

the second on Jan. 3, 1973, when the Secretary of the Senate was authorized by resolution to administer the oath of office to Senator-elect Joseph R. Biden, of Delaware, absent because of a death in his family.⁽¹⁴⁾

§ 6. Challenging the Right to be Sworn

When the Speaker directs the membership-elect of the House to arise to take the oath of office, any Member-elect may challenge the right of any other Member-elect to be sworn at that time.⁽¹⁵⁾

14. 119 CONG. REC. 9, 93d Cong. 1st Sess.

15. For the procedure of challenging, see §6.1, *infra*. The authority to challenge the right of a Member-elect to be sworn is based on U.S. Const. art. I, §5, clause 1, which constitutes the House as the sole judge of the elections, returns, and qualifications of Members. Challenges are made before the oath is administered because the oath is given under art. VI, clause 3, to "Representatives before mentioned", meaning those who meet the qualifications and election requirements stated in the Constitution. The right of one Member-elect not yet sworn to challenge the right of another not yet sworn is unquestioned (see 1 Hinds' Precedents §141).

House as judge of qualifications, see *The Power of a House of Con-*

In stating his objection to the right of another to be sworn, the Member-elect must base his challenge either on his own responsibility as a Member-elect, or on specific grounds.⁽¹⁶⁾ If neither basis is stated to support the challenge, the House may decline to entertain it.⁽¹⁷⁾ A Member-elect may also challenge the right of an entire state delegation to be administered the oath.⁽¹⁸⁾ Usually, such a challenge relates not to the qualifications or elections of the individual members of the state delegation, but to the status of the constituency.⁽¹⁹⁾

When a challenge is proposed, the Speaker asks the challenged Member(s) not to rise to take the oath with the rest of the membership, as the House and not the Speaker determines both the preliminary and the final action to be taken on any challenges.⁽²⁰⁾

gress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673-84 (Jan. 1968).

16. See §6.2, *infra*.

17. 1 Hinds' Precedents §455.

18. See, for example, 1 Hinds' Precedents §§457, 460-462.

19. See *Parliamentarian's Note*, §6.4, *infra* (systematic state denial of voting rights). For occasions following the Civil War when entire state delegations were challenged on the ground of collective disloyalty, see 1 Hinds' Precedents §§457, 460-462.

20. See §6.1, *infra*. The statement has been made that the Speaker may,

When the right to be sworn of an individual Member-elect is challenged, he generally loses no rights thereby,⁽¹⁾ except for his right to vote.⁽²⁾ While his case is pending, he may be permitted to debate his own right to the seat,⁽³⁾ and may serve on committees.⁽⁴⁾

but is not required to, direct the challenged Member-elect to stand aside (1 Hinds' Precedents §§143-146). The Speaker has held, however, that such request is a matter of order, for the convenience of procedure (1 Hinds' Precedents §145). The Speaker has recently held that debate on the right to be sworn of a challenged Member-elect is not in order until after the remaining Members have been sworn (see §6.3, *infra*).

1. See 1 Hinds' Precedents §155. See §2, *supra*, for the status of Members-elect.
2. After the membership of the House has been sworn in en masse, Members-elect who have not taken the oath due to absence or due to challenges are not entitled to vote until being sworn. See §2.2, *supra*.
3. See §2.5, *supra*. Rule XXXII clause 1, *House Rules and Manual* §919 (1973) grants the privilege of the floor to contestants in election cases.
4. See 4 Hinds' Precedents §4483. This is the traditional view, as stated by Jefferson's Manual: ". . . Before a return be made a Member elected may be named of a committee, and is to every extent a Member except that he cannot vote until he is sworn." *House Rules and Manual*

Challenged cases are taken up in the order in which challenges were made.⁽⁵⁾

The pendency of a challenge does not preclude the entertainment of other business before the House, and all other organizational business may be completed before a challenge is resolved.⁽⁶⁾ By unanimous consent, the House may also proceed to general legislative business pending consideration of the right of a Member to be sworn.⁽⁷⁾

After the unchallenged membership of the House has been sworn, some preliminary action is usually taken on each challenge. The House may simply seat a Member by authorizing the administration of the oath; such a resolution may determine his *prima facie* as well as final right to the seat.⁽⁸⁾ A com-

§300 (1973). For a summary of the rights and privileges of Members-elect not yet sworn, see §2, *supra*.

5. See 1 Hinds' Precedents §§147, 148. Where a division is demanded on one resolution to seat several claimants, the oath may be administered to each as soon as his case is decided (see 1 Hinds' Precedents §623).
6. See 1 Hinds' Precedents §474.
7. See 1 Hinds' Precedents §§151, 152.
8. See, for example, the resolution at §6.5, *infra*. The Member proposing a resolution to seat a challenged Member-elect may, prior to the adoption of rules, move the previous question and cut off all debate on the subject,

mon type of resolution authorizes the administration of the oath to the challenged Member-elect based on his prima facie right to the seat, but refers the determination of his final right to committee.⁽⁹⁾ The third type of resolution refers the prima facie as well as the final right to the seat to committee, without authorizing the administration of the oath.⁽¹⁰⁾ The determination by the House as to which kind of resolution to adopt depends on both the sufficiency of the credentials and on

since House Rule XXVII clause 3 (House *Rules and Manual* §907 [1973]), allowing 40 minutes debate in certain situations when the previous question is moved, is inapplicable prior to the adoption of rules (see Ch. 1, *supra*, for a full discussion; see §5.5, *supra*, for a recent instance thereof). If the previous question is rejected, or if the proposing Member yields for the purpose, amendments may be offered, if germane, to a resolution authorizing the administration of the oath to a Member-elect (see Ch. 1, §12, *supra*, for a general discussion; see Ch. 1, §12.7, *supra*, for an occasion where such an amendment was held not germane).

9. Admission on prima facie right, without regard to final right, usually occurs when the Member-elect comes from a recognized constituency, with credentials in due form and with unquestioned qualifications (see 1 Hinds' Precedents §§528-534)
10. See §§6.6, 6.7, *infra*.

the strength of the grounds for challenge.⁽¹¹⁾

Except for the exclusion of Members-elect from the Clerk's roll for irregularities in credentials, no action is taken upon the right of a Member-elect to his seat until the time comes for his taking the oath. Therefore, when a Representative-elect was excluded from the 90th Congress and was re-elected to the same Congress after a vacancy in the seat had been declared, Speaker John W. McCormack, of Massachusetts, ruled that no action would be taken upon his right to membership until he appeared to take the oath and was challenged once again.⁽¹²⁾

Forms

Form of resolution providing that a Member, who had been asked to stand aside when the oath was administered to the other Members, be permitted to take the oath of office.

Resolved, That the gentleman from Missouri, Mr. Morgan M. Moulder, be now permitted to take the oath of office.⁽¹³⁾

11. For specific election contests and House action thereon, see Ch. 9, *infra*.
12. See §6.8, *infra*, for the ruling. See §6.9, *infra*, for the challenge that was made when the Representative-elect appeared to take the oath.
13. 107 CONG. REC. 24, 87th Cong. 1st Sess., Jan. 3, 1961.

Form of resolution authorizing the Speaker to administer the oath of office to a challenged Member-elect and providing that the question of final right to his seat be referred to the Committee on House Administration.

Resolved, That the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from Arkansas, Mr. Dale Alford.

Resolved, That the question of the final right of Dale Alford to a seat in the 86th Congress be referred to the Committee on House Administration, when elected, and said committee shall have the power to send for persons and papers and examine witnesses on oath in relation to the subject matter of this resolution.⁽¹⁴⁾

Form of resolution providing that the question of the right of either of two contestants for a seat be referred to the Committee on House Administration, and providing that until that committee has reported, and the House decided, neither the Member-elect nor the contestee should take the oath of office.

Resolved, That the question of the right of J. Edward Roush or George O. Chambers, from the Fifth Congressional District of Indiana, to a seat in the 87th Congress be referred to the Committee on House Administration, when elected, and said committee shall have the power to send for persons and papers and examine witnesses on oath in relation to the subject matter of this resolution; and be it further.

Resolved, That until such committee shall report upon and the House decide the question of the right of either J. Edward Roush or

14. 105 CONG. REC. 14, 86th Cong. 1st Sess., Jan. 7, 1959.

George O. Chambers to a seat in the 87th Congress, neither shall be sworn.⁽¹⁵⁾

Form and Procedures of Challenges

§ 6.1 A Member-elect challenges the right of another Member-elect to take the oath prior to the swearing in of Members-select en masse, whereupon the Speaker requests the challenged Member-elect to stand aside.

On Jan. 5, 1937,⁽¹⁶⁾ after Speaker William B. Bankhead, of Alabama, had requested the membership of the House to rise for the administration of the oath of office, Mr. John J. O'Connor, of New York, arose and said:

Mr. Speaker, I ask that the gentleman from New Hampshire [Mr. Jenks] stand aside.

Despite the fact that a certificate of his election has been filed with the Speaker, it may be impeached by certain facts which tend to show that he has not received a plurality of the votes duly cast in that congressional district.

THE SPEAKER: The gentleman from New Hampshire will stand aside momentarily.⁽¹⁷⁾

15. 107 CONG. REC. 24, 87th Cong. 1st Sess., Jan. 3, 1961.

16. 81 CONG. REC. 13, 75th Cong. 1st Sess.

17. For examples of similar requests by the Speaker when challenges have

§ 6.2 A Member-elect challenging the right of another to be sworn offers, as a basis for challenge, either his own responsibility as a Member-elect, or the strength of documents, or both.

On Jan. 10, 1967,⁽¹⁸⁾ Member-elect Lionel Van Deerlin, of California, stated a challenge to the right of another Member-elect to be sworn in the following terms:

Mr. Speaker, upon my responsibility as a Member-elect of the 90th Congress, I object to the oath being administered at this time to the gentleman from New York [Mr. Adam C. Powell]. I base this upon facts and statements which I consider reliable. ...

The same language has often been used to propose challenges,⁽¹⁹⁾ although on Jan. 3, 1937,⁽²⁰⁾ Member-elect John J. O'Connor, of New York, stated a challenge not

been made, see 111 CONG. REC. 18, 19, 89th Cong. 1st Sess., Jan. 4, 1965; 113 CONG. REC. 14, 90th Cong. 1st Sess., Jan. 10, 1967; 115 CONG. REC. 15, 91st Cong. 1st Sess., Jan. 3, 1969.

18. 113 CONG. REC. 14, 90th Cong. 1st Sess.

19. See, *e.g.*, statement of Mr. William F. Ryan (N.Y.), 111 CONG. REC. 18, 89th Cong. 1st Sess., Jan. 4, 1965; statement of Mr. Clifford Davis (Tenn.), 107 CONG. REC. 23, 87th Cong. 1st Sess., Jan 3, 1961.

20. 81 CONG. REC. 13, 75th Cong. 1st Sess.

on the basis of his responsibility but on facts tending to show that the challenged Member-elect had not received a plurality of votes in the district from which elected.⁽¹⁾

Debate on Challenges

§ 6.3 It is not in order to debate a challenged Member's right to take the oath of office at the beginning of a Congress until the remaining Members-elect have been sworn in.

On Jan. 5, 1937,⁽²⁾ after Mr. John J. O'Connor, of New York, had challenged the right of a Member-elect to take the oath, Mr. Bertrand H. Snell, of New York, arose to state certain remarks as to the certificate held by the challenged Member-elect and as to the principle that in standing aside, the challenged Member-elect yielded none of his rights or privileges as a Member of the House. Mr. O'Connor then arose to state a point of order, as follows:

MR. O'CONNOR: Mr. Speaker, I make the point of order that at this par-

1. If a challenge does not propose either the strength of documents or the responsibility of the challenging Member-elect, the House will not entertain it. 1 Hinds' Precedents §455.

2. 81 CONG. REC. 13, 75th Cong. 1st Sess.

particular time the matter is not debatable. . . .

MR. SNELL: I think I have the right to make this statement now and under the circumstances should be allowed to make it.

THE SPEAKER:⁽³⁾ The request made by the gentleman from New York was that the gentleman holding the certificate of election from the State of New Hampshire stand aside momentarily.

The Chair is of the opinion that he waives no rights and just as soon as the other Members take the oath the matter can be settled. ...

The Chair will recognize the gentleman later if he desires to extend his argument.

Challenge to a Delegation

§ 6.4 The right of an entire state delegation of Representatives-elect to take the oath may be challenged.

On Jan. 4, 1965,⁽⁴⁾ Mr. William F. Ryan, of New York, challenged, on his behalf and on the behalf of a number of colleagues, the right of the Representatives-elect from Mississippi (Mr. Abernathy, Mr. Whitten, Mr. Williams, Mr. Walker, and Mr. Colmer) to take the oath of office. Speaker John W. McCormack, of Massachusetts, requested the Representatives-elect from Mississippi as well as a challenged Member-elect from another

3. William B. Bankhead (Ala.).

4. 111 CONG. REC. 18, 19, 89th Cong. 1st Sess.

state not to rise to take the oath with the other Members being sworn in en masse.

Parliamentarian's Note: The challenge to the Mississippi delegation was based on the constitutional argument that systematic denial of Negro voting rights throughout Mississippi invalidated the election of the entire House delegation from that state.

§ 6.5 The House may authorize, through one resolution, the administration of the oath to an entire state delegation which has been challenged.

On Jan. 4, 1965,⁽⁵⁾ after unchallenged Members of the House had been sworn in, the following resolution was offered, in relation to an entire state delegation that had been challenged:

Resolved, That the Speaker is hereby authorized and directed to administer the oath of office to the gentlemen from Mississippi, Mr. Thomas G. Abernathy, Mr. James L. Whitten, Mr. John Bell Williams, Mr. William M. Colmer, and Mr. Prentiss Walker.

Immediately after the adoption of the resolution, the five Members-elect from Mississippi were sworn in all at one time.

5. 111 CONG. REC. 18, 19, 89th Cong. 1st Sess.

Preliminary House Action on Challenges

§ 6.6 When two persons claimed a seat in the House from the same congressional district, one with a certificate of election signed by the Governor of the state and the other with a certificate of election from a citizens' election committee of the congressional district, the House refused to permit either to take the oath of office and referred the question of their prima facie as well as final right to the seat to the Committee on Elections.

On Jan. 3, 1934,⁽⁶⁾ the Clerk of the House, South Trimble, transmitted to the House a signed certificate of the Governor of Louisiana attesting to the election of Mrs. Bolivar E. Kemp, Sr., to fill the vacancy caused by the death of the Honorable Bolivar E. Kemp. He also transmitted a communication from the Citizens' Election Committee of the Sixth Congressional District of the State of Louisiana in the form of a certificate of election of Mr. J.Y. Sanders, Jr., to fill the same vacancy. The House then adopted the following resolution:

Resolved, That the question of prima facie as well as the final right of Mrs.

6. 78 CONG. REC. 11, 12, 73d Cong. 2d Sess.

Bolivar E. Kemp, Sr., and J.Y. Sanders, Jr., contestants, respectively, claiming a seat in this House from the Sixth District of Louisiana, be referred to the Committee on Elections No. 3; and until such committee shall have reported in the premises and the House decided such question neither of said contestants shall be admitted to a seat.

§ 6.7 The House agreed to a resolution excluding a Member-elect pending an investigation of his right to the seat, which referred to a select committee questions of his right to be sworn and to take the seat, permitted him pay and allowances of the House pending a final determination, and required the committee to report back to the House within a prescribed time.

On Jan. 10, 1967,⁽⁷⁾ the House agreed to a resolution excluding Mr. Adam C. Powell, Jr., of New York, from his seat pending the final determination of his right to be sworn:

Resolved, That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative, be referred to a special committee of

7. 113 CONG. REC. 24-26, 90th Cong. 1st Sess.

nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House.

For the purpose of carrying out this resolution the committee, or any subcommittee thereof authorized by the committee to hold hearings, is authorized to sit and act during the present Congress at such times and places within the United States, including any Commonwealth or possession thereof, or elsewhere, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee nor any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpoenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

Until such question and right have been decided, the said Adam Clayton Powell shall be entitled to all the pay, allowances, and emoluments authorized for Members of the House.

The committee shall report to the House within five weeks after the

members of the committee are appointed the results of its investigation and study, together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

Challenge to Member Once Excluded

§ 6.8 Where a Representative-elect, excluded from membership in a particular Congress is re-elected to the same Congress, it is for the House to determine the procedure to be followed if and when he appears to take the oath; no action is taken until such time that the Representative-elect appears to take the oath and is again challenged.

On May 1, 1967,⁽⁸⁾ Speaker John W. McCormack, of Massachusetts, responded to a parliamentary inquiry as to the necessity of the House to take affirmative action when a Representative-elect, excluded from membership "in the Ninetieth Congress", by resolution, was re-elected to the same Congress. The Speaker stated that when the Member appeared, if he was challenged, it would be a matter for the House to decide and for the

8. 113 CONG. REC. 11298, 90th Cong. 1st Sess.

House to express its will upon. He stated that the leadership intended to take no action with regard to the seating of such Member until he appeared to take the oath.

§ 6.9 The right to take the oath of a Member-elect, who had been excluded by resolution from membership in the 90th Congress, was challenged in the 91st Congress.

On Jan. 3, 1969,⁽⁹⁾ the right to be sworn of Mr. Adam C. Powell, Jr., of New York, Representative-elect to the 91st Congress, was challenged. Mr. Powell had been excluded by the House from membership in the 90th Congress. The Speaker⁽¹⁰⁾ asked Mr. Powell to

9. 115 CONG. REC. 15, 91st Cong. 1st Sess.

10. John W. McCormack (Mass.).

stand aside while the oath of office was administered to the other Members.

Senate Challenges

§ 6.10 On one occasion, a Senator-elect died while there was pending in the Senate a question as to his right to take the oath of office.

On Jan. 4, 1947,⁽¹¹⁾ the Senate laid on the table the credentials of Mr. Theodore G. Bilbo, of Mississippi, whose seat was challenged, pending the improvement of his physical condition. Mr. Bilbo died on Aug. 21, 1947, before the matter was again brought before the Senate.

11. 93 CONG. REC. 109, 80th Cong. 1st Sess.