

## **A Brief History of the House Committee on Privileges and Elections**

The Committee on Privileges and Elections was the first standing committee to fully develop, not just in Virginia, but in England as well. Historically, the committee has dealt with two sets of issues. As the committee's name suggest, the first were those matters related to questions of privilege, the second to matters resulting from an election. Both are fundamental to the very foundations of a representative assembly, for matters of privilege relate directly to the ability of a legislative assembly to function, and matters relating to the election of members to the crux of representative government.

Mary Clarke writes "The history of parliamentary privilege is little more than the history of precedent as applied to the growth of parliamentary rights." The establishment of a precedent is the key, for a precedent starts a custom, and a custom eventually grows into a right; and right, once established, is virtually impossible to ignore or abolish. Parliamentary privilege is fundamentally nothing more than the set of rights, claimed and exercised by a legislative body, emanating from custom, practice and precedent.

At the core are six foundational rights: freedom from arrest, freedom from molestation, freedom of speech, access to the executive, a presumptive validity of the actions of the body, and the right to judge member's fitness to serve. The last of these, the right to judge member's credentials included the ability to sit in judgment of the return of elections but also the ability to sit in judgment of members (and even non-members) who in any way insulted or offended the body as a whole.

Two of the first liberties that the burgesses secured were freedom from arrest during assembly sessions and the right to judge members' credentials.<sup>1</sup> Although reference to the "ancient rights and privileges" of membership do not appear in the Journal of the House until 1684, they undoubtedly manifested themselves earlier. In 1684, the speaker is said to have presented "the usual petition" which again indicates that the custom was already established.

The House of Commons claimed the "ancient and undoubted rights and privileges" of its members as early as 1515. In the earliest of forms, these rights and privileges were bestowed by the king at opening of each session of Parliament in reply to a petition from the speaker on behalf of the House. As early as the Middle Ages (1066-1485), the House of Commons began choosing a presiding officer. The earliest known presiding officer was Peter de Montfort in 1258. He, and his successors, were known by a variety of titles, "parlour" be the most common, until 1377, when Sir Thomas Hungerford was selected the first speaker. The term "speaker" was chosen, because the principal function was to serve

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<sup>1</sup> Billings, 56.

as spokesman for the House in any and all communications with the king. It was often an unenviable task, and at least nine Speakers are known to have died a violent death, four of them during the turbulent period of the Wars of the Roses. On the other hand, the Speaker frequently turned out to be a King's man. Stubbs described the speaker as being "the manager of business on the part of the Crown" and it is likely that speakers were chosen with at least the tacit consent of the king.

Regardless, the selection of the speaker and the bestowing of the rights and privileges on the House were part of an elaborate ritual at the beginning of the each session. Until the early 18<sup>th</sup> Century, the custom was for the speaker-elect to exhibit excessive modesty usually by taking the floor to implore the body to reconsider its decision by selecting someone more fit for the position. The house would then insist on its selection until the nominee was compelled to accept their kindness and faith in his abilities and promise to faithfully execute his duties. It was in this vain that in April 1614, the newly elected speaker of the House of Commons sought to remove himself, whereupon the members rose, commended the speaker's admirable modesty and stated that protestations only kindled the desires of the House that he serve. After much applause, the speaker-designee was then "fetched" to the chair and greatness was forced upon him.

The House would then present their choice for Speaker to the crown. The customary etiquette of the time was that the speaker-designee would then plead with the king "to command the house to proceed to the election of some other for their speaker." In fact, the speaker continued to be called the speaker-elect until the king had rejected his call for election of a different presiding officer. It was then, after he had been accepted by the crown, that the speaker would petition the crown to safeguard him (and the body at-large) from inadvertent error or any action that might displease the king.

While to some it might seem an elaborate show of self-abasement, the selection of the speaker, and subsequent confirmation by both the membership and the crown were quite significant in affirming the speaker's position as spokesman for the body. In 1748 Governor William Popple of Bermuda resented a reference by that assembly to the "ceremony" of presenting the speaker. "It is not a ceremony," he said, "but essential to the constitution of the speaker, the approbation of whom is the undoubted right of the crown."

While the subsequent granting of the fundamental rights was to become customary, it was hardly perfunctory. None of these rights were so well established that they could not be challenged, and in 1604, James I insisted that, indeed, the members of the House had no rights or privileges whatsoever, except those that the crown saw fit to grant. It was not a position shared by the members of the House, but does speak to the degree to which the granting of these privileges was a less a matter of established right,

but rather an unknown quantity determined by the personalities of the time. Both in England, and later, here in the colony, strained relations between the legislators and the executive added an air of uncertainty to the process.

In 17th century England, much of the trouble between the Stuart kings and parliament has to do with a clash between the prerogatives of the king, based on the doctrine of divine right, and the privileges of the people exercised through their members of parliament. But by the latter part of 17th Century the conferring of “ancient and undoubted rights” had taken on the sanctity of tradition and granted as a matter of course.

By the time the colonial assemblies were established, the speaker’s petition was a recognized part of the political heritage acquired by the colonies from the mother country. Even so, a measure of discretion and restraint appears evident. For example, On March 2, 1693, rather than specify a particular set of rights, Thomas Milner petitioned the governor to grant the Burgesses “all those privileges that have heretofore at any time been used.” Two years later, on April 19, 1695, Phillip Ludwell asked for “the usual privileges” but specified only one – access to the governor.

In other instances governors appeared quite amenable to the petition for the ancient rights and privileges. On March 20, 1703, Lieutenant Governor Francis Nicholson, who was then serving as acting governor in the absence of Governor George Hamilton, 1st Earl of Orkney, not only granted all the usual privileges but graciously offered that if the burgesses could think of any others, he would present them to the crown for approval.

One of the most noteworthy appeals occurred in August 1736 when Sir John Randolph prefaced his petition with a lengthy speech tracing the foundations of the colony and the early lack of freedom and consequent need for the extension of the fundamental rights:

Freedom of Speech is the very essence of their Being, because, without it, nothing could be thoroughly debated, nor could they be looked upon as a Council; an Exemption from Arrests, confirmed by a Positive Law, otherwise their Counsels and Debates might be frequently interrupted, and their Body diminished by the Loss of its Members; a Protection for their Estates, to prevent all Occasions to withdraw them from the necessary Duty of their Attendance; a Power over their own Members, that they might be answerable to no other jurisdiction to 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.

All these I say, besides other which spring out of them, are incident to the nature and constitution of our body, and I am commanded by the house to offer petition in their behalf, that you will be pleased to discountenance all attempts that may be offered against them.

### **Freedom from Arrest**

Of all the fundamental rights, perhaps the oldest is the freedom from arrest for members of the legislature.

Three cases involving the House of Commons were fundamental to the establishment of this among the core of legislative rights. In 1404, Richard Chedre, the servant to Thomas Brooke, a member of Parliament from the county of Somerset, was “emblemished and maimed even to the peril of death” by John Sallage. The House was outraged and petitioned the King for justice.

[I]f any man shall kill or murder any that come under your protection to Parliament, that it be adjudged treason; and if any do maim or disfigure such so come under your protection, that he lose his hand; and if any do assault or beat any such so come, that he be imprisoned for a year and make fine and ransom to the king; and that it would please you of your special grace hereafter to abstain from charters of pardon in such cases, unless that the parties be fully agreed. <sup>2</sup>

Sallage was ultimately brought before the King’s Court and ordered to pay double damages, a fine and ransom. In 1433, a law was passed providing for double damages, fine, and ransom as the punishment in any case in which a Member of Parliament was assaulted.

The second landmark case occurred in 1543 when the House of Commons freed one of its members by sending its serjeant-at-arms and mace to not only liberate the member but to arrest those responsible. Known as the Ferrers case, this case is frequently cited as the first instance of the mace being wielded as a symbol of the House to liberate “privileged” persons. While hailed as precedent setting and a victory for legislative privilege, such claims are most certainly overstated and undervalue the role of the crown in helping to settle the issue.

One of the most famous cases in British history was the arrest of Sir Thomas Shirley in 1604, early in the reign of James I. During the course of events, the House of Commons imprisoned three persons, and forced at least one of them to confess his faults on his knees at the bar; imposed heavy fines on two men; and rejected a bill providing for assistance from the king or lord chancellor in favor of one under which the House was wholly dependent on the serjeant and mace. While it unquestionably strengthened the establishment of legislative privilege in England, it was perhaps even more instrumental for helping to establish the importance of privilege in the minds of those that would establish the Virginia colony and convene the first General Assembly at Jamestown in 1619.

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<sup>2</sup> Joshua A. Chafetz, Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions, 2007 pg. 194

It can be argued that Virginia was more insistent about embodying the concepts of freedom from arrest in statute than any other colony. The first such act, approved in March 1624, provided that no burgess of the assembly should be arrested during the time of the assembly nor for a week before or after, on pain of forfeiture of the debt in question and such other punishment as the court should inflict.<sup>3</sup>

Similar acts were passed in subsequent sessions and in clearly demonstrate a progressive expansion of the privilege. On March 13, 1660 the House of Burgesses voted not to claim freedom from arrest during adjournment, which seems to indicate that such freedom had been previously recognized.

By 1662 the assembly's position had advanced and the privilege extended in two notable regards: servants were exempted from arrest as well as members; and the period of exemption extended from the time of election until 10 days after adjournment of the House, with the special provision that the exemption not apply during any recess.

When the act was reaffirmed in 1705 protection it included one important limitation – the exception of treason, felony or breach of the peace.<sup>4</sup>

This privilege, and the accompanying exception, was extended through remainder of Virginia's time as a royal colony and eventually made its way into the Articles of Confederation of 1777 (Article V), as well as in three state constitutions (Maryland, Massachusetts, and New Hampshire) and eventually into the U.S. Constitution. Ironically, while it remained in statute, in Virginia, immunity from arrest did not appear in the Virginia Constitution until 1870.

The language in Section 9 of Article IV of the current Virginia Constitution is virtually identical to the language added in 1870. At the 1969 special session an amendment to extend immunity from 15 days to 30 days passed the House but, was rejected in the Senate. While additional statutory protections have been added (§30-4, §30-6, and §30-7), the only changes to the language in the Virginia Constitution have been stylistic, rather than substantive.<sup>5</sup>

### **Freedom from Molestation**

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<sup>3</sup> Billings, 56.

<sup>4</sup> These three exceptions (treason, felony and breach of the peace) were commonly recognized in England and remain in the language of Section 9, Article IV of the Virginia Constitution.

<sup>5</sup> There are no reported Virginia cases interpreting section, although there is an Attorney General's opinion stressing that privilege from arrest is applicable only while the General Assembly is in session. (1965-66 opinion, number 136)

In the context of legislative privilege, molestation is the theory that any action that infringes on the time, strength, or attention of any member of the legislature during the performance of his duties, is detrimental to the public good and should be prevented. Because the definition is so broad as to encompass practically anything, freedom from molestation is one of the most highly cherished of fundamental legislative privileges.

In England, and in the American colonies, almost anything that distracted a member's attention from his legislative duties could be construed as a violation of this privilege. In 1701 the House of Burgesses took offense to a man who walked down the wrong stairway and passed out through the assembly room. He was arrested, reprimanded, and discharged only after the fees were paid. In North Carolina, in 1761, the assembly was called to the governor to present bills for his signature. While this dignified ceremony was in progress a cat alighted upon Charles Robinson, a member of the house, who complained of this occurrence as a contempt and indignity to the house itself. The luckless man who was accused of throwing the cat, explained in vain that the animal had leaped upon him from a stairway and in surprise he had thrown it off. If the cat happened to fall on a member of the house, he contended, it was no contempt, at least not intentionally so. Nevertheless he was severely reprimanded, compelled to ask pardon and taxed for the customary fees.

Far more common were cases in which a member of the House was served with notice of legal action. The House of Commons was especially resentful if its members were called to jury duty or subpoenas were served upon them or they were made defendants in civil suits. Members of the House of Burgesses were equally as resentful if called to jury duty or of being served with a subpoena. If any were called to court as a defendant, witness or attorney without gaining the consent of the House the honor and dignity of the entire assembly was judged to be impaired and the offending party would undoubtedly be punished for a breach of privilege.

Challenging a legislator to a duel was considered an especially offensive type of breach of privilege. In 1676, Giles Bland, a member of the Council of State, challenged Burgess Thomas Ludwell to a duel. Failing to find Ludwell, Bland "nailed the glove at the door where the grand assembly used to meet, writing some words under it." Because he was a member of Council, it was ultimately the Council rather than the House of Burgesses that forced Bland to ask Ludwell's forgiveness and fine him 500 pounds for breach of privilege.

When it came to exerting the privileges of freedom of arrest and freedom from molestation, the members of the House of Burgesses, like the members of Parliament, insisted that this immunity be extended to three other classes of persons: servants of individual members, officers in the employ of the whole house, and "evidences."

Association of the servant with the master in privilege was a custom of long standing and can be traced back as far as the reign of Henry IV (1399-1413). It has already been noted, that the 1404 case of Richard Cheddre involved an assault on a servant of a member of Parliament, Thomas Brooke, and not on the member himself. In Virginia, servants first received statutory protection (from arrest) in 1662 and there are examples of actual violence or threats of violence against servants in 1704, 1740 and 1752.

In 1705 the House of Burgesses joined the House of Commons in extending the freedom from molestation from the members and their servants to the entirety of their estates. As if the definition of molestation wasn't already broad enough, the extension of privilege to a member's property created the situation whereby any action that a member might see fit to resent could be classified as an indirect indignity to the house. The Journals of the House of Commons contain numerous examples whereby trespass on a member's estate, fishing in his pond, cutting down trees belonging to him, blocking a lane used in hauling grain, diverting a stream of water that supplied his house, pulling down scaffolding from his home, "entering upon the mines of a member", and driving away his cattle were considered molestation and subject to jurisdiction of the House. There is even an example from 1606 in which the horse of a member was drafted for postal service, and both the post-master and his servant were both brought to answer before the House.

"For the sake of uninterrupted assembly business it was even more important that officials of the house be accorded special protection. Naturally the officer who was most frequently in need of this was the sergeant at arms or the messenger, who was entrusted with the hazardous duty of arresting offenders at the behest of the house. Such offenders were constantly tempted to retaliate by bringing complaints against the sergeant, who, if he had not been included in privilege, might have been in prison a good part of the time." While there are no examples of an employee of the Virginia House of Burgesses being so molested examples abound from other colonies.<sup>6</sup>

The third category of persons deemed in need of protection were "evidences", i.e. those persons called to give testimony before the General Assembly. "Colonial assemblies had a habit of making investigations; and anyone who could give information to further such an inquiry was a candidate for special protection. If a private bill was introduced, the house, either as a whole or through a committee, usually satisfied itself that the allegations were true before passing the bill into law. Persons in debt were frequently in

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<sup>6</sup> In 1697, the sheriff of Ann Arundel County (MD) arrested the clerk of the committee on laws and in 1771 the sergeant-at-arms of the N.C. house was obstructed in the performance of his duties. Other examples can be found in NY and Pennsylvania.

greater danger of arrest in the capitol than in their own homes and were therefore usually unwilling to answer the summons unless first assured of the assembly's protection."

Moreover, freedom of molestation did not just encompass not just overt acts, such as those against members, their servants, their property or persons under their protection (officers of the House and evidences), it also included breaches of a less tangible type. Written or spoken words that to denied the assembly's authority, or reflected negatively on the honor Assembly or its members, either singularly or collectively, could also be considered as molestation. Countless numbers were brought into the House of Commons, and later before the House of Burgesses, for comments made or for writings which intentionally or unintentionally had caused the body to take offense.

Perhaps the most interesting case occurred in 1758 when Rev. Jacob Rowe, professor of philosophy at the College of William and Mary, was accused of saying at a public meeting, "How many of the House of Burgesses were to be hanged? That every Member who should vote for setting the Parsons' Salaries in Money, would be Scoundrels, and that if any Member wanting to receive the Sacrament was to apply to him, he would refuse to administer it." The House resolved that these words were "scandalous and malicious" and "highly reflecting on the Honor and Dignity of the House." The Reverend Mr Rowe disavowed any evil intent on his part, but was nonetheless forced to apologize and pay a fine.

A few years later, in 1664, House of Burgesses took offense to an accusation that the Speaker of the House, Robert Wynne, was an atheist.

Written remarks could be treated just as harshly as spoken words. Any paper which "tended to the disreputation of ... members of the house" was naturally resented as a serious breach of privilege, but even more serious was the paper which reflected on the house as a whole. In England, books that were considered seditious or derogatory were burned by the hangman. In 1738, the House of Burgesses reprimanded a man for writing improper words on one of the benches the House chamber.

When derogatory letters or articles were published in colonial newspapers the printer as well as the author was often held responsible. In 1753 the printer of the New York Mercury was cited for publishing, without authority, some votes of the assembly of that colony.

Nor was anonymity a shield. On May 31, 1699 papers addressed to the Speaker were declared to be scandalous although the authorship was never determined.

Government officials and persons of prominence were also not immune from censure. In 1728 the South Carolina assembly found offense at a paper by Richard Allen, the state's chief justice.



## Enforcement

Whomever the accused by be the process of enforcing the freedom from arrest and freedom of molestation was largely uniform. If an absent member was reported to be under arrest or a present member complained of any assault or abuse or indignity that had been inflicted upon him, the house at once ordered the sergeant-at-arms or doorkeeper, or whatever officer was in attendance for that purpose to seize the offending person without delay. As noted in reference to the Ferrers case in 1543, the “arresting” over would usually care the mace as an outward symbol authority.

The offender would then be compelled to come to the house to answer for the charges. Often the offender would plead that he had not known that the object of his attack was a member of the legislature, and he would then apologize for his unintentional insult and throw himself on the mercy of the body. If the plea seemed genuine, the accused would typically be released, and sometimes was even able to avoid paying the customary fine.

On the other hand, if the accused denied the charge or the assembly’s authority, he was returned to the custody of the sergeant-at-arms for future trial. In many instances, the sergeant-at-arms had no place to confine the accused, except his own house, until such time as a more formal hearing could be arranged before the whole house, a committee appointed for that purpose, or in later years the Committee on Privileges and Elections. In some cases the hearing was informal and consisted of nothing more than a series of questions and answers, in other cases it appeared to mirror a court proceeding with the presentation of evidence, the appearance of witnesses and the presence of legal counsel.

At the conclusion of the hearing, if the accused were found guilty, he was usually sentenced to ask pardon on his knees. While this may have been a very humiliating punishment, it was a common one; and even men of considerable prominence submitted to it. Other times the punishment might take the form of a formal reprimand accompanied by an admonition to be more careful in the future and not make the same mistake in the future. In the most egregious cases, particularly if the accused proved obstinate, the accused might be imprisoned either for a specified period or until he had a change of heart and was willing to get down on his knees and ask for forgiveness from the body for his transgression. In virtually every case, fees were demanded to pay the expense of capture and detention; and if these fees were not paid promptly, the individual would almost surely be imprisoned until they were.

The Virginia House of Burgesses proved equally as adept at punishing those accused of breaches of privilege as the House of Commons. In 1619, during the first session of the General Assembly, Thomas Garnett was ordered to stand four days with his ears nailed to the pillory and to be whipped on each of those days. In 1723, William

Hopkins was ordered to apologize for “uttering several rude, contemptuous and indecent expressions” about the conduct of a member of the House of Burgesses. Because he adopted a surly attitude and stood “in an insolent posture” when called to the bar, Hopkins was ordered to get down on his knees in open session of the House or be led through the streets of Williamsburg from the gates of the College of William and Mary to the Capitol, and back, tied to a cart, while wearing a sign around his neck reading , “for Insolent Behavior at the Bar of the House of Burgesses when he was there as an Offender and with Obstinacy and Contempt disobeying their Order.” Hopkins was then directed to spend the weekend in jail contemplating his punishment. In the end, he chose to apologize on bended knee at the bar of the House.<sup>7</sup>

On the whole, that vast majority of those accused submitted humbly to the authority of the body, and those that did not at first were likely to be made very humble before the incident was over.

Two penalties could be imposed on members that were not applicable to non-members – suspension and expulsion. In extreme cases, the house claimed the right not only to expel a member but to declare him incapable of sitting in any future assembly.

The House of Commons expelled Arthur Hall in 1580 and a large number of members in later years suffered the same fate.

The most famous case of continued exclusion is that of John Wilkes

Members of the House of Burgesses were treated similarly

### **Freedom of Speech and Debate**

The concept of “freedom of speech” which is such an integral part of the First Amendment of the U.S. Constitution is rooted in legislative privilege. As has just been seen, remarks, be they printed or spoken, could be interpreted as a form of molestation. Yet, protection for legislator for speeches or debate in legislative chambers is fundamental to the integrity of the legislative process.

The request for freedom of speech seems to have first been made in 1542 but certainly it developed between 1523 and 1563. Originally, it applied only to the speaker, and no other members of Parliament, but gradually all members were given the right to give voice to their opinions within the confines of Parliament without fear of being called into account for doing so. While freedom of speech and debate were frequently included in the speaker’s petition to the crown as a part of the ancient rights and privileges of the legislature, recognition of this right by the crown was a slow and uneven process.

Queen Elizabeth during her reign (1559-1603) constantly struggled with Parliament over the issue. In 1593 when the Speaker of the House of Commons, Sir Edward Coke,

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<sup>7</sup> Journal of the House of Delegates, 1723, pg 383-385.

made the customary request for freedom of speech, he was told, “Privilege of speech is granted, but you must know what privilege you have; not to speak everyone what he listeth or what cometh in his brain, but your privilege is Aye or No.”

At the opening of the parliament of 1601 the Speaker reported Queen Elizabeth desired ‘that this parliament should be short. And therefore she willed that the members of this House should not spend the time in frivolous, vain, and unnecessary motions and arguments.’

The struggle continued through much of the 17<sup>th</sup> century, and it eventually came to be codified in the English Bill of Rights of 1689. But the struggle to establish freedom of speech and debate in England during this time undoubtedly influenced and harkened the desires of colonial legislators to ensure the privilege in American assemblies.

Following the Revolution, a “speech or debate” provision was included in Article V of Articles of Confederation of 1777 and in the state constitutions of Maryland, Massachusetts, and New Hampshire. When the Constitution of the United States was adopted the provision was included in Article I, Section 6.

Virtually the same language appears in the Virginia Constitution. “Members of the General Assembly shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during the sessions of their respective houses; and for any speech or debate in either house shall not be questioned in any other place. They shall not be subject to arrest under any civil process during the sessions of the General Assembly, or during the fifteen days before the beginning or after the ending of any session.”

### **Access to the Crown and A Presumptive View Toward Actions of the House**

Two of the traditional ancient rights and privileges – access to the executive and a presumptive view toward actions of the legislature – were less controversial and had become so engrained as fundamental to the functioning of government that by the early 18<sup>th</sup> century they were dropped from the speaker’s petition.

Elsing says that the petition for access to the king was first recorded in 1537 and as has already been noted, it was included in early petitions to royal governors in Virginia. In fact, in 1695, it was the only privilege specifically enunciated by Speaker Phillip Ludwell when he asked for the usual privileges for the Burgesses. But by 1705, it was omitted from Speaker Randolph’s petition.

Early speakers of the House of Commons would petition not only for forgiveness for any action that might displease the king or encroach on his power but also for permission to correct any errors in his report of the Commons’ proceedings. While the request would in subsequent centuries become more a part of the ceremonial presentation of a new speaker to the crown than a request for legislative privilege, it was no doubt one of importance to the speaker, if not the entire membership. The modesty of

many early speakers on their selection was no doubt sincere and certainly no speaker wanted to endanger the success of the assembly by failing to distinguish between his own actions and the behavior of the body as a whole.

“If in the course of a session the speaker died, or from illness or other cause, resigned his office, his successor, on being presented to the governor, regularly asked (again) that his faults should not be imputed to the house. The other requests, previously granted were assumed to hold over since the assembly was already vested with them. Since distinguishing between the mistakes of the speaker, individually, and the house as a whole, was more personal, each speaker requested this “ancient right and privilege” individually.”

It was thus during the 16th century that the House of Commons began to aggressively assert the fundamental rights of legislatures – freedom from arrest, freedom from molestation, freedom of speech, access to the executive, and a presumptive validity of the actions of the body. During the 17th and 18th centuries, in the colonial assemblies asserted essentially the same “ancient rights and privileges” has had been petitioned for in England, and in most cases granted, Parliament. While the crown may have retained a reluctance, and in some cases refused the legislature’s demand for privileges “in no way belonging to them” in both England and America, the constant repetition helped establish these legislative privileges as inherent rights.

### **Right to Judge Elections and Returns of Elections**

“A fundamental element in jurisdiction over members is the power to determine who they are.”<sup>8</sup>

Because attendance at sessions of Parliament was often more burden than a privilege, members could be just as happy to lose an election as to win a seat in the legislature. Despite this, elections had to be settled.

During the 13<sup>th</sup> and 14<sup>th</sup> centuries, twelve people, usually bishops and persons of the rank, appointed to settle disputes on behalf of the king. It was until the 16<sup>th</sup> century that the House of Commons became taking an active role in settling election disputes and addressing questions of members’ credentials. Initially the House of Commons acted in concert with the king and the House of Lords, but gradually the House began to act alone to determine questions of membership.

Over a span of 30 years, the House of Commons moved election disputes from the whole of Parliament to the committee structure. The first instance of a special, ad hoc committee being appointed to try an election petition is on October 12, 1553 in the first Parliament of Philip and Mary. By the beginning of Queen Elizabeth’s third Parliament, on April 6, 1571, instead of separate ad hoc committee being appointed for each petition,

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<sup>8</sup> Clarke, pg 132

we a single ad hoc committee being assigned a group of election cases. And on February 24, 1581, a 12-member committee of elections was appointed to examine all the election returns of the session.

Finally, in 1586, the House was confident enough to boldly assert its exclusive right to settle its own election disputes, and to specifically deny such power rested with the chancellor or the judges.

### **Committee on Privileges and Elections in Parliament**

By late in the reign of Queen Elizabeth, House was accustomed to appointing committees to deal with the privileges and elections of members. Initially these were two separate committees, one to investigate election returns and another to consider questions of privilege. A committee on privileges was formed during the Parliaments of 1586 and 1587, but neither had a committee on elections, but the Parliament of 1589 had both a committee of privileges and a committee of elections.

The first modern standing committee on privileges and elections was established on February 26, 1592, when the House of Commons ordered, "that all the members of the House, being her Majesty's privy council, together with 30 other members, be appointed a committee to examine and make report of all cases touching election returns and privileges." From 1592-1598, similar committees, consisting nearly of the same members, and the same in number, were appointed every session. By this point the practice of appointing a standing committee of privileges and elections seems to have been regarded as a matter of course and routinely included in the rules adopted at the beginning of each Parliament, and is the only standing committee found in every session from the accession of the Stuarts to the outbreak of the Civil War.

Although the custom was by then well established and consistently adhered to, the power of the House of Commons to settle election disputes exclusively was not so well established as to prevent James I from interfering in the Goodwyn-Fortesque dispute. While generally regarded as instrumental in establishing the right of the House to settle disputes, after all, in the end James conceded that the House of Commons was a court of record with power to judge election returns, the case was not a clear-cut victory for the house. The final decision of this particular contest was a compromise by which both men were excluded and a new election held.

Although the committee structure was by this time in place, the system of standing committees was not yet producing a more efficient means for handling legislation. On the April 12, 1604, a motion was made, "touching the slow proceeding and dispatch of such bills and business as were depending in the House, which grew, as was said, by the non-attendance of a sufficient number at committees." Thereupon it was ordered, "that if eight of any committee should be assembled, they might proceed to a

resolution, in any business of the House.” From this point through 1770, any eight persons was deemed a quorum for any committee of the house.

By this stage in the history of Parliament, perhaps driven by difficulties achieving a quorum from the appointed membership, was transitioning to grand committees at which “every one of the House may come and speak.” Despite this trend, the members seemed to have recognized the dangers in associated with opening participation in meetings of the committee on privileges and elections to any member desiring to attend. In 1614, the size of the committee was doubled from 12 to 25, but subsequent attempts to further increase the membership were rejected.

On the February 23, 1623, Mr Mallory and Sir Thomas Hobby proposed, that any member of the House who would come before the committee on privileges and elections should have voice; but the Speaker admonished them that it was contrary to the orders of the House limiting the size of the committee and when the vote was taken on their motion it was resolved, No; and upon the question of whether the membership be limited only to the persons appointed, it was resolved, Yes.

When the English Civil War broke out the standing committees were enlarged. On April 16, 1640, 100 members were appointed to the committee on privileges and elections, to consider “all questions to grow and arise this parliament about elections, or other privileges.” Although Parliaments under Cromwell were generally was more conservative by the second Parliament of Charles II in 1661 to the session of 1832, the House of Commons appointed anywhere from 100 to 300 members to be a committee of privileges and returns.

The size of the committee continued to increase until the Cavalier Parliament in 1672, when Lord Chancellor Shaftesbury, at the desire of the King, assumed for himself the power of issuing writs of election. The House of Commons naturally balked and referred the matter to the committee of privileges and elections, and when the committee was announced on February 6th, the membership numbered 220. From the 7th to the 22<sup>nd</sup>, the membership continued to expand until it eventually reached 400. At this point, it was finally decided to that it was only logical to open the membership to any member that desired to attend. And in 1708 the house resolved that all matters that should come in question touching returns or elections and matters of privilege, should be heard before the full House.

Finally, in 1722 a measure was introduced before Parliament seeking to return consideration of contested elections to the committee on privileges and elections, rather than having them heard before the whole house. It passed the House of Commons but was thrown out in the House of Lords by 38-57. Similar efforts were made in 1770 and in 1847 upon the alleged interference of Earl Fitzhardinge in the election for West Gloucestershire but the committee was never appointed to sit.

## The Right To Judge Members' Credentials Comes to Virginia

Parliament was not the only legislative body to assert the view that the right to judge members' credentials is a fundamental right of a legislative bodies. The Virginia General Assembly asserted that same right within the first few minutes of convening in Jamestown on July 30, 1619. Governor Yeardley's called for each plantation to send two representatives to that first assembly, and before the "Great Charter" could even be read to the members, a question arose over the credentials of certain of the members.

None other than the Speaker of the Assembly, who was formerly a member of Parliament, John Pory, took exception to the seating of Captain John Warde and John Gibbes, the two representatives from Captain Warde's Plantation, and both were directed to excuse themselves until their status could be agreed upon. The argument was made that Captain Warde had come to Virginia "without any authority or commission from the Treasurers, Counsel and Company in England" and as such were not entitled to be part of any Assembly called pursuant to the Company's charter. Those in favor of seating the two argued that Captain Warde had ventured to the colony at his own expense and at great pain, and since settling in Virginia had "brought home a good quantity of fish to relieve the colony y way of trade" that he was entitled to be seated as a member. Furthermore, it was noted that call for a General Assembly directed the admittance two burgesses from every plantation, without exception, that Captain Warde need not produce a commission or other documentation establishing his authority to settle in Virginia. After much debate the members agree that Captain Warde and Mr. Gibbes should be conditionally admitted. That is that they should be seated with the provision that prior to the next session of the General Assembly that Captain Warde secure from the Virginia Company of London "a commission lawfully to establish & plant himself and his Company, as the Chiefs of other plantations have done. And in case he do neglect this, he is to stand to the Censure of the next general assembly." It was only after Captain Warde, "in the presence of us all", consented to this condition that he, and Mr. Gibbes, were allowed to take the oath of Supremacy and seated among the other burgesses.<sup>9</sup>

Having resolved the questions concerning Captain Warde's plantation, the Assembly next turned to a question concerning the seating of the burgesses from Martin's Hundred plantation. In this instance it was Governor Yeardley, who objected. Governor Yeardley objected to the seating of Mr John Boys and Mr. John Jackson on the basis that the patent for Martin's Hundred contained a provision exempting that plantation from "any command of the Colony" except those directing aid or assistance against any foreign or domestic enemy.<sup>10</sup> Given that Captain Martins Patent, granted under seal of the

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<sup>9</sup> Ultimately, a patent to Captain Ward confirmed and sealed by the Virginia Company on May 17, 1620.

<sup>10</sup> "[I]t shall and may be lawful to and for the said Captain John Martin, his heirs, Executors, and Assigns, to govern & command all such person or persons, as at the time he shall carry over with him, or that shall be

Virginia Company of London, was “of a higher condition and of greater force then any act of the General Assembly” the governor questioned whether it was fitting for the representatives of that plantation to participate in making laws if they were going to be exempt from their effects. As Captain Martin, himself, was not present to represent the interests of his plantation, Mr. Boys and Mr. Jackson, were asked to withdraw and Captain Martin himself was directed to personally appear at the bar of the House and consent to submit himself and his plantation to the actions of the General Assembly, notwithstanding the language of his patent. If he were willing to do so, his representatives would be admitted; if not, “they were utterly to be excluded, as being spies, rather than loyal Burgesses.”

On Monday, August 2, 1619, Captain John Martin appeared at the bar of the House at which time Speaker Pory read to him the orders of the Assembly as they pertained to him and the seating of the representatives from Martin’s Hundred. Captain Martin freely discussed and attempted to answer the concerns of the members, but refused to agree to forego the provisions in his patent, which appeared to give him, and only his plantation, the right to decide whether to abide by the actions of the Assembly. Based on his refusal, the General Assembly resolved not to admit the representatives of Martin’s Hundred and further directed to Speaker to demand from the Virginia Company of London that the provision be removed from Captain Martin’s patent to ensure “the uniformity and equality of laws and orders extending over the whole Colony.”

While the first General Assembly laid claim to the same right as Parliament to judge for themselves the credentials of members, it should also be noted that the questioning of the credentials of the representatives from Captain Warde and Captain Martin’s plantations were taken up before the whole of the Assembly and not a special committee on privileges and elections. However, it should also be noted that the size of that first Assembly was limited and the membership comprised of two representatives from each of eleven plantations. Thus, at a time when the number of members of Parliament exceeded 400, the whole of the Assembly considering the challenge to the seating of the representatives from Captain Warde’s plantation, was only 18 burgesses; and with the addition of the Captain Warde and John Gibbes, just 20 members when the question of seating Captain Martin’s representatives was resolved on August 2. The important thing was that the General Assembly had, from the first hours, asserted its control over its own membership.

While the records of the House of Burgesses are incomplete for large portions of the remaining records suggest that the whole Assembly continued to sit in judgment of

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sent him hereafter, free from any command of the Colony, except it be in aiding and assisting the same against any foreign or domestic enemy.”



the its members until 1663 when a special committee was appointed at the start of session to certify the writs of the elections of burgesses.

### **Committee for the Examination of Elections and Returns** (1663-1688)

The first committee did not take on the name “privileges and elections”, even though that was the title given to its counterpart in Parliament. Instead, the committee was initially called the Committee for the Examination of Elections and Returns, a name it retained until 1691.

Nor was Virginia alone. Throughout the other English colonies, other colonial legislatures were also turning to committees to investigate election contests. While Virginia was the first, by the end of the 17<sup>th</sup> century, Maryland (1678), Pennsylvania (1682), South Carolina (1692), and New York (1699) had all formed similar committees, and New Jersey would follow shortly thereafter (1710). In addition, even though Georgia would not form a standing committee until 1755, the colonial legislature asserted the right to judge the returns of elections much earlier. Likewise, Connecticut, which did not have a system of standing committees in place before 1789, laid at least partial claim to judging member credentials in 1639.

It is also clear that the Assembly’s claim on the right to judge member’s credentials was not limited to judging merely election contests. In 1652 the House expelled a burgess “notoriously knowne a scandalous person, and a frequent disturber of the peace of the country, by libel and other illegal practices.” And in 1663, the Assembly expelled members simply for religious nonconformity. John Hill, the sheriff of Lower Norfolk “represented to the house that Mr. John Porter, one of the burgesses of that county was loving to the Quakers and stood well affected towards them, and had been at their meetings, and was so far an Anabaptist as to be against the baptizing of children, upon which representation the said Porter confessed himself to have and be well affected to the Quakers, but conceived his being at their meetings could not be proved, upon which the oaths of allegiance and supremacy were tendered to him which he refused to take; whereupon it is ordered that the said Porter be dismissed this house.”<sup>11</sup>

### **Committee on Elections and Privileges** (1691-1722)

In April 1691 Committee for the Examination of Elections and Returns took the name, the Committee on Elections and Privileges. The following year, the House approved a set of resolutions declaring not only that the House of Burgesses was the only judge of its members’ qualifications, but also that any other person who should usurp such authority would be guilty of breach of privilege.<sup>12</sup>

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<sup>11</sup> September 12<sup>th</sup>, 1663; Hening, ed. *Statutes at Large*, II, 198; Billings, 77.

<sup>12</sup> Journals of 1659-1693, pg 379

During this 28 year period, the House of Burgesses judged was called upon to make judgments on a number of elections and to consider whether numerous actions constituted breaches of its privileges. At no time were these deliberations more evident than during the session of 1715.

The College of William and Mary is the second-oldest college in America with a charter, from King William III and Queen Mary II of England signed February 8, 1693. For a five year period, at the beginning of the 18<sup>th</sup> century, following the burning of the capitol in Jamestown and prior to the completion of the capitol in Williamsburg the General Assembly actually met in the buildings of the College.

One of the most notable features of the College's Royal Charter is a unique provision that the College be afforded a seat in the House of Burgesses.

Section XVIII. And also, of our special grace, certain knowledge, and mere motion, we have given, and granted, and by these presents, for us and our successors, do give, and grant, to the said President, and masters, or professors of the said college, full and absolute power, liberty, and authority, to nominate, elect, and constitute one discreet and able person of their own number, or of the number of the said visitors, or governors, or lastly, of the better sort of inhabitants of our colony of Virginia, to be present in the house of Burgesses, of the General Assembly of our colony of Virginia, and there to act and consent to such things, as by the common advice of our said colony shall (God willing) happen to be enacted.

Although the provision for the election of a burgess representing the College was contained in the charter of 1693, there is no record of a writ of election for a burgess to represent the College until 1715. In that year, the College selected Peter Beverly as their representative. Beverly was an interesting selection for several reasons. Most notably, he had served as Clerk of the House from 1691-1697 and had presided over the House as Speaker from 1700-1705 and again from 1710-1714. But Beverly was not re-elected to represent Gloucester in the Assembly. Because the provision in the college's charter allowed the college to select any inhabitant of the colony as its representative, the College chose Beverly.

Although the College's Charter provided for a representative in the House, it also provided that the Trustees, named in the Charter, were to transfer all corporate powers to the President and Masters (Professors), while the Trustees would be "the true, sole and undoubted Visitors and Governors of the College." Unfortunately, for Beverly and the College, when the writ of election was presented to the Committee no such transfer had taken place.

Furthermore, the College's President, James Blair had run afoul of the Assembly and been removed from his post as chaplain of the House. At the start of the 1712 session, Blair had been replaced as chaplain of the House by Rev. Benjamin Godwin for his "failure to read the services on several occasions" and "attend punctually to his duties." That Blair,

who was commissary of the bishop of London, a member of the governor's council and president of the College of William and Mary, to be replaced was not insignificant. While Blair possessed a prickly personality, to the point of being quite disagreeable he was nonetheless the single most commanding political personage of the time.

Thus when Beverly's name was presented to the Committee on Elections and Privileges for certification as the burgess representing the College, it was not a foregone conclusion that he would be allowed to take his seat. Notwithstanding Beverly's previous distinguished service, significant debate followed.

Although political parties in the modern sense did come into being until the 19th century, factions have long been a part of the legislature. Much like today, typically, the two major factions consisted of one that was closely aligned with the governor and one that opposed him. Beverly was part of that faction considered aligned with Governor Alexander Spotswood and in 1714, it was the opposition faction that dominated the legislature.

In 1713 Governor Spotswood introduced legislation creating "a series of tobacco warehouses and inspectors who would ensure that tobacco of less quantity but higher quality would reach the European market. Both large and small planters initially balked at the plan; but when Spotswood announced that twenty-nine of the fifty-one burgesses would receive appointments to the lucrative inspector posts, the bill passed both houses." The passing of Queen Anne and the Carolina Yamasee War in 1715 prompted new elections in the colony. "The ensuing election campaign, perhaps the most competitive thus far in Virginia history, resulted in the overwhelming defeat of incumbents, including all but one of the tobacco inspectors." While the newly elected burgesses lacked the political skills to repeal the Governor's scheme, the Council proved more adept and successful appealed to the Privy Council to disallow the governor's tobacco inspection plan.

Gov. Spotswood responded by calling for a new round of elections. "He hoped by an appeal to the country to find himself provided with a House of Burgesses more inclined to look at questions through his lenses." But his opponents retained nearly all their seats.

In the end, the only thing the Governor had achieved was the return of a House even more hostile to him than was its predecessor. Although it consisted largely of the same members as before, there opposition was bolstered by the elections returns and the support they had received in from the Council of State regarding the governor's tobacco inspection plan.

Given the tensions between the House and the College and the House and the governor, the College's selection of an ally of the Governor hardly seems prudent. As a result, on Saturday, August 6, 1715, Gawin Corbin, chairman of the Committee on

Elections and Privileges reported on behalf of the committee that Beverly not be certified and seated as burgess. The official reason given was that the College did not have a sufficient number of Masters (professors) and “still being under the control of the trustees.”

A debate ensued during which Beverly was asked to remove himself from the chamber. After some deliberation the House delayed action on the committee recommendation until such time as the President and Masters of the College of William and Mary could appear with their council and be heard on the matter. Before adjourning for the day, the House rejected a motion to allow Beverly to be seated until the matter was resolved. The debate resumed again on August 11th, and although the President and Masters of the College appeared and were heard, the House remained unable to make a final determination. Two days later, on August 13th, the debate resumed. Ultimately the House agreed to accept the report of the committee and it was Resolved “That Mr Peter Beverly who is Returned a Burgess to Serve in this present General Assembly for the said College hath not any Right to Sit in this Assembly as a Member thereof.”

For the College it meant that they would not have the representation in the House of Burgesses guaranteed them in the royal charter. For Beverly it meant he not only lost his seat in the House but his position as Speaker and Chairman of the Committee for Public Claims. But for the House, it reaffirmed their authority to sit in judgment of the credentials of the members and returns of elections. For if no less a person than the Speaker of the House and chairman of one of the body’s most powerful committees could be rejected, then who was immune from the sanction of the committee?

Three years later, when the House convened in April of 1718, the result was decidedly different. Although the College had still not yet been turned over by the Trustees to the President and Masters, the House on this occasion accepted John Custis to represent the College in the House. The change in the House’s position was undoubtedly influenced by the fact that the College selected as its burgess an opponent of the governor.

From 1723 to 1728, the College again went unrepresented in the House of Burgesses, but by 1729 the College was fully established, the transfer of the corporate rights had been made to the faculty and the Trustees had become “The Visitors and Governors of the College of William and Mary, in Virginia.” With this transfer, the last vestiges of opposition to the seating of a burgess representing the College disappeared and the College was continuously represented in the House and in the Revolutionary Conventions until 1776.

In addition to determining whether or not to seat the former Speaker as the burgess for the College of William and Mary in 1715 the House also was called upon to address the cases of Richard Littlepage and Thomas Butts.

Their cases centered on whether the justice of any county could refuse to certify to the General Assembly properly signed propositions and grievances or public claims. The House's procedure, at the time, as spelled out in an act of the Assembly from October 1705, was that the sheriff of each county was to post a public proclamation on the door of the county courthouse giving notice of the time when the county court would receive and certify complaints or claims from colonists for presentation at the next session of the General Assembly. The 1705 further provided that the complaints (or claims) be signed by the person or persons presenting them and certified by the chief magistrate of the county. Once they had been certified, the petitions would be sent to the burgesses representing that county for presentation to General Assembly. The role of the justices was purely administrative. They lacked the authority to examine complaints (or claims) to determine their validity. It was the responsibility of the Assembly, working through the committees of public claims or propositions and grievances to judge the merits of the complaints submitted. As is much the case even today, the committees would make a report to the House, and if their recommendation were approved by the House then it would be sent to the Council for the concurrence of that body.

On August 4, 1715, the second day of the session, a complaint was laid before the House of Burgesses charging the justices of New Kent County with having refused to certify some complaints and claims from that county.<sup>13</sup> The clerk of the county court was called before the House and examined, after which time the House ordered the offending justices – Messrs. George Keeling, Richard Littlepage, Thomas Butts, and Alexander Walker – arrested pursuant to a warrant issued by the Speaker.

On August 9, two of the justices, Richard Littlepage and Alexander Walker were brought before the House. After a brief examination, they were ordered to make “an humble acknowledgement of their error at the bar of the House,” and receive a reprimand from the Speaker. Walker accepted the judgment of the House and was discharged. But Littlepage refused and was remanded to the custody of the messenger (sergeant-at-arms).

Three days later, on August 12, Littlepage and Butts, who had not yet appeared before the House, escaped from custody. At this the House took great offense and declared both men guilty of a “high misdemeanor and contempt of the authority” of the House of Burgesses. It was further order that the men be pursued and returned to custody. (The messenger, who had been responsible for the men, was also adjudged to be guilty of neglect in the execution of his office and relieved from his position.) When informed of the House's action, Littlepage and Butts said the House of Burgesses had no

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<sup>13</sup> A similar complaint was lodged against the justices from Richmond County, which resulted in the House ordering that the justices be prosecuted by the attorney-general of the colony for the neglect of these duties and that the claims from the county “be referred to the consideration of the Committee for Public Claims to examine the matter thereof and report the same with their opinion thereon to the House” notwithstanding their lack of certification.

authority over them, and they refused turn themselves in or acknowledge the validity of the arrest warrants.

When informed of the two men's obstinance, House appealed to Governor Spotswood for assistance, resolving, "That an humble address be presented to the Governor that he would be pleased to give such orders and directions as his Honor shall think proper and necessary for bringing of the said Littlepage and Butts before this house to answer for their repeated contempts of the authority of this House."

Given the tensions then existing between the House and Governor Spotswood it is hardly surprising that he was less than sympathetic. Spotswood responded that his concern for the honor of the House would always be equal to their concern for the honor of their country. "I am Sorry to find your utmost Concern to be about what you call the Rights and Privileges of your House, while you seem to reserve none for the distressed Condition of your Neighbors," wrote the governor making a not so veiled reference to the House's failure to approve supplies the Governor had requested for South Carolina.

As might be expected, the House was none too pleased with the Governor's response. It was the position of the Burgesses that as elected representatives of colonists it was their responsibility to hear complaints and claims; and that Butts and Littlepage by refusing to receive and certify those grievances, were guilty of subverting the rights of the people. The House then directed that second message be sent to the Governor reiterating the request that he assist in the apprehension and return of Butts and Littlepage. Although the committee of elections and privileges was again ordered to prepare the communication, in all likelihood, this time actually communication was most likely prepared John Clayton, chairman of the committee of propositions and grievances, who was most probably the best writer in the House. The second address is a well expressed paper, setting forth in excellent language the reasons why His Honor was again appealed to, and begging that steps should be taken. The address, after being reported to the House by the committee of elections and privileges, was accepted by that body, transcribed, signed by the speaker, and taken to the governor by the committee of elections and privileges, the committee of public claims and seven additional members.

Although well-reasoned, and making an effective case for the position of the House, that steps must be undertaken to by His Excellency to preserve to the House its ancient rights and privilege, the House's second letter met with no more success than had the first. On August 19 Governor Spottswood's reiterated his concern over the House's continued objection to the provision of supplies for South Carolina, and stating that while he was ready to assist the House in maintaining its fundamental rights and privileges, the House could not be permitted to try Butts or Littlepage as if a court of law. The Governor maintained that while the two justices could be called to answer to the House for a breach of privilege, the House not conduct a trial on a high misdemeanor.

In reply, and for a third time, the committee of elections and privileges was charged with making reply to the governor. Their reply, approved by the House on Monday August 22nd reviewed the Burgesses' conduct during this session on a broad array of matters, not just in regard to Littlepage and Butts. But in regard to their cases specifically, the House maintained "that when Justices in cases where they are not Judicial but Ministerial only will Assume a Jurisdiction and by their judgment debar the People and their representatives of the rightful ways and means prescribed by Law for Redressing their grievances by excluding them from a true representation thereof. We believe that such matters do concern the Burgesses in Assembly."

This time it was the Council that objected, claiming the Burgesses were trying to assume the entire power of hearing and redressing grievances when in reality that power belonged to the whole General Assembly. On August 25 Mr Clayton replied on behalf of the House that it was not the intention of the Burgesses "to attempt to invade any of the privileges of the upper house," and relating to Council that since the Burgesses were the direct representatives of the people, it was only proper that complaints and claims from the colonists be addressed by the House instead of being presented directed to the Council or the governor.

On August 27, Governor Spotswood delivered yet another message to the House. This time the Governor questioned the real motives of the burgesses by suggesting that some members of the House might have a personal interest in the consideration of some of the complaints and claims that had been rejected by Butts and Littlepage. Spotswood also pointed out that it was not uncommon for the House to consider grievances that not certified by the county courts. And while he did not make specific reference to the claims arising from Richmond County, he did point out that the House had even done so during the current session. As a result, he argued, the refusal of Littlepage and Butts to attest to them did not bar the burgesses from action. Furthermore, the governor took issue with the view that the justice's actions were merely administrative. He took the view that "the reason for judicial certification was to weed out false, unlawful or seditious propositions, and that if the justices were not to use their judgment in distinguishing between those propositions and grievances which were baseless and those which were just, he saw no reason why they should be submitted to the court before they were sent to the Assembly. It was thus hardly fair to punish Butts and Littlepage for doing their jobs. The governor's final words were, "I must plainly declare that I will not assist in the brining of any of his Majesty's subjects to plead to a Charge of Crimes and Misdemeanors at the Burgesses Bar.""

In their final communication on the matter, the House replied that the Burgesses were motivated by their desire to see that the complaints and claims of their constituents be fairly considered and that the "just rights and privileges" of the House be preserved by compelling the offending justices to appear before the House. The 1715 session ultimately

ended without the matter being resolved. At the beginning of the next session (1718), another resolution was introduced to bring Thomas Butts into custody to answer for his escape of the custody of the House, but did not pass.

The two cases are a good illustration of the status of the legislature's fundamental rights and privileges at the start of the 18<sup>th</sup> century. In the controversy surrounding the seating of Peter Beverly as the burgess for the College of William and Mary was a clear cut victory for the right of the House to determine the credentials of its members. But the failure of the Council of State and the Governor to support the House's attempts to hold Littlepage and Butts accountable for breach of privilege by denying the authority of the House shows just as clearly that the entire array of fundamental rights and privileges was not yet fully secure.

### **Committee on Privileges and Elections** (1723 – 1776)

There is no record why but in 1723 the name of the committee was again changed, this time from Elections and Privileges to the more traditional Privileges and Elections.

During this period, Speakers of the House continued to request from royal governors that the House be granted the various elements of privilege, that in the 1736 words of Speaker John Randolph are “incident to the nature and constitution of our body.”

Notwithstanding the 1723 case involving Littlepage and Butts, the House continued to assert its right to sit in judgment of breaches of privileges whatever form they might take. When it came to the dignity of the House, the Burgesses showed little concern for who committed the breach, or the form of the offense.

As in England, acts of violence against members of House, their servants or officers of the House almost assuredly resulted in punishment, such as occurred during the 1744 Session when William Nugent was found guilty of a breach of privilege for beating one of the doorkeepers of the House.

Threats of violence were punished just as severely. That same year was found John Austin of King William County was found guilty of a high crime and misdemeanor for saying that “if a Bill passed for erecting a middle Parish in that County, that Mr Power and Mr Moore [members of the House of Burgesses] should never see the Capitol again; and also said, that if he lived in the Upper Parish, he would raise a body of Men, and come down and drive the House of Burgesses into Hampton River.”

False or malicious insults against the House and its members, even those that did not rise to the level of an actual threat, were attacked with the same zeal as was afforded the physical protection of the members and their personal property. In 1738, Bedford Davenport was reprimanded for writing indecent words on the seat of one of the members of the House. Twenty years later, on October 2, 1758, Thomas Knox was forced



to apologize to the House for “scandalous and malicious” remarks directed toward Burgess William Kennon.

The House also demonstrated that it was willing to discipline its own members for illegal or inappropriate behavior, including insulting comments directed against the House or other members. In 1736, a speech by former Speaker Daniel McCarty was found to have been disrespectful. In 1748, the burgesses charged John Blair, a member of the Council of State with “scandalous and malicious reproaches, and false expressions, highly reflecting upon the honor of the Speaker and of the house.” Blair was forced to apologize to the House to resolve the matter.<sup>14</sup>

An odd twist to the Littlepage and Butts case occurred in 1740. In that session, the justices in Prince William County were accused of refusing to certify two of the complaints brought before them by the citizens of that county, just as Littlepage and Butts had refused to do previously. But this time, one of the accused justices, Valentine Peyton, was also a member of the House. The committee of privileges and elections, investigated the case, reported to the House that the justices, including their own Mr. Peyton, had ‘acted illegally, arbitrarily, and contrary to the rights of the people.’ Since Peyton was a member of the House, he was immediately directed to acknowledge his guilt and to ask the forgiveness of the House. The other justices involved were similarly ordered to appear before the House. Upon arriving in Williamsburg, they immediately apologized. In light of the fact that the justices had been not only been disgraced but also had been compelled to travel several hundred miles to Williamsburg at their own expense, were released with no further punishment.

Other examples abound as well.

In 1742, Burgess Henry Downs of Orange County accused of having stolen a sheep in Maryland in 1721 (21 years earlier). Downs plead guilty and was whipped, pilloried and sold to owner of the sheep for one year and nine months in order to pay his court fees. When called before the Committee on Privileges and Elections Burgess Downs denied he was the same Henry Downs as in the Maryland records; but several other members of the House testified before the Committee that he had previously admitted to being the same person. As a result, he was expelled from the House.<sup>15</sup>

That same session, Burgess William Andrews of Accomack was found to have been dismissed from his office as tobacco inspector by the governor and council for “very enormous Misdemeanors.” He was found unworthy to sit as a member of the House and was expelled for malpractice in the office of inspector.<sup>16</sup>

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<sup>14</sup> Journal of the House of Burgesses, 1748, pg 290

<sup>15</sup> Journal of the House of Burgesses, 1742, pg. 11

<sup>16</sup> Journal of the House of Burgesses, 1742, pg. 33

In 1759, Burgess Thomas Johnson of Louisa accused a contractor who supplied provisions for the troops of cheating the government. The contractor responded by asking why, then, did he continue to be hired by the Assembly? Johnson replied, "You know very little of the Schemes, Plots, and Contrivances that are carried on in the House of Burgesses; in short, one holds the Lamb while another skins; and it would surprise any Man to see in what Manner the Country's money is squandered away." Johnson cited as one example an episode in which the House had prepared to settle the Clerk's salary and the clerk "got up and walking through the Burgesses gave a nod to his Creatures on each Side, who all followed him out of the House, and promised to be for the largest Sun proposed." Johnson's remarks were judged to reflect negatively on the honor of the House, and was reprimanded by the Speaker.

While other examples of members of the House being expelled for poor behavior or receiving reprimands for insulting remarks, there are few examples as curious as the case of William Clinch that occurred during the 1754-1757 Sessions.

In 1754 William Clinch had a court judgment served against him for 1200 pounds that he owed Burgess John Ruffin of Surry County. By 1756, it was Clinch that was representing Surry in the House, and not Ruffin. Clinch had by this time mortgaged some of his land and slaves and wrote Ruffin to arrange a meeting to settle the debt. Ruffin went to Clinch's house, where Clinch led him into an inner room and locked the door. A short time later Ruffin emerged from the house "in great confusion" and declared Clinch had tried to extort from him at gunpoint discharge of the entire debt. Ruffin then obtained a warrant from the governor to apprehend Clinch, who armed himself and shut himself up in his house. Armed officers surrounded the house for over 24 hours, during which time messages passed between Ruffin and Clinch and they finally agreed on terms of a settlement. On April 26, 1757, Clinch was expelled from the House and barred from sitting or voting "forever hereafter." Notwithstanding the House's expulsion, Clinch was returned to the House by Surry County for the 1758 Session but the House reaffirmed their previous position that he was "incapable of sitting or voting in the House."

No case illustrates the rise of legislative privilege in the House so much as the 1767 case of James Pride. That year, Pride, an officer in the royal navy posted to the York River, served a writ on Edward Ambler, the burgess representing Jamestown, during the timeframe when serving notice of legal action on a member was considered molestation. Ambler and the House resented the breach of legislative privilege and summoned Pride to appear before the Committee of Privileges and Elections. Instead of appearing, Pride sent a physician's certificate saying that he was physically unable to do so. The House questioned the veracity of the physician's assessment and sent two other physicians to examine him. Based on their assessment, Pride was ordered arrested and the sergeant-at-arms "empowered to break open doors and call in all necessary assistance, in case the said Pride deny or refuse to surrender himself."

After his arrest and while confined Pride occupied by writing “an advertisement” for placement in the Virginia Gazette concerning his situation. When the House was informed of that action and examined the ad, they found it “a scandalous insult upon the members of the House and high Breach of their Privilege.” Pride was brought to the bar of the House for a formal reprimand from the Speaker, after which the jailer was given directions to keep Pride “in close confinement, without the use of Pen, Ink or Paper; and that he be fed on Bread only, and allowed no strong Liquor whatsoever.” The House kept Pride so confined for an entire year, from March 1767 to March 1768, and asked the governor to remove him as naval officer for the York River.<sup>17</sup>

From the first session in 1619 the House of Burgesses continuously fought to safeguard its “ancient rights and privileges” as a legislature, with varying degrees of success. A no point was this struggle more evident than during the transformative 52 year period between 1715 and 1767. It was an amazing period in the history of the General Assembly. At the turn of the century, the House had been unsuccessful in getting either the Council of State or the royal governor to back its attempts to enforce the ancient rights and privileges, but by 1767 were entirely successful in disciplining a royal naval officer appointed under the great seal of England.

The role of the Committee on Privileges and Elections in securing the ancient rights and privileges evolved in direct parallel with the struggles of the House in securing these rights. But the importance of the committee was not limited to securing the rights and privileges of the legislature. The committee played an equally important role in insuring the integrity of the electoral process so instrumental to representative government.

### **Elections**

During the early years, when the Virginia colony was still relatively small, the right to vote was widely held and elections were not tightly regulated. In fact, the first election laws, aimed at systematizing election procedures, do not appear until the mid-1740s. Unfortunately, these early attempts at enacted uniform procedures were accompanied by a narrowing of the franchise.

Prior to mid-1650's, all freemen in the colony were eligible to vote. In 1654, the franchise was restricted to “housekeepers” but this restriction lasted just one year, when the General Assembly decided it was “something hard and unagreeable to reason that any persons shall pay equal taxes and yet have no vote in elections.”

In 1663, Governor Berkeley proposed legislation calling for taxes to be imposed on land and effectively limited the right to vote to just those freemen who owned land. The

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<sup>17</sup> Journal of the House of Burgesses, 1767, pp 91, 97-99, 103, 120, 125; and Journal of the House of Burgesses, 1768, pp 143 and 150.

House of Burgesses rejected this notion, declaring that the vast majority of freemen in the colony would rather pay taxes than lose their right to vote. But just seven years later, in 1670, the Assembly reversed course and restricted the right to vote to those freemen who owned property or houses - "none but freeholders and housekeepers who only are answerable to the publique for the levies shall hereafter have a voice in the election of any burgesses in this country."

This restriction too would be short-lived. During Bacon's Rebellion in 1676, the House passed a series of acts commonly referred to as "Bacon's Laws." Among these was an act repealing the restriction adopted in 1670 and restoring the right to vote to all freeman. It was a tumultuous time, and in 1677, following the suppression of Bacon's Rebellion, Charles II directed Governor Berkeley to declare all of "Bacon's Laws" null and void. It is somewhat ironic considering that it was Berkeley, and not Bacon, that first appealed for restoring the franchise to all freemen. In fact, in calling for the election of Burgesses to meet in 1676, Berkeley disregarded the existing restrictions and issued writs which permitted all freemen to vote. Equally as strange is the fact that while the Assembly rejected the crown's appeal to rescind most of "Bacon's Laws", they nonetheless acted to restore the suffrage restrictions.

Suffrage was further restricted in April 1699 when the Burgesses enacted an election law providing that only freeholders should vote; that no woman, infant, or Roman Catholic was to be allowed to vote; and any unqualified voter found to have voted would be subject to a fine of 500 pounds of tobacco for each offense.

By the mid-18<sup>th</sup> century, the electoral process was fairly well established and in 1762, the General Assembly enacted a comprehensive election law under the title, "An Act for directing and better regulating the elections of Burgesses, for settling their privileges and for ascertaining their allowances."<sup>18</sup> The royal governor would issue a call for elections for members of the House of Burgesses to each county sheriff, who was charged with actually conducting the election in their county. The sheriff would then set a date for election and provide public notice, usually through the parish ministers and churches in the county. After the election, the sheriff would then communicate the election returns in the form of a writ of returns to the House of Burgesses. At the beginning of the legislative session, the Committee on Privileges and Elections would review the writs and report to the House the names of those individuals found to be duly elected. If there were any signs of irregularity or if the Committee received a specific complaint or a defeated candidate filed a petition alleging an illegal or improper action on the part of election officials or

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<sup>18</sup> The act of 1762 remained in force until 1769 when the November session of the Assembly passed an act to take its place. The act of 1769 was substantially the same as the earlier statute of 1762, differing only in minor details. The length of tenure of land, the possession of which carried with it the right of suffrage, was reduced from one year to six months, this change of tenure requiring changes in the form of oaths given by freeholders at the taking of a poll. This act also contained a more strict provision against bribery and corrupt practices in elections.

other candidates, the committee would conduct a hearing. The Committee would then give notice to the victorious candidate of the time and place of hearing, and specific nature of the complaint. Both sides would also be asked for a list of witnesses, any if applicable, a list of persons objected to as not being qualified voters. The Committee, which was empowered to send for any witnesses or documents it might desire, would then examine the available evidence, hear testimony, and report its findings and recommendations to the House for a final determination.

While today, few election contests ever make their way to the Committee on Privileges and Elections, during the period between 1725 and 1775 contested elections were reasonably frequent. About 8 percent of all elections for seats in the House of Burgesses being contested<sup>19</sup> with most complaints falling into one of two categories: those involving the qualifications of voters and those involving corrupt or illegal practices.

Voter qualifications. During those periods when the ownership of land was a prerequisite for voting, additional requirements could sometimes further restrict suffrage. The merely ownership of land was not always sufficient to secure the right to vote. Often there was a requirement that an individual own a certain amount of land and sometimes there was an requirement that the land had to have been owned for a certain period of time before the right to vote was secured.

No doubt these restrictions were a result of cases resulting from the transfer of a sufficient amount of land between parties to franchise someone not otherwise entitled to vote and based on an agreement that the newly qualified voter would cast their vote in a certain manner. During the 1736-1740 Session, several residents of King George County received small parcels of land, just adequate to establish them as landowners and qualifying them to vote, by the winning candidate. That same session, a similar scheme was brought to light from York County where the sheriff, Francis Howard, was found guilty of leasing out small parcels of land to individuals just prior to an election in order to qualify them as voters. The House found that he had ‘acted corruptly, against law, and the duty of his office,’ and that his actions were “in Prejudice of the Rights of the lawful Freeholders and to the evil Example of all others.” The sheriff was reprimanded by the Speaker and compelled to pay the required fees.

As a direct result of these cases, the Assembly enacted an ‘Act to declare who shall have a right to vote in the election of burgesses to serve in the General Assembly, for counties; and for preventing fraudulent conveyances in order to multiply votes at such elections’ whereby only the owner of one hundred acres of unimproved land or twenty-five acres of land having a house on it and cultivated, the same having been owned for at least one year before the election (when not coming by decent, marriage, marriage settlement or bequest), or the sole owner of a house and lot in a town or city, could vote

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<sup>19</sup> Kolp, 1992, pg 656

in an election for the House.” It was neither the first, nor certainly the last time, the House would enact legislation in response to perceived abuses.

Nor did the enactment completely solve the problem. Consider the case of Thomas Payne, who, on the Saturday before the 1762 election purchased a 5 foot by 3 ½ foot “house” and moved it onto a lot he owned for the express purpose of qualifying it as improved land and qualifying him as a voter in the upcoming election. Interestingly, after the election Payne went off to sea without paying for the structure and the “house” was repossessed and removed from the property. In consideration of the facts, the House disallowed his vote and disqualified him as an eligible voter.

Not all of the cases involving the qualifications of voters involved the ownership of property. In 1756 the Committee of Privileges and Elections disallowed the vote of a man whose father was white and whose mother was a mulatto, as well as his own son by a white woman.<sup>20</sup> And in 1762, the committee was asked to consider whether to allow the vote of William Tucker who, “for seven or eight years past has been generally reputed not to have been in his proper senses, and incapable of buying, selling, or making any contract; that he hath sometimes met with his old Acquaintances, whom he hath not known, and particularly with one William Foce in the Street, invited him home, and when he was there asked him who he was.” Despite this testimony the Committee decided that at the time of giving his vote Tucker was “in his perfect senses” and his vote was allowed.<sup>21</sup>

Propriety of Elections and Corrupt Practices. Well before the establishment of the Virginia colony, the English law prohibited candidates from offering money, or entertainment, or other inducement to gain votes.<sup>22</sup> And while, essentially the same prohibition was adopted throughout the colonies, the practice of “treating” voters was not considered bribery, especially if the “treats” were distributed to all voters, both supporters and opponents of a candidate. Nevertheless, the practice of “treating” voters often came down to establishing intent, and thus was always open to debate. The Committee on Privileges and Elections frequently heard complaints that a winning candidate “did make feats and Treats at his House to procure his being elected a Burgess for the said County.” One candidate even was alleged to have said that he would rather spend eight or ten ponds than to lose his election.

While “threatening” voters was not considered bribery, making campaign promises could be. Perhaps the most interesting case in this regard comes from 1715 and the election of William Cole and Cole Diggs as burgesses from Warwick County. During their campaigns, both men promised that, if elected, they would not draw any salary for their

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<sup>20</sup> Journal of the House of Burgesses, 1756, pp 359-360

<sup>21</sup> Journal of the House of Burgesses, 1762, pg 88

<sup>22</sup> According to Blackstone, the first prosecution for bribery occurred in England in 1571.

service. Burgesses were not considered employees of the state, the way they are today. Instead, each county was responsible for paying the salaries of its two Burgesses. It was thus alleged that the promise to serve, if elected, without salary was a promise of reward to the county, by sparing them the expense of paying the member's compensation to which they would otherwise be entitled. Upon investigation, the Committee of Elections and Privileges, as it was still known at the time, declared that the charges against Cole and Diggs were true, and that accordingly they were declared not duly elected to the House. Based on this finding, the House directed the governor to issue writs for a new election in Warwick County. As both Cole and Diggs were among the small number of supporters of Governor Spotswood in the House, the governor seems to have been incensed that the House had refused to seat them, and in his message of August 27 he criticized the Burgesses for their action. The Burgesses replied that they had acted in accordance with the laws of the colony disabling any person from sitting as a member of the House who made a gift of money or anything else or promised any gift or reward to any "person or persons in Particular" or to any "county, Town, or corporation in general" and reasserting their right to sit as ultimate judge of the membership of the House. To this the Council replied that there was no law in Virginia to prevent a candidate from offering to serve without pay. Ultimately, it became a non-issue as both men were re-elected to the House. Diggs was, in 1720, appointed to the Council of State, and Cole continued to serve in the House until 1726.

In 1752, one of the principle issues in Hanover County voters was a proposal to divide the county. Much of the opposition came from landowners that they owned property in what we be both the new and old counties if the division was approved. These landowners would then be required to pay taxes in both counties. When one of these opponents told one candidate, John Chiswell, that he could not possibly vote for a candidate who supported division, Chiswell eagerly signed a paper pledging to oppose any division of the county, if elected. He then had this paper posted in one of the churches known to be frequented by other opponents. Seeing this, John Syme also posted a statement that he too was opposed to dividing the county; but a third candidate, who ultimately lost the election, refused to commit himself. It was this third candidate, who contested the election on the grounds that Chiswell and Syme had "bribed" the voters of Hanover County by promising to oppose the division. The Committee on Privileges and Elections, and subsequently the House, concurred and declared Syme and Chiswell not duly elected. Further it ordered any writings promising not to support division of the county be "immediately torn and thrown under the Table." A new election was ordered and Chiswell was re-elected, although Syme was not.

A similar case appears from 1759 involving Matthew Marrable, one of two burgesses elected from Lunenburg County. In this case, Marrable was accused of pledging to pay 500 pounds if he did not do his best to support a division of that county. As in the

previous case, the House accepted the recommendation of the Committee on Privileges and Elections to void Marrable's election. But as happened with Chiswell, Marrable was re-elected, so eventually assumed his seat.

Other unusual cases followed.

In addition to setting the date and time of an election, the sheriff in each county also decided whether or not to conduct the election of burgesses by a voice vote rather than casting of actual ballots. In 1727, Peter Presley persuaded the sheriff of Northumberland County that he should be chosen by "the General Voice." After he was proclaimed the winner of the voice vote, the sheriff then proceeded to fill the county's second seat in the House of Burgesses (at the time each county elected two members to the House) by traditional ballot, however, because Presley had already been declared the winner, voters were told they could cast only one vote rather than two. Notwithstanding the sheriff's direction, one voter insisted it was his right to cast two ballots. "The Sheriff bade him be gone, the man answered he would not be gone, for he had a right to stand there; upon which the Sheriff told him he would break his head, and he answered he would break the Sheriff's head, but was admitted to give but one vote." The Committee of Privileges and Elections considered the case and declared Presley had not been duly elected because of the irregularities in the manner of voting, however, this was one of the rare instances in which the recommendation of the committee was rejected by the House. As a result, Presley was seated and allowed to serve.

That same session, the Committee was confronted with another interesting situation. Because there was no residency requirement in the law, indeed if a man owned the requisite amount of land in two counties, three counties or even ten counties he was eligible to vote in each, the Committee had to address a case in which a burgess, in this case, no less a burgess than the Speaker of the House (and Treasurer of the colony), John Holloway, was returned as duly elected by both the voters of York County and Williamsburg. Since a member could only serve one constituency, the member was allowed to choose which locality they would represent, with a new election being directed in the other. Edward Tabb, who served as a burgess from York from 1723 to 1726, but was defeated in the 1727 election, immediately announced his intention to challenge the returns from York County. There appears to have been no grounds for a challenge, Tabb merely hoped that if Holloway could be induced into choosing to represent Williamsburg that Tabb could declare himself a candidate in the new election that would have to have been held in York County. In the end, Tabb was convinced that it was wiser to wait until Holloway made his decision. (Holloway chose to represent York, John Clayton was elected to represent Williamsburg and Edward Tabb never returned to the House).

Over a period of several years, beginning in 1730, the House considered matters related to conflict of interests, either real or perceived. As previously has been noted, the



sheriff of each county was responsible for conducting the elections for burgesses. During the May-July 1730 session, the House, in consideration of the fact several members of the legislature had accepted appointments and were simultaneously serving as both sheriff and burgess, considered whether such dual office holding represented a conflict of interest. As a result, a special committee chaired by Nicholas Meriwether was appointed to see how dual office holding had been handled by the House previously. The committee reported that they had found two cases in the past in which service in both positions had not been allowed. Consequently an act was passed prohibiting any sheriff from sitting as a member of the House, and preventing the governor from appointing members of the House as sheriffs. The legislation also provided that if any member of the House accepted any position of profit under government, it would render their election void. Based on this provision, the House requested the governor order new elections in at least eight instances.

However the legislation did not prohibit a sheriff from seeking election to the House, it merely provided that if elected, that individual had to resign their position before they could be seated in the House. As a result, in a 1769 case, one local sheriff, who was himself a candidate for Burgess, was accused setting the date for the election on the same day as one already set in an adjoining county for the express purpose of placing his opponent, who was known to have more strength in the other county at a disadvantage. The House found that the sheriff had intentionally acted so as to prevent the adjoining county's residents from voting in his election. However, the House found that such action while improper had no real effect on the results of the election and so he was allowed to remain a member of the House.

Sheriffs were not the public officials to be accused of using their positions to influence elections. In 1736, there was a case out of Caroline County involving Thomas Roy, a tobacco inspector who was also a candidate for Burgess. It was alleged that Roy threatened voters that he would burn their tobacco or not approve it for sale unless the producers supported his election. After hearing from various witnesses, the Committee recommended that Roy be found guilty of "diverse illegal Practices to induce People to vote for him." And the House concurred.

That same session, another tobacco inspectors was accused of "treating" voters to "great quantities of Liquor"; asking people when they brought their tobacco to him for inspection whom they planned to vote for; and promising several persons positions as tobacco inspectors should they support him. He was found guilty by the House, expelled from that body and stripped of his other offices.

As a result of these incidents, in 1736 and 1748 the House enacted legislation prohibiting tobacco inspectors from serving in the House.

“During the colonial period, Virginia probably had more election disputes than any other colony (with the possible exceptions of South Carolina or Jamaica); and probably left in its official records more details of these elections than any other colony.” While only a few examples have been presented here, a thorough examination of the Journals of the House of Burgesses suggest that Virginia General Assembly was most interested chiefly in the candidate’s motives. As long as the Committee on Privileges and Elections was convinced that the member was not directly responsible for the improprieties, the House seemed willing to overlook any number of unfortunate details. Furthermore, while a number of elections were voided, in many instances, the same individuals were returned after new elections were ordered. Thus the House only delayed the member’s seating rather than preventing it altogether.

### **Rules**

While judging member’s credentials and validating election results were central duties of the Committee on Privileges and Elections, it also fell to the committee to determine and recommend rules of procedure under which the House would operate. (There would be a separate standing committee on Rules until 1865.) Indeed, control of its own membership had to extend beyond mere questions of membership to control over the behavior of members once they were elected and seated. While the authority of the house, and the responsibilities of the Committee, have already been clearly enunciated with regard in matters ranging from assault and molestation to free speech, the ability to regulate member’s behavior also extended to such procedural matters as attendance.

As with most of the other ancient rights and privileges, the right to regulate procedure is today embodied in most state constitutions. In fact, the North Carolina Constitution is the only one that does not contain specific language to this effect.<sup>23</sup>

While an important function, it was not one the committee performed with any regularity. The Journal of the House records that on November 8, 1769, the Committee on Privileges and Elections was directed to review the “ancient Rules and standing Orders of the House, and present such as are fit to be continued, with any others which they think ought to be observed.” The chairman of the committee was the future Speaker, Edmund Pendleton, and among those on the committee were George Washington, Thomas Jefferson, Benjamin Harrison, Richard Henry Lee, and Patrick Henry. Their report, consisting of 28 proposed rules, adopted on December 10, 1769, represented the first serious study of the rules of procedure of the House. It was also the first general revision to the rules in more than 100 years, and while 28 rules might not seem significant in terms of the Rules of the House as they exist today, they represented a five-fold increase over the five rules the chamber adopted in 1658.

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<sup>23</sup> Brenda Erickson and Hogan Brown, “Sources of Parliamentary Procedure: A New Precedence for Legislatures”

## **The Committee on Privileges and Elections (1777-1838)**

After the American Revolution the Committee of Privileges and Elections continued to play an important role in determining member's credentials and resolving election contests. However, without the threat that some royal authority, on behalf of the crown, would coopt the legislature's rights and privileges, the House seems to have lost some of the zeal for pursuing this part of its mission.

Other challenges were more mundane. In 1800, Hugh Phelps, John G. Henderson, Abner Lord and Joseph Spencer battled in a four-way contest to become the first delegates elected to represent Wood County in the General Assembly.<sup>24</sup> All four of the contestants were among the eight men appointed as justices of the first county court. In fact, prior to the construction of a county courthouse, the court actually met in the home of Justice Phelps. The contest, considered by the Committee on Privileges and Elections, centered on whether or not to include a tally of votes from a separate poll sheet, that had not been included in the original tally. The regular poll book showed Lord with 58 votes, Spencer with 55, Phelps with 50 and Henderson with 48, but the second tally sheet while adding 11 votes each to the totals for Lord and Spencer, added 39 votes each to Phelps and Henderson. If these additional votes were included in the results, Phelps and Henderson with 89 and 87 votes respectively, would have defeated Lord and Spencer, who tallied 69 and 66. Testimony before the Committee on Privileges and Elections indicated that the votes recorded on the second tally sheet were of persons who refused to swear that they were freeholders, and based on their refusal to so swear, the sheriff of Wood County, William Lowther, excluded their votes from the results initially reported. Lord and Spencer served only two days for ultimately the House decided to include the second tally sheet and seat Phelps and Henderson for the term.

One major change that occurred in the post war years was the inclusion in the first state constitution of language giving the General Assembly the authority to issue writs of election to fill vacancies in the membership of the House. The House of Commons started issuing writs of election for its members during the 16th century but throughout the colonial period, writs could only be issued by the royal governor.

This provision was amended slightly in the Constitution of 1830. The General Assembly retained the authority to issue writs of election, but only in cases where the vacancy occurred while the legislature was in session. In between legislative sessions, the authority was returned to the governor. It is also noteworthy that, as written, the Constitution provided that the House "shall" direct writs to fill vacancies that occur

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<sup>24</sup> Wood County was from Harrison County by an act of the General Assembly passed on December 21, 1798, effective May 1, 1799. The county was named for James Wood who served as Governor of Virginia from December 1, 1796 to December 1, 1799.

during sessions and but that the Governor “may” direct writs as to vacancies that occur during recess.

### **The Committee on Privileges and Elections (1839-1860)**

While the Committee on Privileges and Elections is the oldest of the standing committees of the House, a clerical error in 1839 almost resulted in the committee’s abolition. As originally presented to the House, the list of standing committees for the 1839 session omitted the Committee on Privileges and Elections. A floor amendment had to be adopted to add the Committee on Privileges and Elections back into committee structure of the House, prior to the adoption of the Rules.

A very unusual question confronted the committee during the 1852 Session of the General Assembly. On \_\_\_\_\_ 23rd, Delegate James Barbour of Culpeper introduced a resolution alleging that Delegate George R.C. Price of Hardy County “is incapacitated to sit as a member of this house” by virtue of his confinement w in the Western Lunatic Asylum at Staunton. Barbour’s resolution further directed “that the committee of privileges and elections be instructed to enquire into the fact, and report what measures, if any, are proper to be taken, in order to secure a proper representation” for the residents of that county.

In accordance with the directive of the House, the Committee issued a subpoena to Dr. Francis T. Stribling, the superintendent of asylum. During his appearance Dr. Stribling testified that Price had been admitted to the asylum, under guard, “on account of the violence of the lunatic” on September 6, 1852. He further testified that Price had been examined by three justices of the peace of Hardy County, “who certified that they believed him insane, and furnished the testimony, taken under oath and in writing, upon which this belief was founded.”

Dr. Stribling’s testimony indicated that:

[Price’s] physical health has been good for the most part during his residence in the asylum, and that he is now probably as well, physically, as he has been in some years; that this mind is in some respects much disordered; that he is not a monomaniac, because of his delusions are not confined to one subject; nor does he labor under general derangement of his intellectual faculties, inasmuch as upon many subjects he is not only rational but intelligent; that his malady may be properly styled “partial insanity,” consisting chiefly in a morbid suspiciousness as to and misconstruction of the conduct and motives of others, and without sufficient cause, considering those his worst enemies many of whom are doubtless his warmest and best friends; that, without entering into details, he considers his malady one of a serious nature, and that it is more than probable it will continue to resist obstinately the effects of remedies, if, it does not eventually prove incurable.<sup>25</sup>

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<sup>25</sup> House Document No. 30, 1852.

It is interesting to note that Dr. Stribling's testimony was the only testimony received by the Committee. No other witnesses were called and none appeared.

Delegate Harrison B. Tomlin of King William presented the committee's report on December 8, 1852. The Committee found that the House had not only the constitutional right to inquire into the qualifications of members but also "to examine into the disqualification and permanent disability of its members, and as the exercise of the power is intended for the benefit of the constituent body, that right ought to be asserted and the power exercised." The report also notes that the committee's position is reinforced by "parliamentary history and precedents" and the examination of several cases whereby members of parliamentary bodies were removed on the basis of "permanent and incurable" insanity.

In light of the facts presented, the Committee concluded:

That George R.C. Price, the delegate returned to represent the county of Hardy, has been duly committed as a lunatic to the Western lunatic asylum at Staunton, and is now properly confined therein, and that the nature of his malady is such as to render it improbable that he will be restored to his sound mind, and improper that he should again take his seat in this house during his term of service, and that his seat should be declared vacant on account of such disability.

Based on this finding, the Committee on Privileges and Elections recommended that a writ of election be issued for the county of Hardy to fill the seat.

Although the Committee's report had been presented on December 8<sup>th</sup>, the House delayed consideration of the report until Wednesday, December 15, 1852 at which time, the Speaker of the House, Oscar M. Crutchfield of Spotsylvania County, laid before the House a letter from Mr. Price, written December 1, 1852.

Sir - My attention has been called to the proceedings of the house of delegates of the 23d, in which I find a preamble and resolution offered by Mr. Barbour of Culpeper, declaring that it has been represented to the house that I am incapacitated to sit as a member thereof, and instructing the committee of privileges and elections to enquire into the fact and report what measures, if any, are proper to be taken in order to secure a proper representation for the county of Hardy.

Fully recognizing the right of the house of delegates, at any stage of its session, to institute proceedings necessary to secure a proper representation from each of the counties of the commonwealth, I have, I presume, no right to complain that upon the second day of its adjourned session it should entertain the proposition submitted by Mr. Barbour. This communication is therefore addressed to you for the purpose of facilitating the action of the committee of privileges and elections in the matter referred to. With that view, I request that prompt measures be adopted to ascertain whether I have ever been legally an inmate of this asylum; and if so, whether I am not now entitled to my discharge from it. Confidently believing that my confinement here has been, in its letter and its spirit, false

imprisonment in contemplation of law, and a gross contempt of the legislature, and knowing that I have been for at least six weeks past harshly and inhumanly treated, I respectfully ask and demand, in the character of a man and in the capacity of a member of the house of delegates, that I be immediately restored to liberty, and that the supremacy of the law and justice and the honor of the house be vindicated. The physician and superintendent of this asylum is, I have reason to believe, now in Richmond, in the expectation of influencing, as far as he can consistently with the laws of the state, the action of the house of delegates upon the preamble and resolution to which I have referred. I therefore submit to the consideration of the honorable body over which you preside, whether the sergeant-at-arms should not be at once directed to remove me to Richmond, in order that I may have a fair opportunity of maintaining my just rights and privileges. Be kind enough, sir, to present this communication to the house of delegates,

As Price's letter had not been considered during the Committee on Privileges and Election's original deliberations the whole matter was re-referred to the Committee.

The House of Delegates returned to the matter on Thursday, December 16, 1852 at which time Delegate Tomlin presented the committee's revised report. In light of Price's letter the committee reconsidered the question of whether he had be legally confined, "and whether he is not now entitled to discharge." Having previously heard only Dr. Stribling's testimony on this issue, the Committee concluded:

By the 12th section of the 85th chapter of the Code, it is provided that any justice who shall suspect any person in his county or corporation to be a lunatic, shall issue his warrant ordering such person to be brought before him. He and two other justices shall enquire whether such person be a lunatic, and for that purpose summon his physician, if any, and any other witnesses. And the mode of examination is pointed out.

By the testimony of Dr. Francis T. Stribling it appears that Mr. Price was never summoned by the justices to appear before them, and that the investigation had before them was without his presence.

Your committee are therefore of opinion, that the commitment by said justices and the subsequent reception of Mr. Price into said asylum, were illegal.

Resolved, therefore, as the opinion of this committee, that the sergeant-at-arms of this house be directed to proceed to said asylum and require the discharge of George R.C. Price from his illegal imprisonment, and that he be delivered to said sergeant and be brought by him before the committee to investigate further into his case.

Upon the presentation of this report, Delegate Fleming B. Miller of Botetourt offered an amendment to strike all of the language following "from his illegal imprisonment" from the final sentence; however this amendment was rejected.

A motion was then made by Delegate John D. Imboden of Augusta to substitute the original report declaring Mr. Price to be legally incarcerated and declaring the seat

vacant on account of his permanent and incurable insanity. Prior to its consideration, Delegate Tomlin proffered an amendment changing the word “insanity” to “physical and mental disability.” Despite the amendment, the motion on the adoption of the Imboden substitute, and therefore the original committee report, was defeated.

The House then adjourned for the day without taking further action was taken on the revised committee report.

The House returned to consideration of the committee report offered by Delegate Tomlin on Friday, December 17th. Upon the motion of Delegate Spicer Patrick of Kanawha the report was laid upon the table. Thus neither the original report affirming the legality of Price’s confinement and ordering a special election to fill his seat nor the second report directing his release were ever approved by the House. Thus Price retained his seat in the House of Delegates throughout the period of his confinement, no special election writ having ever been ordered.<sup>26</sup>

No further action ever taken on the matter, although just before the close of the Session, a special committee was appointed “to enquire into the expediency of paying over to Mrs. Price, the wife of George R.C. Price, the pay due him as a member of the present general assembly” despite his confinement. HB 936 to accomplish this purpose was considered and approved by the committee, eventually passing the House on a vote of 78-20.

### **The Committee on Privileges and Elections (1861-1899)**

While seven of the eight colonies with a system of standing committees had a committee on privileges and elections in place by 1770<sup>27</sup> the U.S. Senate Committee on Privileges and Elections was not established March 10, 1871 and even then last only a short time. The U.S. Senate abolished the committee on January 2, 1947 and its functions were transferred to the Committee on Rules and Administration.

### **The Committee on Privileges and Elections (1900-1999)**

By the start of the 20<sup>th</sup> Century, the power and prestige of the Committee had waned. The ancient rights and privileges of the legislature were well established not only by precedent, but were embodied either in the state’s constitution, or statute, or in some cases both. Election challenges were declining and the Rules Committee had taken over the function of developing the rules under which the House conducted its business. While it was still an honor and privilege to serve on what had been, historically, the Assembly’s most powerful and prestigious committee, the real import of the committee had decline precipitously.

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<sup>26</sup> John H. Castain was sworn in as the representative from Hardy County when the House convened on December 5, 1853.

<sup>27</sup> Pennsylvania being the lone exception.

In the consideration of revisions to the state constitution in 1969, the issuance of writs of election once again scrutinized. As originally written, the language in Constitutions of 1776 and 1830 provided that the House “shall” direct writs to fill vacancies that occur during sessions and that the Governor “may” direct writs as to vacancies that occur during recess. As a result of the changes made at the 1969 special session, section 7 of Article IV was changed to provide that the House “may” direct writs regarding vacancies occurring during sessions. While the difference between “shall” and “may” is significant, the intended purpose of changing “shall” to “may” was to avoid requiring a chamber to issue a writ if a member dies or resigned near the end of a session when the general election is close at hand. Since there was a concern voiced over what would happen if a vacancy occurred during a session but no writ was issued, the provision concerning the Governor was changed so that he may direct a writ to fill a vacancy that “exists” during recess whether the vacancy occurred during the recess or not.

### **The Committee on Privileges and Elections** (2000-present)

It has already been noted that the right to sit as judge of its own memberships is among the most fundamental rights of a legislative body. Indeed, it embodied in the U.S. Constitution as well as most state constitutions. Of all the states, Massachusetts’ constitution is perhaps the most specific that each house “may try and determine all cases where their rights and privileges are concerned, and by the constitution, they have the authority to try and determine, by committees of their own members, or in such other way as they may respectively think best.”<sup>28</sup> The language in Virginia’s current constitution is far more typical that “each house shall be the judge of the election, qualification, and returns of its members, ...”.<sup>29</sup> It is also virtually identical to that found in the state’s first constitution. Although the language has remained the same as a practical matter it is clear that no right has eroded over time as precipitously.

While the Constitution still provides that each house shall be the judge of its own members, the State Board of Elections has assumed much of the responsibility for certifying election returns, even for the members of the General Assembly. As a result, today, each session opens with a communication from the State Board of Elections communicating the results of the most recent general election, as certified by the Board. The results are not referred to the Committee on Privileges and Elections for review, nor does the House vote to accept the Boards report. It is simply taken at face value.

While “contests” of elections are still by tradition, and by statute, within the purview of the Committee on Privileges and Elections, true contests are rare. Notices of an intent to contest an election are rare, and even rarer is an instance of the matter

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<sup>28</sup> Cushings

<sup>29</sup> Article IV, Section 7.



making it all the way to the legislature. Most election contests are now settled within the judicial system, not in the legislature.

Meanwhile the Committee on Rules, chaired by the Speaker of the House, has assumed a greater role in policing member behavior and ethical issues. While the Rules of the House Delegates, adopted at the start of each two-year term, delineate between roles of Committees on Privileges and Elections, Rules, and the independent Ethics Committee because the Speaker enjoys broad discretion under the Rules, as a practical matter since 1982 the Rules Committee has assumed a greater responsibility for matters relating to member “privileges” and behavior.

In the Rules of the House adopted at the beginning of the 1982 Regular Session, were the first to split jurisdiction on issues related to the conduct of members between the Committee on Rules and the Committee on Privileges and Elections. First appearing as Rule 21(a), the House established a three-member Ethics Subcommittee of Rules to review member’s disclosure forms<sup>30</sup> and consider member’s requests for advisory opinions “with respect to the general propriety of any current or proposed conduct.” In Rule 21(b), the Committee on Privileges and Elections was charged with receiving and investigating “any charges or complaints brought against any member of the House of Delegates in the performance or discharge of his responsibilities.”

At the start of the 1994 Regular Session, changes to the Rules of the House resulted in a renumbering of these two rules, although the language remained the same. As a result, the language relating to the Standards of Conduct subcommittee of the Rules Committee became Rule 23 and the language concerning the Committee on Privileges and Elections was made Rule 24. In 1998, as a result of a power-sharing agreement in the House, Rule 23 was expanded from three members to four members, and a provision was added that two members be appointed from the majority party caucus, and two from the non-majority party caucus. While the House no longer operates under a power-sharing agreement, and Republicans hold a two-to-one edge in the membership, the provision remains in the Rules that the membership on the Ethics Subcommittee be equally split, two Republicans and two Democrats.

While Rules of the House have, since 1982, distinguished between contemplated conduct and actual conduct, with the Committee on Rules charged with jurisdiction regarding “the general propriety of any current or proposed conduct” and Privileges and Elections charged with investigating charges or complaints brought against any member, the reality has been that all cases of member conduct have, in recent years, been referred to Rules.<sup>31</sup>

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<sup>30</sup> Statements of Economic Interest

<sup>31</sup> See William Robinson, Jr.; Fenton Bland; and most recently, Phil Hamilton examples.

Except for the language previously noted in Rules 23 and 24, the subject matter jurisdiction of the standing committees of the House of Delegates is not announced in the Rules of the House of Delegates. Instead, the standing committees have very broad jurisdiction to consider and report on matters specially referred to them by the Speaker. While the Speaker enjoys complete discretion in determining which legislation is referred to each of the standing committees, since 1998, when the Committee on Nominations and Confirmations was abolished, the Committee on Privileges and Elections Committee has typically considered matters concerning voting; apportionment and redistricting of state legislative and congressional district boundaries; proposed constitutional amendments; elections; and nominations and appointments to any office or position in the Commonwealth, except judges and justices of the Commonwealth.