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Authority of the Senate Over Seating Its Own Members: Exclusion of a Senator-Elect or Senator-Designate

Cynthia Brown, Coordinator
Legislative Attorney

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Summary

This report is intended to provide a brief legal analysis of the authority of the Senate over the seating of its own Members, and the Senate's power to exclude, that is, to refuse by majority vote to seat a Senator-elect or Senator-designate who presents valid credentials from state officials. Under Article I, Section 5, clause 1 of the Constitution, each house of Congress is granted the express authority to judge the "elections," the "returns," and the "qualifications" of its own Members. This explicit delegation in the Constitution grants the Senate broad authority to judge and to make the final determination concerning not only the narrow constitutional "qualifications" of a Member-elect or Member-designate (age, citizenship, and inhabitancy in the state), but also the legitimacy and validity of the "election" or selection of those presenting "credentials" (the official "return" from state officers) to the Senate.

The question of judging the qualifications, elections, and returns of Members, and the issue of exclusion, may arise in the context of both a contested popular election, as well as in an appointment by a governor to fill a Senate vacancy. The issue is generally joined at the time a Senator-elect or Senator-designate is to be sworn and seated, by an objection raised to the taking of the oath based on questioning the "qualifications," the "election," or the "returns" (credentials) regarding such individual. At that time, the Senate may decide to seat such Member-designate or Member-elect "without prejudice," or may seat unconditionally such individual during the pendency of the committee and Senate review of the issues. On less frequent occasions, the Senate has refused to seat one presenting credentials while the issue of qualifications or selection is referred to the committee of jurisdiction (currently the Senate Committee on Rules and Administration) for investigation and recommendation. The Senate may, alternatively, decide not to consider an objection, and seat the Member with no referral of the question to a committee.

When judging "qualifications," the Supreme Court has said that the House (and, by implication, the Senate) is limited to an examination of the three constitutional qualifications for office (and any potential "disqualifications," such as under the Fourteenth Amendment).The Court noted that anyone meeting those qualifications would have to be seated, and not excluded, *if* such person were "duly" elected. *Powell v. McCormack*, 395 U.S. 486, 522 (1969).Under the *Powell* rationale, and under the express constitutional grant of authority, the Senate and House may, therefore, in addition to examining "qualifications" of Members-elect, examine the "elections" and "returns" of their own Members, that is, whether an individual presenting valid credentials has been "duly" chosen. A few years after the *Powell* decision, the Supreme Court clearly affirmed the right of the Senate to make the final and conclusive determination concerning the election process and the seating of its own Members. In the case of contests or challenges properly raised concerning the election or selection of a Senator, the Court affirmed the constitutional authority for "an independent evaluation by the Senate" of the selection of those presenting themselves for membership. *Roudebush v. Hartke*, 405 U.S. 15, 25-26 (1972).

The Senate treats inquiries into those appointed by a state governor as elections cases; and on numerous occasions in the past the Senate has considered the legality or validity of a gubernatorial selection. Additionally, the Senate has from time-to-time examined the selection process (prior to the adoption of the Seventeenth Amendment in 1913, Senators were "chosen" by state legislatures) to see if corruption or bribery has so tainted the process as to call into question its validity. In such cases the Senate is not judging the "character" or "fitness" of the individual (as it may in an "expulsion" of a Member, requiring a 2/3rds vote), but rather is judging the validity, propriety, and lawfulness of that person's selection or election.

Contents

Contacts

Introduction

The Constitution expressly grants to each house of Congress the authority to "be the Judge of the Elections, Returns and Qualifications of its own Members."[1] This express constitutional delegation gives the Senate broad authority to make the final determination concerning not only the narrow constitutional "qualifications" of a Member-elect or Member-designate, but also the legitimacy of the "election" or selection process of those presenting "credentials" to the Senate.[2] Under the Constitution, the Senate may determine the legitimacy and propriety of the selection of a Member-elect or Member-designate, conduct an internal investigation, and make final determinations concerning the results of a popular election in a state.

As stated by a noted parliamentary authority, the final and exclusive right to determine membership in a democratically elected legislature "is so essential to the free election and independent existence of a legislative assembly, that it may be regarded as a necessary incident to every body of that description, which emanates directly from the people."[3] In his historic work, *Commentaries on the Constitution*, Justice Joseph Story analyzed the placing of the power and final authority to determine membership within each house of Congress:

> It is obvious that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty as to who were legitimately chosen members, and any intruder or usurper might claim a seat, and thus trample upon the rights and privileges and liberties of the people. ... If lodged in any other, than the legislative body itself, its independence, its purity and even its existence and action may be destroyed, or put into imminent danger.[4]

The process of examination and inquiry within the Senate is generally initiated at the occasion of the swearing-in of the Senator-elect or Senator-designate by an objection or question to the seating of that individual. The question may be raised by another Senator or by a petition submitted to the Senate (often, in the case of a contested election, by the opposing candidate).[5] The presentation of "credentials" or a certificate of election or certificate of appointment from a governor and secretary of state (that is, the official "return"),[6] is considered to be *prima facie* evidence that the person holding those credentials is entitled to the seat, subject to the final determination of the Senate.[7] A Member-elect or Member-designate presenting such credentials,

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[1] Article I, Section 5, clause 1.

[2] *Powell v. McCormack*, 395 U.S. 486 (1969) (qualifications); *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929); *Reed v. County Commissioners*, 277 U.S. 376, 388 (1928); and *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986) (elections and returns). For a compilation and description of the Senate precedents and cases concerning qualifications, elections, and returns, see Butler and Wolff, Senate Historical Office, *United States Senate Election, Expulsion and Censure Cases from 1793 to 1990*, S.Doc. 103-33, (1995), [hereafter *Senate Election Cases*].

[3] Luther Stearns Cushing, *Law and Practice of Legislative Assemblies in the United States*, pp. 54-55 (1856).

[4] Story, *Commentaries on the Constitution of the United States*, Volume II, § 831, at pp. 294-295 (1833).

[5] Senate Legal Counsel, *Contested Election Cases*, at 9-11 (October 2006) [hereinafter *Senate Contested Election Cases*].

[6] In 18th and 19th century parlance the term "return" indicates the certificate of election or appointment (also called "credentials") transmitted on behalf of the candidate certified by the state as being authorized to hold the seat and perform the duties of office. Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States*, at § 136, p. 50 (1856); George H. Haynes, *The Senate of the United States, Its History and Practice*, 124-125 (1938).

[7] *Senate Contested Election Cases*, at 11-14 ; see discussion of 1857 and 1794 Senate precedents in 1 *Hinds' Precedents of the House of Representatives*, § 534, pp. 693-694: "... the credential, being prima facie evidence, was (continued...)

however, is not a "Member of Congress" until that person is sworn in and seated by the relevant house.[8] Upon a challenge or petition objecting to the swearing-in and seating of a particular individual, the matter of the election, qualifications, or credentials of a Senator-elect or Senator-designate may be referred to the committee of jurisdiction, which in the recent past has been the Senate Committee on Rules and Administration.[9] It has been the "more common practice" in recent years in the case of a Senator-elect or Senator-designate who is challenged and who possesses a valid certificate of appointment or certificate of election, to swear in such person "without prejudice" during the pendency of committee and Senate consideration of the matter.[10] That practice was called the "orderly and constitutional method of procedure" in the early 1900s by Senator Hoar, and referenced by George Haynes in his history of the Senate:

> The orderly and constitutional method of procedure in regard to administering the oath to newly elected Senators is that when any gentleman brings with him or presents credentials consisting of the certificate of his due election from the executive of his state, he is entitled to be sworn in, and all questions relating to his qualifications should be postponed and acted upon by the Senate afterwards.
>
> If there were any other procedure, the result would be that a third of the Senators might be kept out of their seats for an indefinite time on the presenting of objection without responsibility, and never established before the Senate by any judicial inquiry. The result of that might be that a change in the political power of this Government which the people desired to accomplish would be indefinitely postponed.[11]

The Senate has, however, in the past on less frequent occasions also refused to swear in and seat individuals pending Senate resolution of the matter of a challenge, even though credentials appearing valid on their face were presented.[12]

Qualifications

One of the inquiries and judgments that the Senate may make concerning an individual presenting himself or herself for membership is an examination of that person's "qualifications" for office. Although in the past the Senate sometimes looked at a Senator-elect's or Senator-designate's

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(...continued)

liable to be rebutted at any stage."

[8] Riddick and Fruman, *Riddick's Senate Procedure: Precedents and Practices*, "Credentials and Oath of Office," S.Doc. 101-28, at 704, 708-710 [hereafter *Riddick's Senate Procedure*]; *Deschler's Precedents of the U.S. House of Representatives* , Ch. 2, § 3, p. 98, and § 6, pp. 131-132 [hereinafter *Deschler's Precedents*].

[9] See referral of election contest of *Durkin v. Wyman*, 121 *Congressional Record* 1495 (1975); contest of Senator Landrieu election, 143 *Congressional Record* 5 (1997); note *Senate Contested Election Cases, supra* at 15, citing Rule 26.1, Standing Rules of the Senate.

[10] See *Senate Contested Election Cases, supra* at 11-12, 13; *Riddick's Senate Procedure, supra* at 704. "Without prejudice" indicates that the swearing-in is "without prejudice" to the right of the Senate to later determine, by majority vote, the entitlement of the individual to the seat, although in later interpretations Senate leaders have stated the opinion that any swearing in of a challenged Senator is "without prejudice" to the Senate's rights of determination, even if not expressly stated or "reserved" at the time. See *Senate Contested Election Cases, supra* at 14.

[11] Senator Hoar, 1903, as quoted in Haynes, *The Senate of the United States, Its History and Practice*, 123 (1938).

[12] The most recent case in which a Senator-elect presenting credentials was not conditionally seated during an election contest appears to be *Durkin v. Wyman*, in 1974-1975, which involved a contest where one candidate had been certified, and then after a state recount, such certification withdrawn and given to the other candidate. *Senate Election Cases, supra*, case 137, at pp. 421-425; 121 *Congressional Record* 4-5 (January 14, 1975), and 1471-1495 (January 28, 1975). A detailed discussion and analysis of procedural practices and options has been prepared by Elizabeth Rybicki, Analyst on the Congress and the Legislative Process, Government and Finance Division, CRS (7-0644).

"fitness for office" or "moral character" in judging the *qualifications* of such individual to be seated in the Senate, the extent of the authority of the Senate to judge "qualifications" under Article I, Section 5, clause 1, was expressly and narrowly delineated by the Supreme Court in the case of *Powell v. McCormack* in 1969.[13] The Court stated that "in judging the *qualifications* of its members Congress is limited to the standing qualifications prescribed in the Constitution,"[14] that is, the Member-elect's age, citizenship, and inhabitancy in the state from which elected.[15] As explained in *Deschler's Precedents*:

> The [Powell] decision apparently precludes the practice of the House or Senate, followed on numerous occasions during the 19th and 20th centuries, of excluding Members-elect for prior criminal, immoral, or disloyal conduct.[16]

It should be emphasized that the *Powell* decision concerned an exclusion based on judging "qualifications" of a Member-elect. As noted by the Court, the central question of that case meant that the Court "must determine the meaning of the phrase to 'be the Judge of the Qualifications of its own Members.'"[17]

Modern decisions in the House or Senate determining "qualifications" are fairly rare, in part because of the clarification by the Supreme Court in *Powell v. McCormack,* but also because modern communications and media coverage make it more likely that an actual disqualifying condition (such as a candidate's age or lack of citizenship) would be revealed before nominations by a major political party are made. In judging congressional elections, the practice and experience in the Senate (and the House) concerning the implications of finding a Member-elect or Member-designate disqualified or "ineligible" is clear, and is remarkably consistent given the great potential for partisan division on this issue when it arises with respect to a particular Member-elect. The overwhelming weight of authority in both the Senate and the House demonstrates that the ineligibility of the majority candidate in a congressional election, whether because of death, disqualification, disability, or other incapacity before or after the election, gives no title or right to the office to the runner-up candidate, but rather merely creates a "vacancy" in the office from that state.[18] The Senate and the House thus both follow what is known as the "American Rule" (as opposed to the so-called "British Rule") whereby the next highest qualified vote-getter in an election is *not* deemed to be entitled to the seat upon the disqualification of the person receiving the most votes.[19]

Elections and Returns

The limitations on judging the requisite "qualifications" of Members-elect in an exclusion procedure set out in the *Powell* decision do not, however, prohibit or restrict the Senate from

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[13] 395 U.S. 486 (1969).

[14] 395 U.S. at 550. Emphasis added.

[15] Senators: Article I, Section 3, clause 3; Representatives: Article I, Section 2, clause 2.

[16] *Deschler's Precedents*, Ch. 7, § 9, p. 98. Note, for example, the Senate consideration of the case of Senator-elect Arthur R. Gould of Maine, in 1926, concerning allegations of bribery of a foreign official in 1910 in a business deal. *Senate Election Cases*, *supra*, Case 111.

[17] 395 U.S. at 521.

[18] Riddick and Fruman, *Riddick's Senate Procedure, Precedents and Practice*, S. Doc. No. 101-28, 101st Cong., 2d Sess. 701 (1992); *Deschler's Precedents*, Vol. 2, Ch. 7, § 9, at 96; see discussion of "American Rule" versus "English Rule," in *Smith v. Brown* (40th Cong.), *Rowell's Digest of Contested Election Cases*, 220-221.

[19] "In election cases the ineligibility of a majority candidate, for a seat in the Congress gives no title to the candidate receiving the next highest number of votes." *Riddick's Senate Procedure, Precedents and Practices, supra* at 701.

examining and judging the "election" or selection of an individual who presents "credentials" to be seated in the Senate. Under the authority of Article I, Section 5, clause 1, to judge the "elections" and "returns" of its own Members, the Senate has clear constitutional authority, and has in the past exercised such authority, to look behind the certificate of election or the certificate of appointment, that is, the "return" or "credentials" of a Member-elect or Member-designate, to determine if the person presenting himself or herself for seating has been duly chosen or selected.[20]

The Court in *Powell v. McCormack* expressly found that the House may not exclude one who possesses the three constitutional qualifications to office and is "duly elected" by his constituency.[21] Since the House and Senate are authorized to judge not only the three "qualifications," but also the "elections" and "returns" of their Members, a justifiable inquiry may thus proceed under the *Powell* rationale as to whether a Senator-elect or Senator-designate was duly chosen or selected.[22] It should be emphasized that the *Powell* decision concerned a *House* proceeding, and that no Member-elect of the House may be "appointed" or "chosen" other than by popular "election" by "the People."[23] Prior to the Seventeenth Amendment in 1913, however, Senators were "chosen" by the state legislatures, and governors could, and may still, fill Senate vacancies by appointments, and thus the selection of Senators has always involved more than merely a popular "election." In fact, at the time of the drafting of Article I, Section 5, clause 1, concerning the authority of the Senate over the "elections" and "returns" of its own Members, the original constitutional provision concerning the selection of Senators (Article I, Section 3, clause 1) did not actually use the term "election" for the process of selecting Senators. Rather, that provision referred to Senators being "chosen" by the state legislatures,[24] a process which was repeatedly referred to by the Framers/authors in the *Federalist Papers* as an "appointment" by the state legislature.[25] The express constitutional authority in Article I, Section 5, clause 1, has

[20] As noted above, "returns" are considered in the United States to be the "credentials," either the "certificate of election" or the "certificate of appointment," issued by the proper state authorities to indicate that the possessor of such document is entitled to exercise the duties of the office: "The purpose of a return is to authenticate the election in such a manner, as to enable the persons elected to take upon themselves their official functions. In this country, the object is effected by means of certificates of elections (also called returns) under the hands of the returning officers, either given to the persons elected, or sent to some appropriate department of the government." Cushing, *supra* at 50. See also Haynes, *supra* at 124-125, referencing the "credentials" as "the certificate of election or appointment.... "

[21] 395 U.S. at 522.

[22] The same rationale would apply even if one semantically were to consider lawful or proper election or selection as one of the constitutional "qualifications" for office. See *Roudebush v. Hartke* , 405 U.S. 15, at 26, n. 23.

[23] Article I, Section 2, clause 1.

[24] "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof ..." Article I, Section 3, clause 1 (since superseded by the Seventeenth Amendment). The state legislatures had the express, initial authority in the Constitution over the "manner" of choosing Senators, although Congress could supersede state rules as to the timing and manner of the choice of Senators. Article I, Section 4, cl 1. It was not until 1866 that Congress adopted legislation providing guidelines for the procedures for choosing Senators by the state legislatures. 14 Stat. 243-244, July 25, 1866.

[25] Madison consistently refers to the "appointment" of Senators by the state legislatures: "It is equally unnecessary to dilate on the *appointment* of senators by the State legislatures. Among various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a *select appointment* .... " Madison, *The Federalist Papers*, Number LXII (1788). Similarly, Hamilton, in discussing the possibility of the states having authority over federal elections, noted that under the Constitution "the State legislatures, by forbearing the *appointment* of senators, may destroy the national government," but that such conduct would be very unlikely given the structures built into the federal or national system. Hamilton, *The Federalist Papers*, Number LIX. The third author of the *Federalist Papers*, John Jay, also refers to the commitment in the Constitution of "the *appointment* of senators to the State legislatures." John Jay, *Id*. at Number LXIV. Thus, as to the manner of choosing Senators, the terms (continued...)

therefore been understood in historical practice and legal precedent to broadly encompass the right of the Senate to examine the lawfulness and propriety of the selection and choosing of its own Members under the "elections" and "returns" clause.

Concerning the direct constitutional history of the provision regarding the judging of elections and returns, there occurred very little discussion in the Convention of 1787, as the final authority and power over seating their own Members was an authority that the Parliament in England had centuries before wrested away from the King and the chancery. The authority for each house of Congress to ultimately determine who are its lawful and rightful members is traditionally one of democratic legislatures. In a discussion of the derivation of this provision of the United States Constitution, Tucker and Tucker explain:

> Article I, section 5. The provisions of this article are in substance such as were practiced in Great Britain before the Revolution, and are usual in all legislative bodies under free governments. ... The first gives to each House the right to be the judge of "the elections, returns and qualifications of its own members." In 1586 the House of Commons first asserted this right, and from the restoration of Charles the Second to 1770 the House of Commons decided upon the qualifications, elections and returns of its own members. Prior to that time the decision of these questions had rested with the king; but after the statute of 1406 and 1410 the returns of members of the House of Commons were in Chancery and not to the Parliament, and judges of assize were directed by the Chancery to inquire into questions of undue returns and elections. The propriety of each House being the judge of these matters is very obvious. No power external to the House could decide them without an intrusion upon the question of its organization, which would be fatal to its freedom and independence. The right of the House, as a body, to determine upon the right of each member to a place in that body is so obvious that it needs no comment. The power of election is vested, as we have seen, in the constituency under the laws of the States; but whether that constituency have elected qualified persons, and whether the officers holding the election have made proper returns, is left to the House in order to prevent intrusion of persons disqualified or not duly elected upon their deliberations.[26]

The Supreme Court, in a decision *subsequent* to *Powell v. McCormack*, clearly affirmed the Senate's broad authority to be the final judge of the elections and returns of its own Members. The Court in *Roudebush v. Hartke*, ruled that a state's own contest procedures for a senatorial election could not usurp or deprive the Senate of its constitutional duties and authority to exercise "an unconditional and final judgment" over the seating of its own Members.[27] In so holding, the Court expressly recognized the constitutional authority for "an independent evaluation by the Senate" of the selection of a person to be a United States Senator, as the Senate in that case could have accepted or rejected the state's initial count, the recount, or conducted a count of its own.[28] The Court found that the Senate's determination of the right to a seat in Congress in an elections case is not reviewable by the courts because it is "a non-justiciable political question."[29]

(...continued)

"selection," "appointment," and "election," were originally used interchangeably.

[26] Tucker, John Randolph and Tucker, Henry St. George. *The Constitution of the United States. A Critical Discussion of its Genesis, Development, and Interpretation,* Volume I, at pp. 426-427 (1899).

[27] 405 U.S. 15, 19 (1972).

[28] 405 U.S. at 25-26: "The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount."

[29] 405 U.S. at 19.

Earlier, the Supreme Court, in *Barry v. United States ex rel. Cunningham*,[30] had acknowledged the Senate's authority to secure information it needed in determining an election contest where corruption and fraud in the election had been alleged. The Court noted that the "jurisdiction of the Senate to determine the rightfulness of the claim [to a Senate seat] was invoked and its power to adjudicate such right immediately attached by virtue of § 5 of Article I of the Constitution" when a Member-elect who "had received a certificate from the Governor of the state" presented "himself to the Senate, claiming all rights of membership."[31] The Court found that the Senate "acts as a judicial tribunal" with many of the powers inherent in the court system in rendering, in such election cases, "a judgment which is beyond the authority of any other tribunal to review."[32]

The right of the Senate or the House to be the *final* judge over the seating of its own Members was clearly recognized and reaffirmed as an exclusive authority which is not subject to judicial review by then-judge Scalia writing the opinion for the court of appeals in *Morgan v. United States*. In noting the "exclusive authority of each House to decide whether to seat its own members,"[33] the court found such procedure to be unreviewable by the judiciary:

> It is difficult to imagine a clearer case of "textually demonstrable constitutional commitment" of an issue to another branch of government to the exclusion of the courts ... than the language of Article I, section 5, clause 1 that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." The provision states not merely that each House "may judge" these matters, but that each House "shall be *the* Judge" (emphasis added). The exclusion of others – and in particular others who are judges – could not be more evident. Hence, without need to rely upon the amorphous and partly prudential doctrine of "political questions," [citations omitted] we simply lack jurisdiction to proceed. [34]

Senate Precedents and Practice

In numerous cases in the past the Senate has examined and "judged" the election or return of a Senator-elect or Senator-designate to determine if the person presenting credentials was lawfully or properly chosen by the electorate, by the state legislature, or by a governor of a state. The cases, instances, and precedents in which the propriety or legality of the *appointment* of a Member-designate to the Senate was questioned in the Senate have generally been characterized by parliamentarians and historians as "elections" challenges, contests, or cases.[35] That is, within the rubric of "elections" cases and elections challenges is the Senate's examination of the validity, legality, and propriety of a Member-designate's selection or appointment.

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[30] 279 U.S. 597 (1929).

[31] 279 U.S. at 614.

[32] 279 U.S. at 613, 616. See also *Reed v. County Commissioners*, 277 U.S. 376, 388 (1928).

[33] *Morgan v. United States*, 801 F.2d 445, 450 (D.C.Cir. 1986).

[34] 801 F.2d at 447.

[35] See, for example, *Senate Election Cases, supra,* Case 88, in regards to Matthew Quay, characterized as an "Election Case (appointment)," questioning the right of the governor "to make an appointment if the legislature had an opportunity to elect a senator and failed to do so"; Case 85, Henry W. Corbett, characterized as an "Election Case," in which "the Senate faced the issue of whether a governor could appoint a United States Senator at the beginning of a term if the state legislature had failed to elect"; Case 108, Gerald P. Nye: "Election Case (appointment)," determining the right of the state's governor to make a temporary appointment; and Case 124, Clarence E. Martin v. Joseph Rosier: "Election case (appointment)," where in 1941 the Senate heard a challenge to the propriety of a governor's appointment to fill a Senate vacancy.

As noted above, prior to the adoption of the Seventeenth Amendment in 1913 requiring the popular election of Senators, Senators were chosen by the various state legislatures, although the governor of a state could fill a vacancy when the legislature was in "recess."[36] Numerous "election contests" or "elections cases" were presented in the Senate during this time challenging the credentials and seating of a Member-designate based upon the questioning of the legality or propriety of a governor's appointment,[37]or allegations of bribery and corruption in obtaining the selection of the state legislature.[38] In some of the cases concerning gubernatorial appointments, the Senate refused to seat the Senator-designate, even though the Senator-designate appeared with the official certification from the state, and eventually "excluded" the individuals from the Senate. Examples include the case of Kensey Johns, appointed by the Governor of Delaware to fill a vacancy in 1794;[39] the case of Henry W. Corbett, appointed by the Governor of Oregon in 1898;[40] and the case of Matthew Quay, appointed by the Governor of Pennsylvania in 1898.[41]

After the adoption of the Seventeenth Amendment, the popular elections of Senators were also challenged in various cases in which there were allegations of corruption or bribery in the selection of a Member-elect, such that the validity of the entire election process was called into doubt. For example, in 1929, in the case of William S. Vare, the Senate eventually agreed to a resolution which found that "the expenditure of such large sums of money to secure the nomination ... together with the charges of corruption and fraud ... prima facie taints with fraud and corruption the credentials of the said William S. Vare for a seat in the United States Senate," and refused to seat Senator-elect Vare.[42] The Senate Legal Counsel has observed that "On three occasions the Senate has determined that an election was so tainted with corruption that its results were invalid. Each time the Senate declared the seat vacant."[43] With respect to the similar factors

[36] Constitution, Article I, Section 3, clauses 1, 2 (now superseded by the Seventeenth Amendment).

[37] See footnote 35 above, and *Senate Election Cases*, Case 2, Kensey Johns; Case 6, Uriah Tracy; Case 8, Samuel Smith; Case 12, James Lanman; Case 16, Ambrous H. Sevier; Case 23, Robert C. Winthrop; Case 25, Archibald Dixon; Case 26, Samuel S. Phelps; Case 27, Jared W. Williams; Case 71, Charles H. Bell; Case 74, Henry W. Blair; Case 81, Horace Chilton; Case 82, John B. Allen, Asahel C. Beckwith, and Lee Mantle; Case 98, Henry D. Clayton and Franklin P. Glass.

[38] Election case of William A. Clark (*Senate Election Cases*, case 89) in which the Senate committee investigating the credentials and election of Clark, selected by the Montana legislature, concluded in 1900 that Clark was not entitled to his seat by virtue of extensive bribery and corruption in obtaining it. Clark resigned prior to full Senate action, but was later selected and seated for a new Congress when no corruption charges were forwarded. In the election case of William Lorimer (Case 95) the Senate, a year after seating Lorimer, investigated allegations that Lorimer had obtained his seat in 1909 through bribery and corruption of the Illinois legislature. The Senate in 1912 eventually voted to exclude Lorimer by declaring his election by the legislature invalid (see also Senate Legal Counsel, *Contested Election Cases*, at 4-5). See also case of Alexander Caldwell (Case 61), where the Senate committee investigating allegations of bribery and corruption by Caldwell in obtaining a Senate seat from the Kansas legislature, debated whether Caldwell's conduct warranted expulsion or a declaration nullifying his selection, opted for the latter, and reported that Caldwell had not been "duly and legally elected" to the Senate. The ensuing debate in the Senate focused on whether Caldwell's election should be nullified, or whether Caldwell should be expelled, and was eventually concluded by Caldwell's resignation.

[39] *Senate Election Cases*, *supra*, Case 2, at 6-7.

[40] *Senate Election Cases*, *supra*, Case 85, at 253-255; S. Rept. 505, 55th Cong., 2d Sess. (1898).

[41] *Senate Election Cases*, *supra*, Case 88, at 261-262; S. Rept. 153, 56th Cong., 1st Sess. (1900).

[42] S. Res. 111, 71st Congress (1929). *Senate Election Cases*, *supra* Case 109. See also the case of Frank L. Smith, in which the Senate in 1928 voted to deny a seat to a Senator-elect because his election was tainted with "blatant fraud and corruption." S.Rept. 92, 70th Cong., 2d Sess. (1928), see Senate Election Cases, Case 110, and Senate Legal Counsel, *Contested Election Cases*, at 4-6.

[43] Senate Legal Counsel, *Contested Election Cases*, at 4.

to consider in the House of Representatives elections cases, it has been noted in *Deschler's Precedents*:

> Congress is the sole judge of the elections of its Members, and regulation of elections is a subject of various federal statutes. If the House found that a Member had conducted such a corrupt and fraudulent campaign as to render the election invalid, the House could deny a seat to such Member-elect, not for disqualifications but for failure to be duly elected.[44]

It would thus appear from congressional precedents that corruption and fraud in the election or selection process would be, and have been, valid and relevant considerations for the Senate in determining the legitimacy of the selection of a Senator-elect or Senator-designate who presents credentials to be seated.

Exclusion v. Expulsion

The authority of the Senate to "exclude" a Member-elect or a Member-designate by majority vote for failure to be duly chosen, or failure to meet the constitutional qualifications for office, must be distinguished from an "expulsion" by the Senate. An expulsion, unlike an exclusion, is generally recognized as a "disciplinary" measure to punish a Member, as well as a measure to protect the integrity and dignity of the institution from those who have proven unworthy of continued membership.[45] There is a separate authority and procedure for "expelling" a sitting Member for misconduct, general fitness to serve, or other issues of character or behavior, which is authorized in the Constitution at Article I, Section 5, clause 2, and requires a two-thirds majority vote.[46] Exclusion is based upon a failure to meet the constitutional qualifications for office, or a failure to be duly elected or selected, such that one is not entitled to the seat, and may be determined by majority vote.

Author Contact Information

Cynthia Brown, Coordinator
Legislative Attorney
cmbrown@crs.loc.gov, 7-9121

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Former CRS legislative attorney Jack Maskell authored this report.

[44] *Deschler's Precedents, supra* at Chapter 7, § 11, p. 118.

[45] See Story, *supra*, Vol. II, §§ 835-836; and *Deschler's Precedents*, Ch. 12, § 12, p. 174.

[46] See generally, CRS Report 93-875, *Expulsion and Censure Actions Taken by the Full Senate Against Members*.