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# The Constitutional Requirement to Seat the Senator from Illinois: Upholding the Rule of Law

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> [The national government's] authority [is] expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution, and are unalterable by the legislature.
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> —Alexander Hamilton, *The Federalist*, No. 60

The most important factor that distinguishes the United States from many other countries around the world, both today and in comparison to civilizations long gone, is that it is a republic based upon *the rule of law.* It is precisely when upholding the rule of law is unpleasant or unpopular that the rule is sorely tested. The refusal of the United States Senate led by Harry Reid to seat Roland W. Burris fails that test. Burris was appointed by Illinois Governor Rod Blagojevich under the authority of the 17th Amendment to replace outgoing Senator Barack Obama.[1] It is clear from a review of the applicable constitutional provisions, Supreme Court case law, and the history of the Constitutional Convention and the Constitution's subsequent ratification that the Senate does not have the constitutional authority to exclude Burris. There are no political or other objectives that the Senators opposing his seating could possibly have that would in any way justify such a stark and direct violation of the Constitution.

The mistaken belief of Reid and others such as Senator Dick Durbin (D–IL) comes from their complete misreading of Article I, §5, cl. 1, which provides that "each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." This provision *does not* give Senators the power to apply any "qualifications" they arbitrarily create and refuse to seat Burris because of unproven allegations of wrongdoing against the governor or for any other concerns that the Senators may have over the governor or his actions in office. They are ignoring the provisions of Article I, § 3, cl. 3, which state that the only qualifications under the Constitution to be a Senator are to be 30 years old, to have been a citizen for nine years, and to "be an Inhabitant of that State in which *he shall be chosen*."

It is undisputed that Burris meets all of these qualifications and has been "chosen" by the executive of Illinois as authorized under state law.[2] In fact, Senator Kent Conrad (D–ND) admitted that "Gov. Blagojevich clearly has the authority to appoint him." Yet, although under Illinois law Blagojevich retains the executive power to make this appointment despite his arrest on serious corruption charges,[3] Conrad claimed that Burris could not be seated until "this cloud over [Blagojevich's] head" was dispelled.[4]

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This statement is exactly the kind of arbitrary and abusive behavior by a legislative body that the Framers warned against when they set the qualifications to be an elected Member of Congress. In fact, when a proposal was made at the Constitutional Convention that the legislature of the United States should have the authority to establish uniform qualifications for the members of each house with regard to property as the "legislature shall seem expedient," James Madison successfully urged its rejection. He was opposed to this provision

> as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution.… The British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they made of it was a lesson worthy of our attention.[5]

As the Supreme Court said in the seminal case on this issue, *Powell v. McCormack*,[6] Madison's argument was not just aimed at the imposition of a property qualification "but rather at the delegation to the Congress of the discretionary power to establish any qualifications."[7]

In *Powell*, the House of Representatives refused to seat Congressman Adam Clayton Powell, Jr., when he was reelected in 1966 after he was accused of misappropriating public funds as chairman of the Committee on Education and Labor.

Similar to what happened to Burris, Powell was not allowed to take the oath when the 90th Congress convened. Instead, the House referred the question of Powell's eligibility to take his seat to a select committee.[8] Eventually, after receiving a report from the committee, the House voted to exclude Powell in a vote of 307 to 116 and directed the Speaker to notify the governor of New York that the seat was vacant.[9]

Powell sued five members of the House of Representatives, including the Speaker, for violating the qualifications clause of the Constitution. He also named the clerk, the sergeant at arms and the doorkeeper of the House of Representatives for refusing to perform services to which Powell was entitled as a duly elected Congressman, for refusing to pay Powell his salary, and for refusing Powell admission to the House chamber, respectively.[10]

By the time the case reached the Supreme Court, Powell had been reelected in the 1968 election and seated in the 91st Congress, although he was fined $25,000. However, the case was not considered moot by the Court because Powell was still owed back pay from the prior Congress.[11] The Court held

1. The 17th Amendment delegates to the states the authority to fill vacancies, stating that "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."
2. Illinois law provides that if "a vacancy shall occur in the office of the United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election." IL. ST. CH. 10 §5/25-8.
3. See IL. ST. CH. 10 §5/25-2. Only an admission of guilt or a conviction of an infamous crime or an offense involving a violation of his oath of office would remove the governor from office.
4. Catharine Richert, "Burris Draws Hordes, But Cool Official Response," *CQ Today Online News*, January 6, 2009.
5. James Madison, Notes of Debates in the Federal Convention of 1878 Reported by James Madison, W.W. Norton & Company (1987 Edition), pages 427–428.
6. 395 U.S. 486 (1969).
7. *Id.* at 534.
8. *Id.* at 490.
9. *Id.* at 493.
10. *Id.* at 493. The District Court in the District of Columbia dismissed the case for want of jurisdiction and the Court of Appeals affirmed on different grounds. *Powell v. McCormack*, 266 F.Supp. 354 (D.C.D.C. 1967); *Powell v. McCormack*, 395 F.2d 577 (U.S. App. D.C. 1968).

that although the Speech or Debate Clause of Art. I, §6 barred any suit against the individual Members of the House, it did not bar suit against their congressional employees.[12] The Court also found that it was not barred by the political question doctrine from adjudicating Powell's claims, because his claim that the House was without power to exclude him required only an "interpretation of the Constitution—a determination for which clearly there are 'judicially…manageable standards.'"[13]

In the crux of the complaint, the defendants insisted that Congress had the power under Art.I, §5 to judge the qualifications of its members and that the supposed historical background from the British Parliament and American colonial assemblies demonstrated that it "was generally understood to encompass exclusion or expulsion on the ground that an individual's character or past conduct rendered him unfit to serve." Thus, they argued that "the 'qualifications' expressly set forth in the Constitution were not meant to limit the long-recognized legislative power to exclude or expel at will, but merely to establish 'standing incapacities' [to hold office] which could be altered only by a constitutional amendment."[14]

In a nearly unanimous opinion by Chief Justice Earl Warren for eight members of the Court, the Supreme Court rejected this view, holding that "the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[15] In fact, even if the Court assumed that the defendants were correct in their assessment of the pre-Constitutional history of this issue, they had ignored the same history that showed that the British Parliament's arbitrary exercise of the power to exclude was an issue of vital concern to the Framers, particularly the "most notorious English election dispute of the 18th century—the John Wilkes case."[16] They specifically did not want Congress to exercise this type of power.

Wilkes was a member of the British Parliament who criticized a peace treaty with France, claiming it was the result of bribery. He was arrested and the House of Commons expelled him for seditious libel. Despite his conviction and imprisonment, he was reelected three times yet never served because the Parliament declared him ineligible and refused to seat him.[17] Wilkes was a popular hero in the colonies and there is no doubt that James Madison was referring to Wilkes when he referred to the "abuse" that the British Parliament had made of its right to regulate the qualifications of its members. In fact, the British Parliament itself repudiated this right on May 3, 1782, when it expunged the resolutions regarding Wilkes, conceding that these actions of the legislature were "subversive of the rights of the whole body of electors."[18] As the Supreme Court said,

> English practice did not support, nor had it ever supported, [defendants'] assertion that the power to judge qualifications was generally understood to encompass the right to exclude members-elect for general misconduct not within standing qualifications.[19]

The *Powell* decision was reaffirmed in 1995 when the Supreme Court struck down term limits

11. 395 U.S. at 496.
12. *Id.* at 506.
13. *Id.* at 549.
14. *Id.* at 522.
15. *Id.* at 522. The lone dissent was by Justice Stewart based on his view that the case was moot. *Id.* at 559-561. He did not discuss the merits other than to say the constitutional issues in the case "'touch the bedrock of our political system [and] strike at the very heart of representative government.'" *Id.* at 578.
16. 395 U.S. at 527.
17. *Id.* at 527-528. *See also* Luis Kutner, "Due Process In The Contested New Hampshire Senate Election: Fact, Fiction, or Farce, 11 New Eng. L. Rev. 25 1975-1976, at 31.
18. Kutner at 31-32; 395 U.S. at 528 (citing 22 Parl.Hist.Eng. 1411 (1972)).
19. 395 U.S. at 528.

that had been imposed on Members of Congress by the state of Arkansas.[20] Just as Congress could not add any new qualifications to prevent a member from being seated other than those fixed in the Constitution in Art. I, §2, cl. 2 and §3, cl. 3, the states also could not add any new qualifications for the offices of Congressman and Senator. The Supreme Court reiterated that the debates at the state conventions over adoption of the Constitution clearly showed the Framers understood "that the qualifications for members of Congress had been fixed in the Constitution."[21]

The holdings of *Powell* and the Arkansas case are directly applicable to the refusal of the Senate to seat Roland Burris. He has been properly appointed under Illinois law as specified by the 17th Amendment to take the vacant senate seat from Illinois. If the Senate believes that Burris has engaged in any kind of wrongdoing, then it has the constitutional authority to expel him once he has been seated with a two-thirds vote. But it cannot refuse to seat him with a majority vote when there is no question that he meets the fixed qualifications to be a Member as set out in the Constitution. As the Supreme Court said in Powell:

> Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and in extreme cases, to expel a member with the concurrence of two-thirds. In short, both the intention of the Framers, to the extent if can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.[22]

In this matter, certain Senators are not even questioning the "qualifications" of the designee but the qualifications (and actions) of the executive who appointed him as a Senator. Congress refused to seat Congressman Powell based on allegations of wrongdoing made *directly* against the Congressman, yet the Supreme Court correctly found that such a consideration of factors outside of the fixed qualifications of the Constitution were improper. Burris has no choice but to immediately assert his right to be seated and to file suit, as Adam Clayton Powell did, if the Senate continues to unlawfully refuse to seat him. Preservation of the rule of law and of the Constitution requires no less.

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20. *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

21. *Id.* at 792 (citations to *Powell* omitted).

22. 395 U.S. at 548.