term “domicile,” and thus would encompass not only actions taken which evidence the establishment of a physical and principal “home” in a State, such as the purchase or maintenance of a primary personal residence, but also intent, that is, the intent that a place be one’s permanent home, the place where one intends to return after an absence, as such intent is “deduc[ed] from the facts.”²³ Citing as support of the “inhabitancy” of a Member-elect, the Committee of Elections of the House in the case of *Bayley v. Barbour*, Forty-seventh Congress, for example, noted that:

Mr. Barbour testifies that he was a native of the State of Virginia; had always been a citizen of said State; never claimed to have lived elsewhere in a permanent sense or to have exercised citizenship in any other State or Territory ... and that

²⁰*Id.* at 218.

²¹I *Hinds’ Precedents of the House of Representatives*, § 434, pp. 419-421.

²²*Id.* at 421.

²³*Id.* at 421; see *Black’s Law Dictionary*, at p. 501 (7th ed.), defining the term “domicile” to include “... a person’s true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.”

while he had a temporary winter residence in the city of Washington, he had taken a house in Alexandria with his family, in September 1880, [before the November 1880 election]”²⁴

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

To be an inhabitant within the Constitution, it seems clear that one must have, first, a place of abode, and, second, that this place of abode be intended by him as his headquarters; the place where his civic duties and responsibilities center; the place from which he will exercise his civic rights. We think that a fair reading of the debate on this paragraph of the Constitution discloses that it was not intended that the word “inhabitant” should be regarded in a captious, technical sense. ... We think that a fair interpretation of the letter and spirit of this paragraph with respect to the word “inhabitant” is that the framers intended that for a person to bring himself within the scope of its meaning he must have and occupy a place of abode within the particular State in which he claims inhabitancy, and that he must have openly and avowedly by act and word subjected himself to the duties and responsibilities of a member of the body politic of the particular State.²⁵

In judging whether one was an “Inhabitant of that State for which he shall be chosen,” the House of Representatives has thus employed several and varied considerations, depending on the facts and question before it. When an individual had lived in a State previously but then had physically been away from that State, for example, considerations relevant to the question of whether one was an “inhabitant” of that first State might include whether one “had left there any of the insignia of a household establishment,” whether a home was owned or occupied in the first or the new State, and what type of home, *i.e.*, a permanent home or merely a vacation home; where one’s wife and family were located; whether one retained a license in the first State to practice a profession; whether one continued to exercise the responsibilities of citizenship in the first State, such as voting and paying taxes; one’s intention to return to the first State, both stated and “deduc[ed] from facts”; as well as one’s physical presence or absence in the first State at the time of election.²⁶

Cases in the Senate demonstrate a similar application of something akin to a “domicile” concept of “inhabitancy.” In the 1899 Senate case of Nathan B. Scott, the challenge to Mr. Scott’s qualifications as a Senator from West Virginia was referred to the Committee on Privileges and Elections. The challenge was based in part on the fact that Mr. Scott was actually residing in the District of Columbia at the time of his election to the Senate, and not in West Virginia, and therefore, it was

²⁴*Hinds’ Precedents, supra* at § 435, pp. 423-424.

²⁵VI *Cannon’s Precedents of the House of Representatives*, § 174, at pp. 339-340.

²⁶Bailey, I *Hinds’ Precedents, supra* at §434, pp. 419-422; Philip B. Key of Maryland, *Id.*, at §432, pp.417-419; John Forsyth, *Id.*, at §433, p. 419. At least as far as the reliance on State law in determining constitutional “qualifications” for federal office, the precedents *prior* to the Supreme Court’s clarifications in 1969 in *Powell v. McCormack*, and again in 1995 in *U.S. Term Limits, Inc.*, would now appear to be of marginal relevance and reliability.

argued, was an inhabitant of the District of Columbia and not West Virginia. The Committee found, however, that Mr. Scott moved to the District of Columbia after his appointment by the President as Commissioner of the Internal Revenue, that he had resided since a young man in West Virginia, and came to Washington “with the intent to retain his residence, citizenship, inhabitancy, and domicile in Wheeling, W. Va.” and that “he claims to be an inhabitant of Wheeling, W. Va., and that he remained in Washington in the discharge of his official functions with intent to return to his home in Wheeling when his duties of office here ended.” The Committee stated that the term “inhabitant” is “a legal equivalent of the term ‘resident’,” and noting that Mr. Scott also voted in West Virginia, unanimously found that despite his temporary physical absence from the state, he was entitled to his seat.²⁷

As demonstrated by the congressional cases, if a candidate were to be physically absent from the State at the time of election to congressional office, that fact would certainly be one consideration in the House’s review of the issue of “inhabitancy” of a Member-elect. However, absence from the State – particularly involuntary absence, such as if one had been injured and hospitalized out of State, or had been involuntarily removed from the State to another State, would not appear, in itself, to be the *only* consideration or even the determinant factor in judging “inhabitancy” in that State from which elected. The involuntary nature of the relocation to another State would, in fact, significantly militate against a finding that such person intended to abandon his inhabitancy and residency in the first State. Generally, the House has looked to the totality of the circumstances to determine what might be characterized as one’s true “home,” including whether one has kept the indicia of residence in that first State, such as one’s principal personal residence, where one’s immediate family resides, as well as considering the intent of the individual to return to and to make a particular State his “home,” evidenced and deduced by statements and facts.

²⁷I *Hinds' Precedents*, *supra* at § 439, p. 429. See also *United States Senate Election, Expulsion, and Censure Cases, 1793-1990*, *supra* at 258-260 (Case 87).

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