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THE RIGHT OF THE SENATE TO EXCLUDE A SENATOR-ELECT

By Reuben Momsem

The Constitution of the United States provides that no person shall be a Senator who is not thirty years of age, who has not been a citizen of the United States for nine years, who is not a citizen of the State from which he is chosen, who shall at the time of his election hold any other office under the United States, or who having taken an oath to support the Constitution, shall have engaged in rebellion against the United States. These are the only qualifications or disqualifications for Senators stated in the Constitution. Remembering that the Government of the United States was created for certain limited purposes that are set forth in the Constitution; that this Constitution was created at a time when the people were attached to their State government; the question may be asked whether these qualifications are exclusive, or whether the Senate has the unlimited right to add additional qualifications for Senators.

This question was recently decided in the Senate, when the credentials of Senator-designate Frank L. Smith of Illinois and Senator-elect William S. Vare of Pennsylvania were presented to the Senate. Both men possessed all of the qualifications named in the Constitution. But the majority of the Senate were of the opinion that the Senate had the right to fix the qualifications for Senators, that is, to reject on a majority vote a Senator-elect who possessed the Constitutional qualifications, and who had not violated the terms of any positive Federal or State statute.
The Senators-elect thus possessed every Constitutional qualification for the office of Senator, and by their election they became possessed of a legal right which could not be lawfully destroyed by any person or collection of persons acting in either their individual or official capacities.

One of the greatest decisions of the Supreme Court involved a discussion of the right of a citizen to hold an office, under our Constitution; whether this right is a vested right or a property right. It was declared to be a right of which the citizen may not be arbitrarily deprived. In the case of *Marbury v. Madison*, the facts were that President Adams had signed commissions appointing Marbury and others as justices of the peace of the District of Columbia. The seal of the United States had been affixed to such commissions and attested by the Secretary of State. The appointments were made near the close of President Adams’ term of office and by some oversight they were not delivered but came into the possession of James Madison, the newly appointed Secretary of State under Thomas Jefferson.

These offices were purely statutory and resulted from an Act of Congress, which provided that such a number as might be necessary should be appointed as justices of the peace of the District of Columbia for a term of five years.

Chief Justice Marshall in delivering the opinion said: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

“The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right.

“The office of the justice of the peace of the District of Columbia is an office of trust, honor and profit; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It is not, then, on account of the worthlessness of the thing pursued, that the injured party can be said to be without a remedy.

“Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the
performance of which entire confidence is placed by our Constitution in the supreme executive; and for any misconduct respecting which, the injured person has no remedy?

"That there be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted."

If this language is applicable to one of the most insignificant statutory offices ever created, it is at least equally applicable to the office of Senator of the United States. This latter office does not in any respect depend upon the will of the executive, judicial, or legislative departments of the government, but constitutes part of the very framework of our national political organization and owes its existence exclusively to the Constitution.

If the mere act of the executive in affixing his name to a parchment commission invests his appointee with a vested right to enjoy the honors, dignities, and profits of the office of a justice of the peace, can it then be said that a Senator of the United States, possessing all of the qualifications required by the Constitution, as well as an election by the people of his state, has no greater right to the dignity, honor, and emoluments of the office of Senator than his fellow members may, in their discretion, permit him to have?

If the Senate of the United States has the power to overthrow the declared will of the people of a Sovereign State in the choice of the person selected to represent them in that body, it must be found in Section 5, of Article I, of the Constitution of the United States, which provides that:

"Each House shall be the judge of the elections, returns, and qualifications of its own Members."

Unless this provision means that the Senate has plenary power and discretion to arbitrarily determine the fitness of an elected Senator, then such section furnishes no authority or legal grounds for the deprivation of rights, duties, honors and salary of the person duly and legally elected.

The very language of the section forbids any such interpretation or construction. Each House is to be the "Judge" of the qualifications of its own Members; in other words, is to determine or decide whether the elected member possesses the neces-
sary qualifications. The power to determine whether certain qualifications exist and are possessed by the member is judicial in its character, and is the direct opposite of the power or jurisdiction to prescribe qualifications under its legislative power.

Chancellor Kent, in Vol. I, of his Commentaries, at page 235, says:

"Each House is made the sole judge of the election, returns, and qualifications of its members. It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and as each House acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to for the safety of uniformity and certainty."

The Senate acts judicially in ascertaining the facts as to such qualifications. It then applies the facts thus found to the prescribed Constitutional qualifications which the Member must possess. To say that this provision means that either House may prescribe qualifications and require conformity thereto, by the elected Member, is to utterly ignore the plain meaning of Section 5, of Article I, of the National Constitution.

Judicial action is the very antithesis of legislative power. Before a judge can act there must be some already existing rules, written or unwritten, statutory or constitutional, which shall serve as a guide in the rendition of a proper judgment, upon the facts found to exist. Likewise when the Senate is constituted a judge of the qualifications of its own Members, this judicial power presupposes some rule of law, which shall govern the judicial action of the Senate in determining whether the facts indicate that the elected Member possesses the qualifications of which the Senate is the judge.

The Constitutional Convention in exercising its legislative functions prescribed the qualifications of United States Senators. It did so by the indirect method of enumerating certain disqualifications which would prevent the citizen possessed of the same from being elected to the office of Senator.

In determining what persons might hold the office of Senator, the Convention proceeded upon the theory that all citizens have a presumptive right, subject to few exceptions, to aspire to
any office. The exceptions were stated as disqualifications and are stated in Article I, of Section 3, as follows: "First, that no person should be a Senator who had not attained the age of thirty years. Second, that no person should be a Senator who had not been a citizen of the United States for nine years. Third, that no person should be a Senator who should not, when elected, be an inhabitant of that State for which he should be chosen."

Another disqualification is found in Section 6, of Article I, which provides that no person holding any office under the United States, shall be a Member of either House during his continuance in such office. The above are all the express and specific disqualifications which could have any relevancy or pertinence to this discussion.

There is one positive qualification absolutely necessary to the right of a Senator to hold his office, that is, under the Seventeenth Amendment he shall have been elected by the people of his State:

Was it the intention of the framers of the Constitution that its enumeration of disqualifications should be exclusive? That the States, upon ratifying that instrument, should rest in the security of the belief that they might be represented in the Senate by whomever they chose, subject only to the disqualifications in the Constitution itself? Or, on the other hand, did they mean that the Senate should have the right by legislative act to impose additional qualifications, or that the Senate should have the unlimited and arbitrary discretion to reject an elected Senator, who failed to possess certain other qualifications, believed by the other Members of the Senate to be proper and necessary?

The universal rule of construction is that a specific enumeration of powers granted or denied, or of qualifications required, or disqualifications imposed, necessarily excludes the attaching of additional powers, qualifications or disqualifications. "Expressio unius est exclusio alterius."

Mr. Justice Story, in his work on the Constitution, at Section 448, says: "The truth is that in order to ascertain how far an affirmative or negative provision excludes or includes others, we must look to the nature of the provision, the subject matter, the object and scope of the instrument. There can be no doubt that an affirmative grant of power will, in many cases, imply an ex-
clusion of others. For instance when the Constitution declares that the power of Congress shall extend to certain enumerated cases, this specification of particulars evidently excludes all pretensions to a general legislative authority. Why? Because an affirmative grant of special powers would be absurd as well as useless if a general authority were intended.”

If the Senate has the right to change the qualifications for Senators, it has an equal right to disturb the basis of representation. If it can say that any person who spends a large amount of money in circularizing his constituents is manifestly unfit to be a Senator, it has the equal right to say that a state like Nevada should not have the same number of Senators as a state exceeding it one hundred fold in population. Had it been understood that Congress could add to, or take away from, the Constitutional right of each state to representation in the Senate, the Convention would never have adopted the Constitution, nor would the States have ratified it. Imagine Connecticut, Rhode Island, Delaware, or New Jersey voting to ratify a Constitution which left to a majority of the Senate a discretion as to the basis of representation in that body, or the right to prescribe the qualifications of the Senators they were entitled to elect!

It was so understood by the men who framed the Constitution and urged its adoption upon the people. Madison, in Number 45, of the Federalist, answered the objections of opponents to the Constitution and allayed the fears of those who believed that the rights of the different states, in the choice of their representatives in the Senate, would not be sufficiently safeguarded and guaranteed. He said that: “The Senate will be elected absolutely and exclusively by the State legislatures.”

It is worthy of note that in none of the discussions or debates of that period is there any intimation that the provisions of Section 5, of Article I, making each House the judge of the qualifications of its own Members, would give to either House the right to capriciously and arbitrarily reject a person whom his State had seen fit to honor by his election to the Senate. But fears were expressed that Section 4, of Article I, giving Congress power to make and alter regulations as to the time, manner and places of holding elections for Senators, would enable the National Congress to dictate to the States, whom they should select as their
Senators. One of the arguments was that Congress under this power (not at all under the power to judge of the qualifications of its own Members) could pass such laws as would favor the "wealthy and well born" and thus secure their election to Congress. In Number 60, of the *Federalist*, Alexander Hamilton answered this contention as follows:

"The truth is that there is no method of securing to the rich the preferences apprehended but by prescribing qualifications of property for those who elect or to be elected. But this forms no part of the power conferred upon the National Government. Its authority would be restricted expressly to the regulations of the times, the places and the manner of elections. The qualifications of the persons who may choose or be chosen, are defined and fixed in the Constitution and are unalterable by The Legislature."

Each State might prescribe the qualifications of voters, for its State House of Representatives, it may attach any qualifications to such voters as it may see fit. When it had done so the persons entitled to vote for members of the State Legislature became *ipso facto* entitled to vote for the National Representative in that district.

Senators were to be elected by the members of the Legislatures of each State. How such Legislatures should be composed and what qualifications should be required of the members of the State Legislature were matters entirely within the power of the people of each State, in forming or amending the Constitution of each State. It was clearly the understanding of Hamilton that no power resided in Congress to impose additional restrictions or qualifications upon the individuals or bodies having the right to elect Senators to Congress.

The vast claim made for the powers of the Senate, under its right to be the judge of the qualifications of its own Members, has assumed an importance never before attributed to it, and never imagined by the Framers of the Constitution. When the labors of the Constitutional Convention had ended, and the question arose as to its ratification by the several States, all kinds of fears, real and imaginary, possessed the people and found utterance and protest in objections made by an army of opponents to its adoption. Objections were made that the power of the Executive
were too extensive, that the Executive and legislative powers were blended in both the President and the Senate by the right of the Executive to veto legislation and the right of the Senate to confirm appointments of the President; objection was made that the rights of the State were not sufficiently guarded, in the choice of their representatives; that Congress might by its supervisory power over elections destroy the integrity and identity of the State governments, and the same result might be feared from the Constitutional declaration of its own supremacy.

All objections were answered by Jay, Hamilton and Madison, in the Federalist. It is worthy of note that not a single word can be found anywhere in that famous exposition of the Constitution, relating to the provision of the Constitution that each House shall be the judge of the qualifications of its own Members, except the purely perfunctory reference in Number 53, that “each House is, as it necessarily must be, the judge of the elections, qualifications and returns of its own Members”, showing that it was understood to be merely a matter of Parliamentary practice. It did nothing more than to give each House the right to determine whether its Members had been legally elected and whether they possessed the qualifications which had been prescribed in the Constitution itself.

If it had been intimated that the Senate had the right to create disqualifications and adjudge elected Members incapable of holding the office to which they had been elected, except upon the will and at the discretion of their fellow Members, the whole country would have shouted with protest to challenge such an interpretation of the power granted.

The Senate by its recent interpretation of Section 5, of Article I, decided that the Senate not only had the power to ascertain who were legitimately chosen to represent the people, but to capriciously and arbitrarily destroy the rights and deny the freedom of choice of the voters of a State. Thereby making the Senate, by a process of rejection and elimination, a self-constituted body, into whose council none should be admitted except in pursuance of the arbitrary selection or approval of the Members of the Senate. This, too, not by reason of legislative enactment which would declare, in advance, the qualifications to be possessed by one who would obtain the favor of his fellow Members, but by an ex post
facto prescription of qualifications, arising after the election of the Member and to be applied according to the arbitrary will of the Members of the Senate, as each particular occasion arose, and as the interests of the majority might prompt it to determine.

In the case of William Duane, Jefferson stated the arguments in favor of the power to imprison for contempt because of the publication of a libel against the Senate. Such arguments are applicable to the present case, if it could be conceived that the Senate claimed the right to arbitrarily add additional qualifications to the office of Senator:

"That in requiring a previous law the Constitution had regard to the inviolability of the citizen, as well as the Member; as, should one House in the regular form of a bill aim at too broad privileges, it may be checked by the other, and both by the President; and also as the law being promulgated the citizen will know how to avoid the offense. But if one branch may assume its own privileges without control; if it may do it on the spur of the occasion, conceal the law in its own breast, and after the act is committed make its sentence both the law and the judgment on that fact; if the offense be kept undefined and to be declared only ex re nata, and according to the passions of the moment, and there be no limitations either in the manner or measure of the punishment, the condition of the citizen will be perilous indeed."

The condition of the citizen who aspires to the office of Senator of the United States will be equally perilous if he may be deprived of the office to which he has been fairly elected, and for which he possesses every qualification required by the Constitution, by the assumption of the Senate of a right to require in his particular case such other additional qualifications as a bare majority of the membership of the Senate may require.

The denial of the right of a Senator-elect to a seat in the Senate, for which he possesses all of the Constitutional qualifications and to which he has been fairly elected, is a punishment inflicted personally upon him. It is not inflicted in pursuance of any lawful authority, or by virtue of any enactment of any legislature, but by a proceeding resulting in a judgment which cannot be distinguished from an attainder. The Supreme Court in Cummins v. Missouri (18 Law Edition, 356) said:
"The theory upon which our political institutions rest is that all men have certain inalienable rights—and among these are life, liberty, and the pursuit of happiness, and that in this pursuit of happiness all avocations, all honors, all positions are alike open to everyone, and that in the protection of all of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can in no other wise be defined. * * * *

"A bill of attainder is a legislative act which inflicts punishment without judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legislative functions, exercises the power and office of judge; it assumes, in the language of the text-books judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs adduced, whether conformable to the rules of evidence or otherwise, and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

"Bills of this sort; says Mr. Justice Story, 'have been usually passed in England in times of rebellion or gross subserviency to the Crown, or of violent political excitement; periods in which all nations are most liable to forget the duties and limitations of government and trample upon the rights and liberties of others'."

The several States have the undoubted primary right to make whatever regulations are necessary for maintaining the purity of the ballot, for the limiting of campaign expense, and to prevent corrupt practices of any kind; and they have the undoubted right to punish those who violate any of such provisions, which are declared to be criminal.

The Congress of the United States, by virtue of its ultimate right of regulation of elections where Senators are chosen, may undoubtedly enact laws with the same purpose in view and declare a violation thereof a crime. But neither the National Government nor the States can add to or take away from the dis-
qualifications of a Senator, for these are fixed by the will of the people as embodied in the Constitution. Furthermore, the Constitution was declared to be the Supreme law of the land and beyond the power of alteration by either the State or National Government, in any manner, except by Amendment to the Constitution itself.

It was clearly understood by the framers of the Constitution that Congress had no power to add to or take away from the qualifications of Senators. Hamilton, in the *Federalist*, demonstrated that any attempt to interfere with the free and unlimited right of the people, to select anyone possessing the Constitutional qualifications, would be a usurpation of power and a subversion of the Constitution justifying a revolution, which would immediately take place.

As before stated, no apprehension was felt that such interference would take place under the purely parliamentary power to judge of the qualifications of its own Members. But fears were expressed that the right of Congress to regulate the times, places and manner of elections, might be used to influence or coerce the voters into favoring particular persons or classes. It was in answer to this claim that Hamilton said:

"We have seen that an uncontrollable power over the elections for the Federal Government could not, without hazard, be committed to the State Legislatures. Let us now see what are the dangers to be apprehended on the other side; that is, from confining the ultimate right of regulating its own elections to the Union itself. It is not pretended that this right would ever be used for the exclusion of any State from its share in the representation. The interests of all would, in this respect at least, be the security of all. But it is alleged that it might be employed in such a manner as to promote the election of some favored class of men to the exclusion of others; by confining the place of election to particular districts and rendering it impracticable for the citizens at large to partake in the choice. Of all the chimerical suppositions this seems to be the most chimerical. On one hand, no rational calculation of probabilities would lead us to imagine that a disposition which a conduct so volent and extraordinary would imply, would find its way into the National Coun-
cil; and, on the other hand, it may be concluded with certainty that if so improper a spirit should ever gain admission into them. It would display itself in a form altogether different and far more decisive.

"The improbability of the attempt may be satisfactorily inferred from the single reflection that it will never be made without causing an immediate revolt of the great body of the people, headed and directed by the State Governments. It is not difficult to conceive that this characteristic right of freedom may, in certain turbulent and factious seasons, be violated in respect to a particular class of citizens by a victorious majority. But that so fundamental a privilege in a country situated and enlightened as this is, should be invaded to the prejudice of the great mass of the people, by the deliberate policy of the Government, without occasioning a popular revolution, is altogether inconceivable and incredible.

"As to the Senate it is impossible that any regulation of 'time and manner', which is all that is proposed to be submitted to the National Government in respect to that body, can affect the spirit which will direct the choice of its Members."

If the Senate has the discretionary right to exclude a duly elected Senator from admission to its councils, it has the right to deny to any State or to any number of States, less than a majority of all the States, representation in the National Senate. It can do exactly what Hamilton said could not be done without precipitating a popular revolution. If it has the right to exclude one Senator, it has the right to exclude any number less than a majority. Because if this right exists at all, it is absolutely discretionary; it is not exercised in pursuance of any provision of the Constitution or of any law of the United States; no limitation is fixed within which it may operate and no standard is erected by which its operation may be measured. It is simply arbitrary, uncontrolled discretion, utterly antagonistic to the fundamental principle of our political institutions: that we have a government of laws and not of men. If the Senate can arbitrarily say who shall or who shall not be a Senator, then the people of the United States have no choice in the election of their representatives in Congress.
In considering these qualifications Mr. Justice Story, in his work on the Constitution (fifth edition, pages 460-463), discusses this question and gives the following as his conclusion:

"It would seem but fair reasoning upon the plainest principles of interpretation that when the Constitution so 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 negation of all others."

Mr. McCrary in his book on Elections, (Section 625, page 449), says:

"The power given to each House to 'judge the elections, returns, and qualifications of its own Members' does not authorize an inquiry into the moral character of the person elected and returned as a Member. Such an inquiry can only be made, if at all, in the prosecution of proceedings for expulsion."

This view of the correct interpretation of the Constitution was not confined to statesmen and jurists contemporaneous with its adoption; but these views have been repeatedly stated in the Halls of the Senate by statesmen whose abilities and attainments were such as to command attention and respect.

In 1855, the right of Senator Trumbull to a seat, to which he had been elected by the Legislature of Illinois, was challenged on the ground that certain legislation, in the State of Illinois, had added to the qualifications found in the Constitution. Senator Crittenden thus answered the objections:

"According to the plain meaning of the Federal Constitution, every inhabitant of a State thirty years of age, who has been nine years a citizen of the United States, is eligible to the office of Senator. What more can be said about it? It is now supposed by those who contend that Mr. Trumbull is not entitled to his seat, that it is competent for a State, by its Constitution—and I suppose they would equally contend by any law which the legislature might from time to time pass—to superadd additional qualifications. The Constitution, they say, has only in part regulated the subject, and therefore it is no interference with that Constitution to make additional qualifications."
"This I think it will be plain to all is a mere sophism, when you come to consider it. If it was a power within the regulation of, and proper to be regulated by, the Constitution, and if the Constitution has qualified it, as I have stated, was there anything more intended? If so, the framers of the Constitution would have said so. The very enumeration of certain qualifications excludes the idea that they intended any other qualifications."

In 1907, the right of Senator Smoot was challenged on alleged grounds of disqualifications, entirely outside of those enumerated in the Constitution, and in the discussion that took place, Senator Knox said:

"He was at the time of his election, over thirty years of age and had been nine years a citizen of the United States and when elected was an inhabitant of the State of Utah. These are the only qualifications named in the Constitution and it is not in our power to say to the State, 'these are not enough; we require other qualifications,' or to say that we cannot trust the judgment of the States in the selection of Senators, and we, therefore, insist upon the right to disapprove them for any reason."

If the Senate of the United States has the power to arbitrarily say that a person elected by the people and possessing all of the qualifications required by the Constitution, shall not be permitted to hold said office, then every citizen of the State that elected him has received an injury equally direct as that inflicted upon the Senator elected by the people; for while the Senator-elect would lose his right to hold the said office, the citizens of the State would be deprived of the fundamental right of an American citizen, to vote at the election for Senators of the United States. Furthermore, the citizens of that State collectively would be deprived of their Constitutional right to be represented in the Senate by a person of their own choosing, and this wrong would be magnified in proportion to the number of citizens disfranchised.

The Seventeenth Amendment to the Constitution provides: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for
electors for the most numerous branch of the State Legislature."

In the case of the United States v. Aczel, (219, Federal 917-929), the Supreme Court said:

"The right to vote for a Member of the House of Representatives of the Congress of the United States is such a right that it is fundamentally based upon and given and secured by the Constitution of the United States."

The Constitution itself confers upon the citizens of the State the right to vote for Senators, but what protection can there be to the effective exercise of that right if the Senate can nullify it under the plea that it is judging of the qualifications of its Members?

The legislatures of the several States have from time to time attempted to add qualifications or disqualifications with respect to Senators, beyond those laid down in the Constitution. One of the most striking of these instances occurred when the Legislature of the State of Ohio passed a law, fixing a limit on the amount that might be spent by candidates for office (including Senators), and declared that the election of any person whose expenditures exceeded the limit so fixed should be void; it also subjected the offender to a fine not exceeding one thousand dollars.

In the case of the State v. Russell, (10, Ohio 255), it appeared that the defendant was the Nominee of his party for National Representative and he expended more than the amount limited by the act. As he was defeated, the Act, of course, could not operate to void his election, but he was prosecuted under the provision relating to the imposition of a fine. The district court sustained a demurrer to the indictment, on the ground that in so far as it related to candidates for Congress, it was unconstitutional in its entirety, because it was beyond the power of the State to add any qualifications or disqualifications to those enumerated in the Federal Constitution. The circuit court (20, Ohio Reports 551) likewise held that the State had no power to make the election of a National Representative dependent upon the compliance with a legislative requirement of the State of Ohio.

The solution of the whole matter is found in the fact that the qualifications of the Members of Congress, are declared by the people, the ultimate sovereign, through the medium of the written Constitution of the United States, which was agreed by the
people to be the supreme law of the land. It could not be supreme if its creators, the people of the respective States, had retained power to change its provisions by an Act of their legislative bodies; nor would it be supreme if the power to annul or modify its provisions existed in the legislative bodies created. Therefore, neither the State legislature nor the National Congress can add or take away from the plain and specific enumerations for Senators. If they could do so the Constitution would lose its supremacy and have no greater effect than an ordinary legislative enactment.

Representation in the National Congress is one of the most important and undoubted rights that the several States possess, not only for the protection of the interests of the people of the States against Federal usurpation, but in order that its own weight and influence may be felt in the defeat of unjust laws, and in the enactment of wise and salutary ones. This right inheres in the very frame and structure of the Federal Constitution, because the Constitution has always provided for equal Representation of the States, elected directly or indirectly by the people of each particular State.

If either House of Congress can reject a duly elected Representative of the State, who possesses all of the Constitutional qualifications, then the State has no right of selecting its own agents to serve in either of these bodies. Because a right to select subject to rejection by some other person is no right at all; it is merely advisory and on a par in authority and importance with the verdict of a jury in an equity case.

There has long been, in American politics, a form of nomination of candidates for elections and then the elections. This separation of the nomination and the election was known at the time of the Constitutional Convention and at the time of the adoption of the Seventeenth Amendment. Both are conspicuously silent as to any control in Congress, much less in the Senate alone, over nominations. Such control as exists is in Congress and is over the times and manner of elections of Senators. The only law which Congress has attempted to enact with respect to primaries was declared unconstitutional in the recent Newberry case, and the only law passed by Congress since the Seventeenth Amendment is the Act of February 28th, 1925. This Act is
termed the Corrupt Practices Act of 1925, and it specifically confines itself to elections and as specifically denies any control over primaries. Therefore whether or not Congress has any Constitutional power to control Senatorial primaries and declare that a Senator-elect who has spent more than a certain sum of money in the primaries shall be excluded from the Senate is a very questionable proposition.

But even assuming that the Senate has the power to control Senatorial primaries, what is the result? This question came up in the election of Senators when the elections were by the State legislatures. It was considered in the William A. Clark case, in 1899-1901, the William Lorimer cases, in 1910-1912, the Isaac Stephenson case, in 1911-1912, and in the recent Truman Newberry case. It was alleged and proven in the Clark case and the Lorimer cases that money had been used to bribe certain Members of the State legislatures, and it was alleged and proven that large sums of money had been spent in campaigns in both the Stephenson and Newberry cases for nominations for Senators. The rule was established in these cases that in order to disqualify the Senators-elect, it must be shown that the money was corruptly spent, that the spending of the money so influenced the election that without the corrupted votes the Senator could not have been elected, and that the Senator-elect must have personally participated in, or knew of the corrupted use of the money.

In the Lorimer case Senator Borah admitted, on the floor of the Senate, that the rule was that:

“If the officer whose election is challenged did not personally participate in or encourage or sanction the bribery, then his election cannot be avoided unless it be shown by sufficient evidence that enough votes were bribed, without which bribed votes he would not have had the majority required by the statute.”

The issue in the Stephenson and Newberry cases turned on whether expenditures in a State-wide primary for nominations as Senators, were expenditures for elections. It was held that they were not and the holding was subsequently affirmed by the Supreme Court in the Newberry case. There seems to have been no evidence that sufficient votes had been bought in the primaries to nominate the Senators, nor was there any satisfactory evidence
that either of these men participated in or sanctioned any bribery that may have been effected in the primaries. The testimony in the cases of Frank L. Smith from Illinois and William S. Vare from Pennsylvania does not indicate that any votes were bribed by the friends of either candidate, nor does it contain any showing that if any votes were bribed, either man could not have been nominated without the bribed votes. Furthermore the testimony does not show that either man personally participated in or encouraged bribery in either the primary or the election.

The struggle to maintain the Constitution of the United States is an unending one. The real danger to the Constitution lies in the gradual erosion of its principles, as from time to time, in the excess of party strife, some one of these principles is so ignored that it ceases to be of vital force. Washington recognized this in his Farewell Address, when he prophesied that our form of Government would be much more easily "undermined" from within than overthrown by outward attack.

The Senate in the Smith and Vare cases has established a precedent of absolutely refusing to allow the Senators-elect to be seated, whereas in all other cases the man in question has been seated as the representative of his State, his qualifications investigated, and his exclusion voted upon.

The precedent established has greatly endangered and weakened the sovereignty of the States. It has denied to the people their Constitutional right to be represented by the Senator of their choice. It has denied the States of Illinois and Pennsylvania the right of equal representation in the Senate.

Such a precedent will undoubtedly grow and increase in influence and be multiplied in the number of its applications, for it is a doctrine admirably fitted to serve the purposes of a majority in any legislative body where it obtains. Resting solely in the discretion and without any limitation and not subjected to review or restraint by any other body, officer, or tribunal, there will be the constant temptation to apply it to the exclusion of anyone who, for reasons—personal, religious, or political—is opened by a bare majority of the Senate.

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