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Constitutional Law -- Power of Legislature to Disqualify Members-Elect

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mately taken to eliminate police-community hostility, it is important that it be taken now. Otherwise, the future may offer an increasing number of cases like *Lankford v. Gelston.*

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Constitutional Law—Power of Legislature to Disqualify Members-Elect

Julian Bond, representative-elect to the Georgia General Assembly, was not allowed to take the oath of office on the first day of the session. Challenges to his qualifications were referred to a special committee, that held hearings and recommended that he not be seated. The House approved the recommendation and denied Bond his seat. In *Bond v. Floyd*,[1] Bond and two members of his constituency sought to enjoin the exclusion. The three-judge District Court, one judge dissenting, upheld the House action as a reasonable exercise of its power to judge the qualifications of its members. It found the House justified in declaring the strong anti-war statement of the Student Nonviolent Coordinating Committee, which Bond supported and expanded on,[2] repugnant to the oath required of House members to support the federal constitution. Thus, there was no denial of due process.

The dissent did not reach the federal constitutional issues. Construing the power of the House to judge the qualifications of its members as limited to the qualifications specifically mentioned in the state constitution,[3] it would hold the House action void as in violation of that constitution. The majority thought this a "restrictive view, unfounded in recognized authority."[4] Both opinions turned to the federal Congress for legislative precedents.

[1] 251 F. Supp. 333 (N.D. Ga. 1966) *reversed*, 35 U.S.L. WEEK 4038 (U.S. Dec. 5, 1966). See note 75 *infra.*

[2] *Id.* at 336, 337. The SNCC statement opposed the war and declared support for men who would not respond to the draft, calling for a "freedom fight" at home as an alternative. Bond asserted that he fully supported the statement, and added that he was a pacifist who admired the courage of draft-card burners.

[3] GA. CONST. art. III, § VII, para. 1. This provision is substantially the same as U.S. CONST. art. 1, § 5. The qualifications mentioned in the Georgia Constitution are citizenship, residency, age, no former conviction of a crime of moral turpitude, and no holding of a civil or military office at the time of election.

[4] 251 F. Supp. at 340.

In the most recent debate on congressional power to disqualify members-elect, "the intent of the founding fathers" was seen by one senator as "convincing" support for a finding that the power is unlimited.[5] The history of the relevant constitutional provisions has been put to such use before, but that has been by no means its only service.[6] Another reading of the remarks invoked in both causes, set in the context of 1787, may yield a better appreciation of "the intent of the founding fathers."

The Pinckney draft of a federal constitution, presented on May 29, 1787, contained age, citizenship and residence requirements for members of the national legislature. It also provided that the House should be the judge of the "elections, returns and qualifications" of members, a provision which passed untouched to the final Constitution.[7] This draft constitution was seldom referred to in the convention, but provided a convenient skeleton for debate—and, more important, was submitted on July 26, along with the resolutions of the entire body, to the committee of detail.[8] In debate on qualifications, the delegates agreed on a minimum age of twenty-five for Representatives, though Mr. Wilson objected.[9] Delegate Mason later moved that the committee of detail include a clause setting minimum requirements of property and citizenship.[10] Mr. Dickinson "was against any recital of qualifications in the Constitution. It was impossible to make a complete one; and a partial one would, by implication, tie up the hands of the legislature from supplying the omissions."[11] Consistent with his earlier position, Wilson agreed, on the grounds that "odious and dangerous characters" might then be immune from disqualification.[12] Despite the Dickinson and Wilson views, occasionally quoted to show that Congress was not expected to be limited in disqualifying, the convention sent the Mason resolution to the committee.[13]

[5] 93 CONG. REC. 12 (1947). See also Bond v. Floyd, 251 F. Supp. 333, 341 (N.D. Ga. 1966).

[6] See, *e.g.*, 1 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 477 (1907) [hereinafter cited as HINDS].

[7] MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 129 (Elliot. ed. 1845).

[8] *Id.* at 375.

[9] *Id.* at 228.

[10] *Id.* at 370.

[11] *Id.* at 371.

[12] *Id.* at 373.

[13] *Id.* at 375

The proposed constitution, reported on August 6, contained age, citizenship and residence requirements as suggested by Pinckney.[14] Delegates were disappointed, however, by the treatment of the property qualification, embodied in proposed art. VI, § 2: "The legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said legislature shall seem expedient."[15] James Madison voiced strong opposition to this grant of authority where no authority had been proposed: "The qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate either, it can by degrees subvert the Constitution."[16]

When Gouverneur Morris moved to go further, and allow the legislature complete freedom to set qualifications by striking "with regard to property" from the section, Mr. Williamson thought, "This would surely never be admitted."[17] Reasserting the dangers of such power, Madison pointed to parliamentary abuses as "a lesson worthy of our attention." British legislators had regulated qualifications for selfish, political or religious ends, he said. These objections were evidently persuasive, for the Morris motion was defeated.[18] Then, before the final vote on art. VI, § 2, as reported, Mr. Wilson rose to plead again for a wider concession of power to Congress. He argued that the section be dropped because it "would constructively exclude every other power of regulating qualifications." This time Wilson was on the winning side, as the section was defeated.[19]

But whether that action meant what he said it should is another matter. His position seems feeble, in that the convention had already set, over his objections, citizenship and age qualifications, and a residence requirement that he could be expected to dislike for the same reasons. That art. VI, § 2, should have been proposed at all bears out Wilson's and Dickinson's claims that a list of qualifications would constructively exclude all others, leaving the legislature without authority in this area unless granted elsewhere in the instrument. The Morris amendment of the section would have come closest to

[14] *Id.* at 377.
[15] *Id.* at 377.
[16] *Id.* at 404.
[17] *Id.* at 404.
[18] *Id.* at 404.
[19] *Id.* at 404.

Wilson's wishes, but it was soundly defeated. Interpreters of this debate should find it as hard to deny Mr. Wilson's "inclusion of one is exclusion of all others" argument, as to agree that because the convention excluded one qualification, it meant to grant Congress power to include all others.

Madison's strict view of congressional power in this area, as may be expected, was promulgated in The Federalist. In discussing the qualifications specified, Madison suggests that they are exclusive: "Under these reasonable limitations, the door of this part of the federal government is open to men 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."[20] More persuasive, perhaps, is Hamilton's full agreement with this construction, in a more definite statement: "The qualifications of the persons who may choose, or be chosen, as has been remarked upon on another occasion, are defined and fixed in the constitution, and are unalterable by the legislature."[21] Therefore, Hamilton concluded, there need be no fear that Congress might succeed in barring access to all but the rich; it has not the power.

Adherence to this theory has been somewhat erratic in Congress. In times of unusual stress—post-Civil War, World War I, and a period of national indignation at the marital habits of Mormons—legislators have seen other values as superior. But it is insufficient to discuss deviations as solely due to the pressure of events, for each generation sees its own times as turbulent, and finds new requirements for arbitrary action: the Vietnam dissenter today poses the same threat as did the unreconstructed rebel a century ago. A brief survey may reveal whether congressional practice in this area has established a different rule, based on policies unrecognized in 1787. If it has not, and if the policies then relied on remain predominant, perhaps it is time to reiterate the limits on legislative authority over qualifications.

It was early settled that the states could not add qualifications for members of Congress to those prescribed in the Constitution. In the contested election cases of *Barney v. McCreery*[22] in the

[20] THE FEDERALIST No. 52, at 249 (Hallowell ed. 1837).
[21] *Id.* No. 60, at 286.
[22] Clarke & H. Elec. Cas. 167 (1807).

House, and *Lyman Trumbull*[23] in the Senate, candidates were seated though they had not met state requirements. The Committee on Elections' report in the *McCreery* case emphasized that Congress is "sole judge" of qualifications.[24] State courts have since uniformly conceded Congress exclusive jurisdiction in this area.[25] Indeed, they have customarily adopted the maxim *expressio unius est exclusio alterius*, suggested by the committee in *McCreery* as the broader basis of its holding,[26] in construing their own constitutional provisions concerning qualifications.[27]

The Senate, though it had apparently once deviated from strict adherence to that hoary rule,[28] did not squarely face the question until 1862. Its answer then was in harmony with the Madisonian view and the *McCreery* understanding. When Senator Fessenden moved that Benjamin Stark's credentials be referred to the Committee on the Judiciary for an investigation of alleged disloyalty, he considered his action unprecedented.[29] The committee agreed, refusing to go beyond an examination of the credentials, and recommending that Stark be seated.[30] Senator Sumner argued that the Constitution, by requiring an oath of office, had made loyalty a necessary requirement.[31] This suggestion was sharply debated, and

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[23] Hupman, *Senate Election, Expulsion and Censure Cases*, S. Doc. No. 71, 87th Cong., 2d Sess. 21 (1962). [hereinafter cited as Hupman Elec. Cas.]

[24] 17 ANNALS OF CONG. 871 (1807) [1789-1824].

[25] See, *e.g.*, Shub v. Simpson, 196 Md. 177, 76 A.2d 332, *appeal dismissed*, 340 U.S. 881 (1950); Odegard v. Olson, 264 Minn. 439, 119 N.W.2d 717 (1963); State *ex rel.* Wettengel v. Zimmerman, 249 Wis. 237, 24 N.W.2d 504 (1946). *Compare* State *ex rel.* O'Sullivan v. Swanson, 127 Neb. 806, 257 N.W. 255 (1934), *with* State *ex rel.* Sundfor v. Thorson, 72 N.D. 246, 6 N.W.2d 89 (1942). *Contra*, 24 TEMP. L.Q. 484 (1951).

[26] 17 ANNALS OF CONG. 877 (1807) [1789-1824]; *accord*, Wood v. Peters, Mob. 79 (1889).

[27] Thomas v. Owens, 4 Md. 189 (1853); Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352 (1950); Black v. Trower, 79 Va. 123 (1884). In Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950), an additional oath was upheld as an effectuation of a loyalty requirement in the state constitution. As thus interpreted, the oath was found constitutional in Gerende v. Board of Supervisors, 341 U.S. 56 (1951). The court in Barker v. People, 3 Cow. 686 (N.Y. 1824), distinguished between an unconstitutional addition of qualifications and a constitutional disqualification as part of the punishment for certain crimes.

[28] John M. Niles, 1 HINDS § 441. Niles' sanity was investigated before he was seated. The dissent in the principal case notes that sanity is a qualification mentioned in the Georgia Constitution. 251 F. Supp. at 356.

[29] CONG. GLOBE, 37th Cong., 2d Sess. 183 (1862) [covering 1833-1873].

[30] S. REP. No. 11, 37th Cong., 2d Sess. (1862).

[31] CONG. GLOBE, 37th Cong., 2d Sess. 994 (1862) [covering 1833-1873]. The oath is required by U.S. CONST. art. VI.

the Senate defeated Sumner's resolution that Stark not be seated without prior investigation. The Senate then adopted the committee report and admitted Stark.[32]

The Act of July 2, 1862,[33] prescribing an oath of past loyalty, brought a change in congressional practice. As first passed by the Senate, the "iron-clad oath" would not have been required of Representatives, Senators, the Vice-President or the President,[34] and so would have avoided conflict with art. 1. But all exceptions save the President were eliminated in conference compromises with the House.[35] Its constitutionality was often attacked,[36] but never judicially determined. The Supreme Court, however, did strike down an act which extended the test oath requirement to lawyers in federal courts,[37] finding it an *ex post facto* law and bill of attainder.[38] The oath was repealed in 1884.[39]

While it was in effect, both houses excluded elected candidates for disloyalty, determining that the candidate could not swear truthfully.[40] It is unclear from the debates whether this procedure was considered warranted by the act; contradictory support was offered.[41] In one case, the House Committee on Elections paid lip service to the theory that enumerated qualifications are exclusive while disqualifying a candidate.[42] In the two cases in the House,

[32] CONG. GLOBE, 37th Cong., 2d Sess. 994 (1862) [covering 1833-1875]. This action was, however, taken "without prejudice to any subsequent proceeding in the case." The Senate thus agreed with its committee's position that though a member-elect could not be disqualified for prior disloyalty, he might be expelled. In 1796, The Senate had decided it had no jurisdiction to consider crimes alleged to have been committed by a member before election, 5 ANNALS OF CONG. 59, 60 (1796) [1789-1824]. It has never explicitly asserted such jurisdiction, though it did conduct hearings on such a matter in the case of Senator Gould, 68 CONG. REC. 43, 5914 (1926).

[33] Ch. 128, 12 Stat. 502 (1862), required the candidate to swear that he had never borne arms against, or voluntarily supported the enemies of, the United States.

[34] CONG. GLOBE, 37th Cong., 2d Sess. 2861, 2872 (1862) [covering 1833-1873].

[35] *Id.* at 3012.

[36] See, *e.g.*, McKee v. Young, 2 Bart. El. Cas. 422, 434 (1868) (minority report).

[37] Act of Jan. 24, 1865, ch. 20, 13 Stat. 424 (1865).

[38] *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

[39] Act of May 13, 1884, 23 Stat. 21, 5 U.S.C. § 16 (1965).

[40] Phillip F. Thomas, Hupman Elec. Cas. 40 (1868); Smith v. Brown, 2 Bart. El. Cas. 395 (1868); McKee v. Young, 2 Bart. El. Cas. 422 (1868).

[41] CONG. GLOBE, 40th Cong., 2d Sess. 320-30, 632-35, 653-62, 678-86, 1144-56, 1169-75, 1205-10, 1232-43, 1260-71 (1868) [covering 1833-1873]; 1 HINDS §§ 449, 451.

[42] In refusing to seat the candidate who received the second highest num-

strong minority reports were filed, attacking the procedure.[43] Three other House candidates during Reconstruction were investigated before being sworn; all were seated.[44] That the House felt constrained to relieve R. R. Butler of his "disability" under the oath before even administering it to him[45] indicates that the act, rather than a concept of inherent congressional power, was the basis for the Reconstruction disqualifications.

With the extraordinary exception of the *Whittemore* case,[46] the House, in 1870, returned to the practice of seating a member on a mere showing of *prima facie* right.[47] When a candidate was first challenged because of his polygamous marriages, this procedure was regarded as well established.[48] Subsequent to George Cannon's being seated, the Committee on Elections reported that it had no power to question his qualifications beyond these expressly stated in the Constitution, thus following (though not citing) the *Stark* case.[49] Reconstruction departures from these limits were distinguished as special inquiries which "did not relate in the remotest manner to the elections, returns and qualifications of the claimant under the Constitution."[50] The committee did not explain what power Congress had relied on in those cases, and the question was again avoided when, nine years later, Congress decided to exclude the same person for the same offense. It was emphasized that Cannon was a delegate from a territory, which Congress had power to regulate; no power

ber of votes, the Committee said: "This house can only be 'the judge of the election, returns, and qualifications of its members,' that is, can judge whether each member has been elected according to the laws of his State and possesses the qualifications *fixed by the Constitution.* Here its power begins and ends." Smith v. Brown, 2 Bart. El. Cas. 395, 404 (1868) (Emphasis added).

[43] *Id.* at 412, 434.

[44] Zeigler v. Rice, 2 Bart. El. Cas. 871 (1870); R. R. Butler, 2 Bart. El. Cas. 461 (1868); Symes v. Trimble, 2 Bart. El. Cas. 370 (1868).

[45] CONG. GLOBE, 40th Cong., 2d Sess. 3183 (1868) [covering 1833-1873].

[46] B. F. Whittemore resigned from the House when expulsion proceedings were begun against him; when he was re-elected to fill the vacancy thus created, the House refused to seat him. CONG. GLOBE, 41st Cong., 2d Sess. 4669-74 [covering 1833-1873]. Because of the unusual circumstances and the fact that debate was not permitted on the question, the Whittemore case has been found of no precedential value. 1 HINDS § 477; S. REP. No. 1010, pt. 2, 77th Cong., 2d Sess. 59 (1942) (minority report).

[47] Tucker v. Booker, 2 Bart. El. Cas. 772 (1870); Whittlesey v. McKenzie, 2 Bart. El. Cas. 746 (1870); 1 HINDS §§ 461, 465.

[48] 2 CONG. REC. 7, 8 (1873).

[49] 1 HINDS § 468.

[50] 1 HINDS § 495.

was claimed to exclude a Representative on such extra-constitutional grounds.[51]

However, the House ignored the limitations in these cases in 1899, when Utah, since admitted to statehood, elected another polygamist. It referred Brigham Robert's credentials to a special committee before seating him.[52] The committee's majority based its recommendation of exclusion on three propositions:[53] that the House had an "inherent" right existing "of necessity" to exclude lawbreakers; that there was precedent for the exercise of that right;[54] and that such action was authorized by a special statute dealing with polygamy.[55] The minority disagreed on every point, and recommended expulsion rather than exclusion.[56] But the majority pointed to the first *Cannon* case as evidence that a member once admitted under similar circumstances had not been expelled. It doubted whether Congress had the power to expel for conduct not connected with the office.[57] Despite the strong arguments of the minority, Roberts was excluded.[58]

Victor Berger, a former Representative, was challenged in 1919 under section three of the fourteenth amendment,[59] for his anti-war

[51] 13 CONG. REC. 3045-75 (1882).

[52] 33 CONG. REC. 53 (1899). The House thus bypassed its Committee on Election of President, Vice-President, and Representatives in Congress, which reported, on a different matter, that the House could not demand qualifications other than those specified. H.R. REP. No. 2307, 55th Cong., 3d Sess. (1899).

[53] 33 CONG. REC. 1073-84 (1900).

[54] The majority relied on the Act of July 2, 1862, and the *Niles, Thomas, Stark, Whittemore* and *Cannon* Cases. It ignored the constitutional challenges to the Act, and the first *Cannon* case, denying its precedential value. In addition, reference was made to several state cases, but these dealt with either qualifications fixed in the constitutions, or administrative, rather than legislative, offices. 1 HINDS § 477.

[55] The Edmunds Act, 22 Stat. 30 (1882), 48 U.S.C. § 1461 (1965), provides:

> That no polygamist . . . in any Territory, or other place over which the United States shall have exclusive jurisdiction . . . shall be eligible for election . . . to or be entitled to hold any office . . . in, under, or for any such Territory or place, or under the United States.

The Act was held constitutional under Congress' power to regulate the territories in Murphy v. Ramsey, 114 U.S. 15 (1885). But its applicability to a State seems questionable.

[56] 33 CONG. REC. 1085-1100 (1900). They found the concept of "inherent" legislative right negatived by the intent of the constitution's draftsmen, and distinguished cases cited by the majority.

[57] 33 CONG. REC. 1072-1084 (1900). See note 32 *supra*.

[58] 33 CONG. REC. 1217 (1900).

[59] No person shall be a Senator or Representative in Congress, or

editorials in a socialist newspaper. He was excluded, the committee finding that the amendment added a new qualification to the Constitution.[60] This case was distinguished in the principal case as one involving treason, one punishment for which is disqualification.[61] Berger, when re-elected, was excluded twice more.[62]

The House has not since disqualified a claimant on extra-constitutional grounds. The Senate has not done so since the *Thomas* case. Reed Smoot, another polygamist, was challenged in 1904, but he was allowed, and kept, his seat. The Senate overruled its committee by finding expulsion, not exclusion, the proper course of action in such a case.[63] Again in 1942, the Senate rejected a majority report and seated William Langer, accused of moral turpitude prior to his election.[64]

Theodore Bilbo was challenged on several grounds in 1947. Senator Taft thought the issue was whether Bilbo's actions "void the election,"[65] which would place the case among those involving Congress' express constitutional authority to judge elections. At any rate, though the majority in *Bond v. Floyd* rely on Bilbo's case as precedent,[66] no conclusive action was taken. The credentials were tabled when Bilbo's ill health rendered him unable to defend himself,[67] and his death mooted the question.

This review of contested-election cases involving unpopular or criminal acts committed prior to election reveals no development of congressional power to disqualify on these grounds. Rather, it seems to indicate that, in the few instances either house took such action, it did not rely primarily on its judicial function. And, after each such exercise, it ignored or distinguished the case and reaffirmed its

elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

[60] 58 CONG. REC. 8223 (1919).

[61] 251 F. Supp. at 355 (dissenting opinion). This conclusion seems justified by the debate, *e.g.*, 58 CONG. REC. 8237 (1919).

[62] 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 56 (1935).

[63] 41 CONG. REC. 3429 (1907).

[64] William Langer, Hupman Elec. Cas. 140 (1942).

[65] 93 CONG. REC. 17 (1947).

[66] 251 F. Supp. at 341.

[67] 93 CONG. REC. 109 (1947).

constitutional limitations. The most recent statement by a congressional committee on the question will illustrate its present status:

> The only rule presently in effect in the United States Senate which defines standards relating to the right of a member elected on the face of the returns whose right to a seat is challenged is derived from the Constitution of the United States and is as follows: [quoting art. I, § 5]. . . . There are no other statutory enactments, rules, standards of ethics, or laws undertaking to define the right of the Senate to deny a seat to any duly elected candidate. . . .
>
> . . . Since no standards exist, it would be grossly unfair now to formulate those standards "after the fact" for retroactive application. . . .[68]

The principal case, in upholding a broader exercise of power, quoted the Supreme Court in *Re Chapman* to the effect that a legislature "necessarily possesses the inherent power of self-protection."[69] But in that case, the Court construed a contempt statute as applicable only to those who refuse to cooperate in "matters within the jurisdiction of the two Houses of Congress,"[70] and cited an example where Congress had overstepped its limits.[71] Since then, the Court has plainly asserted that there are constitutional bounds beyond which the legislature may not venture in its exercise of the power of investigation.[72] In oral argument on appeal of the instant case, the Attorney-General of Georgia noted that *Bond v. Floyd* is a case of first impression before the Supreme Court. But as in the investigation cases, "the controversy . . . rests upon fundamental principles of the power of Congress and the limitations upon that power."[73] The Court has developed a practice in cases questioning the constitutionality of legislative investigations which is relevant here. Where the exercise of that power runs the risk of infringing protected rights, Congress and its committees will be held to a strict observance

[68] S. REP. No. 647, 82d Cong., 1st Sess. 2 (1951).
[69] 166 U.S. 661, 668 (1897).
[70] *Id.* at 667.
[71] Kilbourn v. Thompson, 103 U.S. 168 (1881), the first case to challenge Congress' power of compulsory process, found the subject matter of the inquiry involved beyond the reach of a legislative investigation.
[72] DeGregory v. Attorney General, 383 U.S. 825 (1966); United States v. Welden, 377 U.S. 95, 117 (1964) (Douglas, J., dissenting); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Watkins v. United States, 354 U.S. 178 (1957).
[73] Watkins v. United States, 354 U.S. 178, 182 (1957).

of their own rules.[74] Such procedure would seem peculiarly appropriate where the rule is imbedded in the Constitution itself. The Georgia Supreme Court has not interpreted this section of the state constitution, but the section is a copy of the federal constitutional provision. By adopting the interpretation of the Georgia Constitution urged by the dissent in the principal case, and supported by the history delineated above, the Supreme Court could follow its policy of avoiding, where possible, the federal issues involved.[75]

HUGH B. ROGERS, JR.

[74] Gojack v. United States, 384 U.S. 702 (1966); Yellin v. United States, 374 U.S. 109 (1963); United States v. Rumely, 345 U.S. 41 (1953); Christoffel v. United States, 338 U.S. 84 (1949).

[75] Immediately prior to printing of this note, the Supreme Court reversed on first amendment grounds. Bond v. Floyd, 35 U.S.L. WEEK 4038 (Dec. 5, 1966). Agreeing with the majority below on jurisdiction, a unanimous Court, per Chief Justice Warren, held that disqualification of Bond because of his statements violated his right of free expression. Bond could not have been convicted of inciting violation of the draft law, and he was willing to take the required oath to support the Constitution. The state may not demand from its legislators a higher standard of loyalty than it may constitutionally require of its citizens. Allowing a majority of his fellow-representatives to pass judgment on Bond's sincerity in swearing allegiance would have a chilling effect on dissent. The "manifest function" of the first amendment is to fan, not quench, the fires of debate. The Court concluded by stressing the benefits afforded by directing this encouragement to legislators as well as to citizens: the constituency is better informed, better able to judge its spokesmen, and better represented in government. Since it found the Georgia Legislature's action in conflict with the first amendment, the Court did not decide the other issues raised.

It seems clear that the Justices regarded this as an "easy" case when brought within the focus of the first amendment. To support its assertion that Bond's statements could not have been the basis for criminal conviction, the Court simply referred to three cases, declaring "no useful purpose would be served by discussing" them. 35 U.S.L. WEEK at 4043. The cases selected from out of the welter of free speech decisions of recent years were, as may be expected, chosen for their aptness and emphasis. Yates v. United States, 354 U.S. 298 (1957), reversed a Smith Act conviction obtained under instructions which did not distinguish advocacy of an abstract principle from incitement to action. So, in the principal case, the Court pointed out that Bond's attack on the Selective Service System fell short of encouragement to violate the law. *Yates* was one of the cases "explaining" the requirements for prosecution under the Smith Act, following Dennis v. United States, 341 U.S. 494 (1951), a case which had modified the "clear and present danger" test. Most observers thought that test had been removed from the judicial toolbox, *e.g.*, Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 213. But in *Bond*, two apparently orthodox "clear and present danger" cases were cited: Terminiello v. Chicago, 337, U.S. 1 (1949) (reversing a breach of peace conviction), and Wood v. Georgia, 370 U.S. 375 (1962) (reversing a contempt conviction). Where the problem is determining the point at which speech can become criminal, the Court seems