Yale Law Journal

Volume 12
Issue 1 *Yale Law Journal*

Article 5

1902

CONSTITUTIONAL ASPECTS OF THE TILLMANMcLAURIN CONTROVERSY

CONSTITUTIONAL ASPECTS OF THE TILLMAN-McLAURIN CONTROVERSY.

On the 22nd of February last, and while the Senate of the United States was engaged in considering the bill known as H. R. 5833, being a bill temporarily to provide revenue for the Philippine Islands, and for other purposes, the two senators from the State of South Carolina, Messrs. Benjamin R. Tillman and John L. McLaurin, became involved in a personal controversy leading up to a physical encounter between the two men, in which Senator Tillman was the aggressor; in consequence whereof the Senate on motion proceeded in closed, or executive session, to consider what was alleged to be a grave breach of the privileges of the Senate, and the following order was adopted by a vote of sixty-one yeas; no votes being recorded in the negative:

"FEBRUARY 22, 1902.

Ordered, That the two senators from the State of South Carolina be declared in contempt of the Senate on account of the altercation and personal encounter between them this day in open session, and that the matter be referred to the Committee on Privileges and Elections, with instructions to report what action shall be taken by the Senate in regard thereto."

Before the committee made its report, which it did on the 28th of February, the bill mentioned above came to a vote in the Senate. Before this the president *pro tem.* of the Senate, Senator Frye, directed the clerk to omit from the roll call the names of the offending senators, which was done, and before the vote on the bill was taken, Senator Turner, on behalf of Senator Tillman, presented a protest of the latter against the deprivation of his State from voting upon the pending measure, upon the broad ground that the Senate could not in the manner that had been attempted thus constitutionally deprive the State of South Carolina from the exercise, through its senators, of the State's right of suffrage. Nevertheless, and without calling or permitting the two senators to vote on the bill, the vote was taken, and the bill passed by a substantial majority, which majority would not have been materially affected had both the

senators been permitted to vote, and both had voted against the measure.

On the 28th of February, the Senate Committee on Privileges and Elections made its report to the Senate, which, after quoting from the official record the report of the controversy and encounter, recommended the adoption of the following resolution:

"*Resolved,* That it is the judgment of the Senate that the senators from South Carolina, Benjamin R. Tillman and John L. McLaurin, for disorderly behavior and flagrant violation of the rules of the Senate during the open session of the Senate on the 22nd day of February, instant, deserve the censure of the Senate, and they are hereby so censured for their breach of the privileges and dignity of this body, and from and after the adoption of this resolution, the order adjudging them in contempt of the Senate be no longer in force and effect."

Senators Bailey, Pettus, Blackburn, Du Bois and Foster dissented from so much of the report of the committee as asserted the power of the Senate to suspend a senator and thus deprive a State of its vote, and so much as described the offences of the senators as of different gravity, but they approved the resolution reported. Two other senators disagreed as to the punishment proposed by the majority, and one disagreed as to the punishment inflicted upon Senator McLaurin. It is not necessary, however, to consider further that phase of the report.

From the foregoing review of this very painful incident in the annals of the Senate, it will be perceived that grave constitutional questions were involved, and it is proposed in a brief way to consider these questions, and for the purpose of this discussion they may be thus divided:

1. What is the extent of the power of the Senate under the Constitution to punish its members for breaches of its privileges?

2. In the exercise of the foregoing power may the Senate deprive a State of its constitutional right of suffrage therein?

It is around the second of the questions, as stated above, that debate has been warmest and much feeling aroused, and it will be considered in this paper. But in considering it the other will necessarily be more or less touched upon.

The last clause of Article V. of the Constitution provides "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." It is, perhaps, safe to say that no provision of the Constitution gave as much trouble to the constitutional convention

as did this one. On more than one occasion it seriously threatened to terminate the sessions of the convention, and it was only by the exercise of the greatest tact and patience by some of the gifted leaders of that memorable body that the work of the convention went on to completion. The struggle over this clause, or rather the principle of it, was between the small States on the one hand and the larger ones on the other; between the national and federal ideas of the government to be; and it is no exaggeration to declare that but for the acceptance of the principle of the equal suffrage of the States, by the convention, there would have been no constitution to submit for ratification.

This being the history of the provision we are considering, its meaning being clear and needing no elucidation, it seems an amazing proposition that the Senate by a majority, or two-thirds vote, or its presiding officer on his own motion, can legally, constitutionally nullify it, and most effectually deny to a State its equal suffrage in that body, as was done in the case of South Carolina, because its two senators, in an unseemly altercation, grossly offended the rules and proprietors of the upper house.

The argument in favor of the power of suspension may thus be stated: The second paragraph of section 5, of Article I. of the Constitution, provides that, "Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member." It is said that this clause furnishes two grounds, upon either or both of which the suspension argument may be rested, the first being the power given to punish members, apparently without any limitation; the second, the power to expel a member.

Clearly in the recent incident the effect of suspending Senators Tillman and McLaurin was, for the time being at least, to deprive South Carolina of its right of equal suffrage in the Senate. What is that right? It is the right or privilege of voting respecting political questions: of participation in political government by voting for laws or measures. And this for several days was denied to South Carolina by the order of suspension. During this period of suspension the Senate voted upon, and passed, among other measures, the Philippine Government bill.

If the extreme contentions of the advocates of the suspension order be sound, then the two constitutional provisions under consideration are hopelessly irreconcilable, and a State *can be* deprived of its equal suffrage in the Senate, when that body determines to

punish a State's representatives therein by denying to them the right to vote upon pending laws and measures.

The precise question involved has never been the subject of judicial determination. Of course, cases there are in plenty in the books that deal with the power of legislative bodies to punish their members for breaches of their privileges, and in one case in the Supreme Court, that of Kilbourn *vs.* Thompson, 103 U. S., 168, there is dictum to the effect that the respective Houses of Congress can imprison their members as a punishment. But are the two provisions in question really in conflict, or if apparently so, may they not be construed in accordance with accepted canons of construction, giving to each its full force and effect, and all apparent conflict avoided? It is insisted that they may be.

To do this, however, it will be necessary to deny to the Senate power to inflict one form of punishment, that of suspension, which would include imprisonment.

It is to be noted that the second paragraph of section 5, Article I. of the Constitution does not in terms prescribe such a form of punishment, but simply authorizes each House to "punish its members for disorderly behavior." This plainly contemplates punishment of the man, not the State he represents. This can effectively be accomplished by the forfeiture of some or all of those personal advantages that attach to his office; such as a loss of salary or of important committee assignments. He might be publicly reprimanded or denied leave of absence, or all of these unpleasant and mortifying evidences of his colleagues' disapprobation may be visited upon him. And if his offense was of such a character as would justify his expulsion, this punishment may be inflicted. But in inflicting it a due regard for a State's right of equal suffrage in the Senate, must be observed. To do this needs but some care in the procedure to be followed.

When the Senate has concluded to expel one of its members, notification of the fact should be made to the proper authority of the State such member represents, and an opportunity given to select and appoint his successor. If the State fails or refuses to do this within a reasonable time, that should be designated by the Senate, it may well be held to have waived its right of equal suffrage, and the judgment of expulsion should be made effective, and the State would remain without its representative until it chose to select one in the manner prescribed by the Constitution.

To admit the power of suspension is to make possible the nullification of the right of the States to equal suffrage in the upper

branches of the national legislature. It is unpleasant to consider what an unscrupulous majority in the Senate might do under the stress of a supposed political necessity, if such a power resided in it. By denying it the power to suspend, the power to punish its members for disorderly behavior is not seriously, if at all, impaired. By admitting the power, a fundamental principle of the government established by the Constitution, the principle of the equality of the States, is threatened, and, as we have seen in this Tillman-McLaurin affair, may be, in the case of individual States, at least, absolutely set at naught.

It is submitted, therefore, that the Senate's power to punish its members cannot be constitutionally so exercised as to deprive a State of its right of equal suffrage, and that the suspension of Senators Tillman and McLaurin, considering that suspension as being made on the order of the Senate, was unconstitutional because it did deprive the State of South Carolina of its equal suffrage therein.

F. L. Siddons.