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Paul M. Butler

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THE CONSTITUTION AND STATE RIGHTS

By PAUL M. BUTLER

"Government was made for the people, not the people for government.—President John Tyler

In a political age marked by a most paternalistic tendency on the part of the federal government of the United States, arises another of many questions that go for their solution to the very foundation of the Constitution of the United States, to the very principle upon which that lasting document was based,—the formation of a more perfect Union in which both state and federal governments would be confined to their respective domains.

The precise question that has been presented to the student of political science and constitutional jurisprudence that involves a consideration of state rights is whether the Senate of the United States Congress has the right to nullify the action of a sovereign state in the selection of its representatives in the Senate. Such was the controversy that arose when the credentials of Senator-designate Frank L. Smith of Illinois and Senator-elect William S. Vare of Pennsylvania were presented to, and summarily rejected by the upper house of the national legislature.

The primary theory of government, as defined in the preamble of the Declaration of Independence, i. e., that the government derives its just powers from the consent of the governed, and the constitutional provisions that relate to the representation of the sovereign states in the legislative branch of the federal government are essentially important in a consideration of this question that strikes as a menace to the rights of the sovereign states to representation in Congress.

Governments depend for their continued existence upon the people and their submission to a reasonable infringement upon their natural rights for the sake of law and order. That government in any form proceeds from the people is a principle that seldom has been controverted in all the history of the world.

That these primary ideas of government and its source were not lost sight of by the framers of the Constitution is evidenced by their own monumental contribution to the creation of a free government for a free people, namely, the Constitution itself.

In the first step towards the unification of the colonial states, i. e., the preparation of the Articles of Confederation, adopted by the Continental Congress in 1777, and subsequently ratified by the thirteen original states, their declared purpose was to provide for the common defense of the states, the security of their liberties, and their mutual and general welfare. To secure those ends, the states delegated certain of their powers and rights, conferred upon them by the governed, to the federal government, and a few years later, upon the failure of the confederation the Constitution of the United States, in which the powers granted to the national government and those retained by the states, and the restrictions upon each are alike set forth.

The states, therefore, are clearly not creations of the national government; on the contrary,—an existing authority of enumerated or delegated powers, as contradistinguished from the reserved powers of the states.

The framers of our great Constitution, doubting its efficacy, as did Franklin, “unless it was, like a pyramid, broad based upon the will of the people”, therefore constructed the Union upon a dual form of representative government, thereby making an unique contribution to political science, and by certain express and implied provisions guaranteed to, and reserved for the sovereign states certain rights and powers.

Among those rights held by the several states in the federal government was the all-important right to representation in both houses of the national legislature,—the Senate and the House of Representatives. It was during the constitutional convention that a conflict arose among the delegates in regard to the equality of representation of the small states with the more thickly populated colonies, and reached its solution in one of the most famous of the several constitutional compromises, whereby there was to be equal representation in the Senate for all states, and representation in the house “apportioned among the several states according to their respective numbers—.” (Article I, Section 2, (3), amended by Article XIV of the Amendments.)

In other words, the Senate was the representative body of the states, and the House of Representatives was, by virtue of the apportionment of its members, the representative body of

the people. As a result of this far-reaching compromise, we find in Article V the provision the “—no state, without its consent, shall be deprived of its equal suffrage in the Senate”.

The action of the Senate in refusing to accept into their body the men duly elected and chosen by the people of the sovereign states of Pennsylvania and Illinois, resolves itself into this precise question: “Did not the Senate exceed its constitutionally granted powers and did it not deprive these states of their equal suffrage in that branch of Congress?”

The ground upon which the senate based its conclusion in the case of Senator-designate Frank L. Smith was that his primary campaign had been tainted with corruption and putrescence, and that as a result he was therefore disqualified as a Senator-elect from the State of Illinois, to present to the Senate, or to have presented to the Senate for him, credentials of his election (Senate resolution 291—December 9, 1926.)

In the constitution Article 1, Section 3, (3), we find this pertinent provision: “No person shall be a Senator who shall not have attained the age of thirty years, and has been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State for which he shall be chosen,” and, again, in Article 1, Section 5, (1) “Each house shall be the judge of the elections, returns, and qualifications of its own members,—”

The case presents to the constitutional jurist a delicate question of the interpretation of the latter section in the light of the former, which definitely stated the three affirmative qualifications of age, citizenship, and state residence. Does Article 1, Section 5, (1), in stating that each house shall judge the qualifications of its own members, limit each house to those specific, enumerated qualifications of the Constitution, or does it imply the power to each house to inquire into the further qualifications of its members and reject a number on the grounds other than those set forth in Section 3? In other words, is the word “qualifications”, appearing in Section 5, a word of limitation, restricted to the qualifications of Section 3, or is it a word of broader meaning, not referring to the technical requirements set forth by the Constitution for the members of both houses of Congress?

The views and opinions expressed during the controversy by many senators on the floor of the senate and by several prominent constitutional lawyers are wholly divergent and utterly beyond reconciliation, there being two different conclusions based upon the same, common grounds.

The conclusion reached by a great majority of the members of the Senate was that it possessed the right to refuse admission to any person sent by the people of a sovereign state to represent them on the ground that the Senate was the judge of the qualifications of its own members, and that there was other qualifications to be considered in addition to the requirements as to age, citizenship and residence.

On the other hand, a large number of very able-minded Senators maintained that such a denial by the Senate to accept the representative of a sovereign state was an abuse of power by the Senate, a danger to state sovereignty, and a direct nullification by the Senate of the act of the people of the state of Illinois in the selection of their own ambassador to the upper house of Congress,—in short, that is violated the fundamental principles of the constitution.

It was argued by those Senators opposed to the seating of the Illinois senator that a debate as to the phrasing of the qualifications clause in the constitution arose in the convention that framed it, and to meet the serious objection that "it was impossible to make a complete list of qualifications, and that a partial list might by implication tie the hands of Congress," the section was finally phrased negatively so that it would not preclude each house from exercising its plenary power to pass upon the qualifications of its members.

In the records of the Constitutional Convention, we find the words of Mr. Wilson: "Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters. It would be best, on the whole, to let the section go out; this particular would constructively exclude every other power of regulating qualifications". And, as a result, the final draft of the qualifications section was worded negatively, viz., "no person shall be a senator who shall not have—".

And, yet, we cannot say that it was the intention of the framers of the Constitution to have the word "qualifications" in

Section 5 either restricted to the three essentials expressed in Section 3, or broadened to such an extent as would confer the Senate the power to reject or exclude a member or one presenting his credentials for acceptance. The line must be drawn somewhere, and it is reasonable to suppose that the power given to the Senate to expel a member, with the concurrence of two-thirds, could be exercised where the Senator-elect did not fulfill other additional qualifications.

The distinction, however, is that the Senate in this case established the precedent of absolutely refusing to allow Senator-designate Smith to be seated, whereas in other cases the man in question has been seated as the representative of his state, his qualifications investigated, and his exclusion voted upon.

In upholding the right of Senator-designate Smith to be seated in the Senate as the representative of the sovereign State of Illinois, James M. Beck, former solicitor general of the United States, and of counsel for the Illinois senator, argued: "If the Senate has the power to keep Smith and Vare out, it could reject a Senator for any reason whatever. Who can tell what waves of class or political feeling may hereafter arise in the turbid stream of American political life? If the Ku Klux Klan spirit should ever get control of the Senate and religious feeling again run high, why might not a Protestant majority in the Senate exclude a Catholic on the same theory? Suppose that the Senate were dominated by radicals, might not they hold that any Senator-Elect who had been the president of a business corporation, or a banker, or a railroad president, was, by reason of his economic ties, quite unfit to be a Senator?"

This argument was answered by Senator Norris of Nebraska with the conclusion that the same reasoning would apply to the Supreme Court. "The truth is," he said, "it is a physical impossibility to confer power upon any body of men without at the same time conferring upon them the right to abuse that power". We seek no better affirmation of this principle than that of Chief Justice Taney, who, in answer to an argument that the powers of the president were apt to be abused, stated: "All power may be abused if placed in unworthy hands" (*Luther v. Borden*, 12 L. Ed. 581.)

Justice Story has been quoted as having said: "It would seem but fair reasoning upon the plainest principles of interpretation that when the Constitution established certain qualifications as necessary for office it meant to exclude all others as prerequisites. From the very nature of such a provision the affirmation of these qualifications would seem to imply a negative of all others".

In the course of the Senatorial debate, three prominent were quoted as to their views on the question of qualifications of legislators:

THROOP on PUBLIC OFFICERS*** "The general rule is that the legislature has the full power to prescribe qualifications for holding office in addition to those prescribed by the Constitution, if any, provided that they are reasonable and not opposed to the Constitution provisions or to the spirit of the Constitution".

CUSHING on CONSTITUTIONAL LAW*** "To the disqualifications of this kind may be added those which may result from the commission of some crime which would render the member ineligible.

BURGESS on CONSTITUTIONAL LAW*** "I think it is safe to say that either House might reject an insane person or might exclude a grossly immoral person".

Senator Walsh, Montana, after pointing out that the Senate on the one hand, could not even exclude a murderer, or any criminal and, on the other, could exclude a man because of his politics, religion, or business, reached this conclusion: "But we are obliged to choose either the one or the other construction of the Constitution, and to safeguard the institutions of the country"

And, certainly, we are not willing to choose that construction that will confer upon the Senate the power to nullify and render ineffective the act of the people of any of the sovereign states in the selection of their representatives to Congress. We must choose that course that "seems to us most accurately to carry out the intent of the framers of the Constitution, and to safeguard the institutions", and the ideals of the government of these United States.

An argument many times resorted to by the opponents to the seating of the Illinois solon was the one based upon, what

was claimed to be, the natural right of any legislative body to keep itself clean, as stated by Senator Ashurst in these words: "The Senate has the power to employ its constitutional and inherent power and right to keep itself clean". It was held, in the case of Truman H. Newberry of Michigan, that the excessive expenditures in his campaign for the senatorial seat were "contrary to sound public policy, *harmful to the honor, and dignity of the Senate*, and dangerous to the perpetuity of a free government."

Senator James Reed reasoned that "if the Senate does not have the right to protect its own integrity, then there is no power outside the Senate to protect that integrity."

1872 President Grant, commenting upon the refusal to seat a congressman as the duly elected representative of his own state, made this observation: "If refused admission as a member for want of due allegiance to the Government and returned to his constituents, they are admonished that none but persons loyal to the United States will be allowed a voice in the legislative councils of the nation, and the political power and moral influence of Congress are thus effectively exerted in the interest of loyalty to the Government of the United States and fidelity to the Union."

Representative Burrows in unseating Representative Cannon in 1880 made this statement: "But it will be observed that the Constitution does not undertake to specify those things which disqualify a person for membership. The doctrine is well settled that to entitle a person to a seat in this House he must not only possess those affirmative qualifications mentioned in the Constitution, to wit, residence, citizenship, and age, but he must be free from those things which by common parliamentary law disqualify."

Senators who championed the right of the Senate to keep itself clean, to keep its membership at the highest possible standard, and to protect its own integrity and honor, seized upon this principle as the basis of their contention that the credentials of Senator Smith should not be accepted. To these men, the excessive expenditure in the interest of the successful candidate and the acceptance by him, as the former commerce commissioner of Illinois, of large contributions to his campaign fund by the public utilities magnates and corporations, whose interests

were alleged to have been served by Smith in that capacity, was such a repugnant and improper practice as would serve to disqualify the candidate elected to any legislative body in the world. Time and again it was asserted on the floor of the Senate that there was never a legislative body in any form of government in any country in the world that did not have the right to protect its own integrity and reputation by passing upon the qualifications of its own members, except where expressly restricted by written Constitution.

The Senate would not be denied by any reasonable person its right to protect itself from men whose presence in its august body would tend to destroy its integrity, its honor, and whatever remains of what was once very high public esteem, but such right is restricted by and subject to the prior rights of the sovereign states.

In answer to the argument of Senator Reed to the effect that no agency but the senate itself could protect its integrity, The New York World said editorially: "By 'protect its own integrity', Mr. Reed means that the senate shall impose its standards of integrity upon the state of Illinois. In his opinion, a majority of the electorate of any state whatever qualifications are deemed necessary to protect the integrity of the senate. If this doctrine prevails, then the majority of the senate can of its own will, reviewable nowhere else, strip any qualifications it likes. The right of a state to representation becomes limited by the arbitrary will of 49 senators".

To comment further upon the effect of senatorially imposed qualifications would tend to weaken the effect of the above quoted words. The result may be plainly seen and should be carefully avoided. We cannot sacrifice fundamental state rights upon the altar of the senate, that its own integrity may be kept un-sullied by the slightest taint of impropriety. "Eternal vigilance is the price of liberty", but the price of senatorial integrity is not, and must never be, the sacrifice of state rights.

But is there a question of state rights involved in a consideration of this question? Senator McKellar, opposing the seating of Senator Smith, claimed that the right of the sovereign State of Illinois were not involved. He said: "It is claimed for Smith that a question of state rights is at issue. I see no ques-

tion of state rights at all in this matter. The Senate is not refusing the State of Illinois its equal representation in the Senate. If Smith were 20 years old and presented credentials otherwise regular, he would be excluded, and it would be no deprivation of state rights. The Governor of Illinois does not have to appoint Smith to fill the vacancy. He can appoint any other qualified citizen of Illinois, man or woman, and the Senate will receive him or her."

If Senator Smith had been 20 years of age, his credentials would have been prima facie void, because he, as a duly elected senator of Illinois, would fail to meet one of the three affirmative qualifications stated in the Constitution. But, if we conclude that the Senate has the right only to consider the qualifications of age, residence, and citizenship of a senator-elect of or designate, then we are denying no right vested in a sovereign state, because the constitutional provision stating the essential qualifications of the representative of a sovereign state were accepted by the state delegates in the Constitutional Convention.

In Article V of the Constitution, there is the provision that, "—no state, without its consent, shall be deprived of its equal suffrage in the Senate." What could have constituted a deprivation of the right of Illinois to equal suffrage in the Senate more than this refusal to seat its duly elected and qualified representative? What could be more conclusive as to the intention of the framers of the Constitution to protect the sacred right to equal suffrage in the Senate for all states than the fact that this article was not amensable?

That Illinois was deprived of her equal suffrage in the Senate is clear from the fact that the entire short session passed without Senator Smith being seated. Illinois has had but one Senator representing her during that time to speak the will of the people on many important measures that confronted the Senate. Was this not a clear violation of state rights?

Our government was a new contribution to the political science of the world. It was based upon a new principle—the dual form of government. It combined the colonies into an "indestructible Union of indestructible states" each supreme in its own domain. Senator Bingham in a very eloquent address during the Smith hearing on this point said: "Aristotle described

all the forms of government that were known to the ancients,—monarchy, democracy, aristocracy, oligarchy,—and state the difficulties to be found and to be met with in those different forms of government. At that time no one had thought of a representative form of government. We on the other hand, have found our prosperity in a representative system of government, and in a new principle of government dividing the powers between a central government—those powers necessary for the national defense—and the local or State governments, who look after their own affairs. It is now proposed to deny to a sovereign state of the Union the right to have an ambassador whom she sends here, with credentials which are not questioned—as to their authenticity or as to their regularity, to take the oath and to be received as an ambassador from the state of Illinois—.”

On the question of sovereignty and state rights, Senator Fess made the following remarks: “Ours is a peculiar system of government. Our government is the only one in the history of the world that represents the double sovereignty, in which there is the sovereignty of the Nation and the sovereignty of the State. The sovereignty of the State is just as exacting and just as precious, within the limits in which it is sovereign, as is the sovereignty of the federal government within the limits of its sovereignty.”

Shall we, then, allow a mere majority or even two-thirds of the Senate to say to the sovereign state of Illinois: We will not accept Frank L. Smith as the Senator-designate of your state. Your governor must either appoint another person, or the people of your state must elect another man to represent them in this body. You cannot be represented by this Senator of your own choice. The Senate must protect its own integrity by closing the door of the Senate upon men whose campaigns are conducted in such a manner as was the Smith campaign? Shall we suffer our rights as sovereign states to be subjected to the will of two-thirds of the Senate?

Surely, the fathers of our government never harbored in their minds such a thought as that. Had they foreseen such a possibility under the Constitution, they would have made express provision against it. Their intention was that it should be the foundation of a great Union of sovereign states, individually

sovereign as states, and collectively sovereign as a Union of states.

We must not allow the passions or popular opinions of the day to undermine our long-established principles of government as set forth in the Constitution. In the words of Chief Justice Taney in a very able opinion in *Scott v. Sanford*, 19 How. 393, "it (the constitution) is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States."

We must keep ever uppermost in our minds the intention of our forefathers in the construction of our government, and in the preparation of the Constitution, and the intention that the United States should be a nation for the common defense and protection on the individual states, and that the sovereign states should be the guardians of the unalienable rights of the people. In a recent editorial, the *New York World* observed on this point: "It has been said that if the nation can trust the Senate to decide the issues of war and peace, then it can trust the Senate to decide whether a state has chosen a representative who meets the proper moral requirements. The answer to this argument is that this is a Federal Union of States, and that to give to a majority of the Senate the right arbitrary to deprive a State of representation is to strike at the very root of federalism and of the autonomy of the States. Great powers are intrusted to the Senate by the people of the several States, but just because these powers are so great they should not also intrust to the Senate the final right to say arbitrarily who shall sit in the Senate. That is the power of the peoples of the States ought jealously to reserve for themselves."

Article X of the Amendments provides that "the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." And this right to choose their own representatives in the national legislature is a right reserved for the people.

Hence, the people of Illinois claim their rights as those guaranteed them by the Constitution and not as a gift of Congress in general, or of the Senate in particular.

If we are solicitous of the preservation of the rights of the sovereign states, our conclusion must be that in its refusal to accept into its membership the senator of any one of the States, the Senate of the United States has usurped its granted powers, and assumed a right not conferred upon it by nullifying the action of a sovereign state in the selection of its representatives in the Senate.

And we find ourselves asking these questions: Are the states being forgotten in the excess of national legislation? Are the states being forced into the background because so much of our thought is national? Are the states being forgotten because our federal government is becoming more and more paternalistic? A survey of recent legislation by Congress, a study of decisions of the United States Supreme Court, and a consideration of recent governmental actions will indicate that that the governing tendency toward further centralization of government, toward a more paternalistic national government, toward a weakening of state sovereignty, has been climaxed by the Senate's deliberate nullification of the right of the people of a sovereign state to be represented in Congress by their chosen Senator.

"If we are a nation," said Senator Bingham in his discussion of this case, "if we are to be an empire, then the Senate is responsible for the type of man it permits to sit in it. If we are a Union of the States, then the States are responsible. Deprive a state of its responsibility, and you make it merely a province of the empire of America." What could have been farther from the minds of our forefathers than to establish here in America an empire? Had they not left the English Empire because it stood no longer as a free government for a free people?

The Senate's act has set a dangerous precedent. It has endangered and weakened the sovereignty of the states. It has denied the people the right to be represented by the Senator of their choice. It has denied the State of Illinois its equal suffrage in the Senate. It has placed the preservation of its own integrity before the preservation of state rights.

Such a precedent as this, more than the excessive expenditures in any campaign, more than the destruction of the honor and integrity of the Senate, is dangerous to the perpetuity of a free government. We cannot permit our government to deviate from the district paths of procedure laid out for it by the Constitution, else our rights as citizens of sovereign states and a sovereign Union of States be whittled away to a mere nothing, and the erosion, constant and increasing as it is, of the federal Constitution terminate in its destruction.

We must be militant in our efforts to preserve it as the foundation of our government. "We cannot suffer its principles to be perverted or abrogated by the passions or the prejudices of the times, or of the few. It has remained permanent and lasting for a century and a half, and we must see that it continues to stand as a governmental superstructure upon the foundation of its own great principles. It rests upon us as a duty to make sure that this guarantee for the protection of our unalienable rights of life, liberty and property passes to our posterity from generation to generation as a heritage of a free people. It is exactly such precedents as this that weaken and undermine the principles of the Constitution.

And, today, we may repeat with Washington the same words of warning and advice that he spoke to his fellow countrymen upon his retirement from service in the interests of his government, words that in this age are as much to be heeded as they were when spoken: "It is of infinite moment that you should properly estimate the immense value of your national Union to your collective and individual happiness. Towards the preservation of your government, and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect, in the forms of the Constitution, alterations that will impair the energy of the system, and thus to undermine what cannot be directly overthrown".