

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb has a dark blue cap, and the bottom bulb has a light blue cap.

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Report R40105

*Authority of the Senate to Exclude and Not Seat a
Senator-Elect or Senator-Designate*

Jack Maskell, Legislative Attorney

January 5, 2009

Abstract. This report is intended to provide a legal analysis of the authority to exclude, that is, to refuse by majority vote to seat, a Senator-elect or Senator-designate who presents credentials from the proper officials of a state. The questions arise in the context of both a contested Senate election, as well as an appointment by a governor to fill a Senate vacancy. This report discusses and analyzes the constitutional and legal issues regarding Senate authority in this area.

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Summary

This report is intended to provide a brief legal analysis of the authority to exclude, that is, to refuse by majority vote to seat, a Senator-elect or Senator-designate who presents credentials from the proper officials of a state. The questions arise in the context of both a contested Senate election, as well as an appointment by a governor to fill a Senate vacancy.

This report discusses and analyzes the constitutional and legal issues regarding Senate authority in this area. A detailed discussion of procedural practices and options has been prepared by Elizabeth Rybicki, Analyst on the Congress and the Legislative Process, Government and Finance Division, CRS.

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 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 from which chosen), but also the legitimacy and validity of the “election” or selection process of those presenting “credentials” (the official “return” from the state) to the Senate.

When judging “qualifications,” the Supreme Court in the 1969 decision of *Powell v. McCormack*, 395 U.S. 486 (1969), found that the House (and the Senate) is limited to an examination of the three standing qualifications to office (and any potential “disqualifications,” such as under the Fourteenth Amendment). The Court there noted that anyone meeting those qualifications would have to be seated, and not excluded, *if* such person were “duly” elected, selected, or chosen. 395 U.S. at 522.

Under the *Powell* decision and rationale, and under the express constitutional grant of authority, the Senate (and House) may, 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 in *Roudebush v. Hartke*, 405 U.S. 15 (1972), clearly affirmed the right of the Senate to make the final and conclusive determination concerning the election process and 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. 405 U.S. at 25-26.

The various internal examinations and inquiries by the Senate of the selection of an individual who has been appointed by a governor of a state have been considered and treated 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 election or selection process (prior to the adoption of the Seventeenth Amendment in 1913, Senators were selected by state legislatures) to see if corruption or bribery has so tainted the process as to call into question its validity.

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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 judge and 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

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 raised by another Senator, or from 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 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-

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); and *Reed v. County Commissioners*, 277 U.S. 376, 388 (1928) (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 It appears that in 18th and 19th century parlance the term “return” indicates the certificate of election or credentials transmitted on behalf of the candidate certified by the state as being authorized to hold the seat and perform the duties of 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, *Elements of the Law and Practice of Legislative Assemblies in the United States*, at § 136, p. 50 (1856).

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 liable to be rebutted at any stage.”

designate presenting such credentials, however, is not a “Member of Congress” until that person is sworn in and seated by the relevant house.⁸ Upon a challenge, petition, or express request from a committee, objecting to the swearing-in and seating of a particular individual, the matter of the election and 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 Although it has been noted that it has been the “more common practice” in recent years in the case of a certified Senator-elect or Senator-designate who is challenged, to swear such person in “without prejudice” during the pendency of committee and Senate consideration of the matter,¹⁰ the Senate has in the past also refused to swear in and seat individuals, pending Senate resolution of the matter, even though credentials were presented.¹¹

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 there had been precedent in the past for the Senate to look at a Senator-elect’s or Senator-designate’s “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 1969.¹² The Supreme Court in that case stated that “in judging the *qualifications* of its members Congress is limited to the standing qualifications prescribed in the Constitution,”¹³ that is, the Member-elect’s age, citizenship, and inhabitancy in the state from which elected.¹⁴ 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.¹⁵

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 On “nine occasions ... the Senate [has] denied a seat to the candidate whose election had been certified by the state.” *Senate Contested Election Cases*, *supra* at 1. 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).

¹² 395 U.S. 486 (1969).

¹³ 395 U.S. at 550. Emphasis added.

¹⁴ Senators: Article I, Section 3, clause 3; Representatives: Article I, Section 2, clause 2.

¹⁵ *Deschler’s Precedents*, Ch. 7, § 9, p. 98. Note, for example, the Senate consideration of the case of Senator-elect (continued...)

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.’”¹⁶

Elections and Returns

The limitations on judging the “qualifications” of Members-elect in an exclusion procedure, set out in the *Powell* decision, do not, however, necessarily prohibit the Senate from looking into 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 certification or “credentials” of a Member-elect or Member-designate to determine if the person presenting himself or herself for seating has been duly chosen, elected, or selected.¹⁷

In a Supreme Court decision subsequent to *Powell v. McCormack*, the Court clearly affirmed the Senate’s 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.¹⁸ 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,¹⁹ finding 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.”²⁰

Earlier, the Supreme Court, in *Barry v. United States ex rel. Cunningham*,²¹ 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

(...continued)

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.

¹⁶ 395 U.S. at 521.

¹⁷ The Court in *Powell* expressly found that the House may not exclude by majority vote one who possesses the three constitutional qualifications to office and is “duly elected” by his constituency. 395 U.S. at 522. 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 proceed under the *Powell* rationale as to whether a Senator-elect was duly elected or selected. It should be remembered and emphasized that the *Powell* decision concerned a *House* proceeding, and no Member-elect of the House may be “appointed” or “chosen” other than by popular *election* by “the people.” Article I, Section 2, clause 1. Prior to the Seventeenth Amendment in 1913, however, Senators were chosen by the state legislators, and governors could, and may still, fill Senate vacancies by appointments, and thus the selection of Senators has always involved more than popular elections. 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.

¹⁸ 405 U.S. 15, 19 (1972).

¹⁹ 405 U.S. at 25-26.

²⁰ 405 U.S. at 19.

²¹ 279 U.S. 597 (1929).

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.”²² 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.”²³

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 or elected. The cases, instances, and precedents in which the propriety or legality of the *appointment* of a Member-designate to the Senate is questioned in the Senate have generally been characterized by parliamentarians and historians as “elections” challenges, contests, or cases.²⁴ 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.

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.”²⁵ 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,²⁶ or allegations of bribery and corruption in obtaining the selection of the state legislature.²⁷ In some of the cases concerning gubernatorial appointments, the Senate

²² 279 U.S. at 614.

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

²⁴ 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.

²⁵ Constitution, Article I, Section 3, clauses 1, 2 (now superseded by the Seventeenth Amendment).

²⁶ See footnote 24 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.

²⁷ 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 (continued...)

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, such as in the case of Kensey Johns, appointed by the Governor of Delaware to fill a vacancy in 1784,²⁸ the case of Henry W. Corbett, appointed by the Governor of Oregon in 1898,²⁹ and the case of Matthew Quay, appointed by the Governor of Pennsylvania in 1898.³⁰

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.³¹ 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.”³² With respect to the similar factors 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.³³

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 to examine 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

(...continued)

election should be nullified, or whether Caldwell should be expelled, and was eventually concluded by Caldwell’s resignation.

²⁸ *Senate Election Cases, supra*, Case 2, at 6-7.

²⁹ *Senate Election Cases, supra*, Case 85, at 253-255; S. Rept. 505, 55th Cong., 2d Sess. (1898).

³⁰ *Senate Election Cases, supra*, Case 88, at 261-262; S. Rept. 153, 56th Cong., 1st Sess. (1900).

³¹ 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.

³² Senate Legal Counsel, *Contested Election Cases*, at 4.

³³ *Deschler’s Precedents, supra* at Chapter 7, § 11, p. 118.

membership.³⁴ 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.³⁵ 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

Jack Maskell
Legislative Attorney
jmaskell@crs.loc.gov, 7-6972

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³⁴ See Story, *supra*, Vol. II, §§ 835-836; and *Deschler’s Precedents*, Ch. 12, § 12, p. 174.

³⁵ See generally, CRS Report 93-875, *Expulsion and Censure Actions Taken by the Full Senate Against Members*, by Jack Maskell.