THE EXPULSION OF THE SOCIALIST ASSEMBLYMEN AT ALBANY

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Our new secretary happens to be the leading American authority on legislative procedure. :: :: :: :: :: :: ::

REPRESENTATIVE GOVERNMENT AT ALBANY

It is commonly accepted that violence settles nothing and that the progress of a man has been marked by the substitution of reason for force. Accordingly the development of the state supplanted self-help and private vengeance with a political and judicial machinery for settling civil difficulties. Traces of the ancient blood-feud survive only in modern lynch law, which meets general disapproval. The prime function of early government was to keep the peace and methods were secondary. Clearly at that period government was the dictatorship of a minority. Developing political instincts, however, have given us representative government on a democratic basis. It is true that some deny the democratic nature of modern government, insisting that what we have in fact is a dictatorship of capitalists. To this they would oppose the dictatorship of the proletariat, a return to force and lynch law, to the dictatorship of a minority. But there are other ways of exercising force than by naked violence. All coercion is not physical. For example, those in control of government for the time being, may use the instruments of government as veiled force to serve their own ends. Take the case of John Wilkes. Here was an effort to meet an issue by force.

THE FAMOUS CASE OF JOHN WILKES

George III was determined in his narrow-minded way to exalt the kingly office. By threats, patronage and manipulation of elections he was enabled to subdue Parliament. The subservience of Parliament caused wide discontent and some riots, and the king's ministers therefore began to assert the supremacy of Parliament against the nation. But the newspaper was coming into influence and the rising press became the court of appeal from a usurping Parliament. John Wilkes, although a member of the House of Commons, made his paper a leader in violent attacks on the secrecy of the proceedings of Parliament. He stoutly maintained the responsibility of members to the country and the right of a free press to publish and criticize their actions. For this he was thrown into jail in 1763 on the charge of seditious libel of the king's ministers, but he was released under the immunity of a member of Parliament. That body, however, under the spur of the king's vengeance, branded Wilkes guilty of seditious libel and denied that the privileges of members extended to this offense. Ordered to appear before the House, he fled to Paris, whereupon the House expelled him.

The popular resentment was great and "Wilkes and Liberty" became the cry. Five years later he returned and

was elected again to Parliament. Upon the demand of the king he was again expelled on the old charge. It cannot be doubted that the House of Commons had the legal power to expel members for offense, but seditious libel was a charge cognizable by courts of law. Accordingly the people believed that Wilkes should have been tried by the courts and if guilty punished, but that the action of the House denied him fair trial and was therefore unjust and oppressive. So Wilkes was again elected and again expelled. Declared incapable of being elected, he was immediately elected for the fourth time and had now become the people's idol. Under such great pressure Parliament was compelled to yield to the right of popular criticism. Wilkes was again elected to the House in 1774 and was admitted. In 1782 the House declared void his earlier expulsion as being "subversive of the rights of the whole body of electors." To this day the resolution of 1782 stands as a warning against abuse of power by a vindictive body, and the precedent is well established in England that conviction for crime in the courts must precede expulsion by the House on criminal charges. Naturally enough, Wilkes, never an able man, being no longer a martyr, dropped into obscurity, but Parliament's trial of force had failed, and republican government emerged from the conflict.

JANUARY 7 AT ALBANY

A "trial" has been concluded in Albany which will test severely American theories of representative government, and the outcome cannot help but have a definite bearing upon our ability to work out present problems by political means. On January seventh, after the house had been organized and the officers elected, the speaker

of the New York Assembly suddenly and without warning ordered the sergeant-at-arms to conduct the five Socialist members to the bar of the assembly. The speaker then read an address in which he charged them with belonging to a party disloyal to our government and having been elected on a "platform that is absolutely inimical to the best interests of the state of New York and of the United States." The men were then allowed to return to their seats, whereupon the majority floor leader introduced a resolution, couched in strong language, asserting that by their membership in the Socialist party of America they had opposed the organized government of the United States, and asking that the matter of their exclusion from the Assembly be referred to the judiciary committee thereafter to be appointed by the speaker. The resolution was accepted as privileged and at once adopted without opportunity for debate. Members who voted in the affirmative criticized later the precipitous procedure which did not permit them to acquaint themselves with the circumstances. After the passage of the resolution the speaker ordered the sergeant-at-arms to conduct the five members out of the Assembly. To them the ceremony was unnecessarily humiliating and was obviously designed to impress all present with their guilt.

THE TRIAL BEFORE THE COMMITTEE

At the beginning of the hearings the chairman of the judiciary committee announced that the defendants would be given a fair trial under the rules of the supreme court of New York. Counsel made clear, however, that in the opinion of the committee the five assemblymen were there "as a matter of grace." "These gentlemen," he stated, "are entitled to no representa-

tion, and this committee itself could go ahead in secret and take testimony and report to the House and upon that report expulsion could be had and no one could complain." "There is no court," he continued, "that can question the Assembly's power or criticize its motives. For the defense to complain that their case was being tried by a committee appointed by the speaker who had instituted the proceedings, that the committee was acting as accuser, judge, and jury, and that the trial could not be fair because of the previously expressed bias of the chairman and committee, was to deny the inherent power of the legislature to pass on the qualifications and eligibility of members." In other words the orderly, due process of law by which guilt and liability are usually determined is not binding upon the legislature. Historic, time honored principles of Anglo-Saxon fairness may be disregarded with immunity.

The trial reached its end in March. Some arbitrary rulings on procedure were made by the chairman and much testimony admitted on the subject of socialism, bolshevism, religion, the family, private property, et cetera, which would have been ruled out in a court as hearsay, irrelevant and incompetent. Pleadings were never really joined. The defense was denied the right to make certain admissions in order to narrow the issues; and the obvious conclusion must be that the purpose of the committee was to leave open to witnesses the wide fields of religion, politics and economics in an effort to arouse popular indignation against the doctrine of the socialist members. The original resolution of the Assembly as well as the charges prepared by the committee as the basis of action were general and indefinite and not accompanied by specifications such as would enable the defense to

prepare an answer. It was generally understood around the capitol that this was a drive on socialism which was good politics at present and it was in this atmosphere that all discussions about the church, the family, property, were carried on.

At the end of March, just late enough so that there could not be a new election to fill the vacancies, the committee reported in favor of expulsion and despite a vigorous opposition, led by young Theodore Roosevelt and others, the five Socialists were expelled by a large bi-partisan majority. By waiting until this date the question contingent upon the re-election of the same men was avoided.

THE LEGALITY OF IT

Regarding the legal competence of the legislature, the committee was absolutely right. The power to judge of the eligibility of members is a legislative privilege the exercise of which no court will review, no matter how arbitrary or unjust the action. As far as legal responsibility is concerned the committee could conduct their proceedings in secret under any rules of their choosing. Yet the recent hearings, biased as they were, were a great improvement over the methods followed in contested election cases in some of the trials of qualifications of members of congress. In these matters of prerogative the legislative bodies are a law unto themselves. The principle is that the legislature in the exercise of its necessary functions must be free from control by any outside department of government. It is responsible to the people alone. It is not strange that a sovereign body should occasionally become arrogant in the use of summary power and deny the binding force of due process in judicial proceedings, but the courts have consist-

ently refused to share in the decision of questions of privilege. Historically this is a very ancient doctrine. In the early days the House of Commons maintained its dignity with difficulty. The king tried to keep it a mere ratifying body and to this end his ministers and judges sought to determine the discussions and membership of the House. Privileges such as freedom of speech in Parliament and uncontrolled election of members came only after hard fights. Against the royal prerogative was levied the "Ancient Privilege of the Commons." It was a real victory for representative government when Parliament proclaimed that the judges of James I could not exclude Sir Francis Goodwin, having been regularly elected. It is one of the curious developments of history that a principle employed to protect the representatives of the people against coercion and intimidation by an autocratic power should to-day remove them from all legal liability in contesting the expressed will of the voters.

But is it not possible that this power of legislative self protection in the hands of a majority may be turned against the very fundamentals of representative government? Inflated with a sense of power, the majority may use its legal prerogative to eliminate an unwelcome minority. This is one method of "direct action." James I had the idea. "None," he said, "shall presume henceforth to meddle with anything concerning our government or deep matters of state." And surely his Lord keeper could not have been thinking of the speaker of the New York assembly when he addressed Parliament: "His Majesty's pleasure is that if you perceive any idle heads that will not strike to hazard their own estates, which will meddle with reforming the church and transforming the

commonwealth and do exhibit any bills to such purpose, that you receive them not until they be viewed and considered by those who it is fitter should consider of such things and can better judge of them."

TRYING THE SOCIALIST PARTY

In accordance with the expressed purpose of the judiciary committee, the doctrines of socialism have been given a thorough airing. Although the complaint charged that the Socialist party was a conspiracy to overthrow our government, counsel for the Assembly specifically repudiated the theory that it was incumbent upon a legislative body to await the judgment of the criminal courts before action on its part. For this there is good precedent in congress. The resolution which instituted the proceedings recounts that the Socialist party of America has declared its solidarity with the Soviets of Russia and is thereby pledged to the forcible overthrow of all organized governments now existing; and that members of the party agree to be guided by its constitution and platform and when elected to public office are liable to expulsion for failure to carry out the instruction of the dues paying party organization given by an executive committee made up in whole or in part of aliens. The resolution further accuses the party of disloyalty in the war and inaccurately concludes that as an organization it was convicted of violation of the espionage act. It was, therefore, resolved that members of this party be denied seats in the Assembly pending investigation. In opening the hearings before the judiciary committee, the chairman somewhat amplified these charges. "The Socialist party," he said, "proposes to substitute minority for majority rule by force if necessary. The five members in ques-

tion personally opposed the successful conduct of the war and gave aid and comfort to the enemy." They are accused also of being engaged with others in a conspiracy "to subvert the due administration of law and to destroy the right to hold and own property honestly acquired, to weaken the family tie which they count is the seed of capitalism, to destroy the influence of the church and to overturn the whole fabric of a constitutional form of government." The catalog is nothing if not complete. Some of the counts could be made the basis of criminal charges. The others were considered relevant because in excluding persons as lacking the qualifications of members it is not necessary to prove criminal conduct. The specific statements of counsel for the committee, as well as the nature of the testimony, reveal that the investigation was intended to touch upon the loyalty of the Socialist party to our form of government and their purpose to overthrow it by parliamentary means if not by violence. The real issue at Albany was whether members of a party which avows a purpose to do all in its power by lawful means to bring about a fundamental change in our economic order are to be disqualified from membership in American representative assemblies. If this question be decided in the negative, the accepted American tradition, that the proper place to attack undesirable party principles is at the polls and that the decision of the ballot shall be final, is destroyed.

THE CONDITION OF SOCIALISM IN AMERICA

It is only natural that many people should be intensely suspicious of the present Socialist party. Its members have passed resolutions and made statements which have been consid-

ered inflammatory and seditious. Although the leaders may have in mind a program of evolution, there has been considerable talk about "revolution" and "mass action," and some talk about "bullets." The customary phraseology of so-called scientific socialism, familiar to all students of the subject, suggests the Terror to many normal citizens. For the popular confusion between the program of evolutionary socialism and that offered by the disciples of violence and terror, the leaders of the present Socialist party are much to blame. Sound political judgment would have served them better.

It is generally understood that the present Socialist party is more radical than it was before the war. Following the adoption of the anti-war resolution at the convention in St. Louis, in 1917, the party was deserted by a number of influential names, leaving control to what had formerly been the left wing. This resolution proclaimed the party's "unalterable opposition to the war just declared by the government of the United States," and called upon "the workers of all countries to refuse support to their governments in their wars." The next convention of the party was not held until August, 1919, at which time the pro-war Socialists were read out of the party. "We unreservedly reject," reads the manifesto of 1919, "the policy of those Socialists who supported their belligerent capitalist governments on the plea of 'national defense' and who entered into demoralizing compacts for so-called civil peace with the exploiters of labor during the war and continued a political alliance with them after the war." The party on this occasion repudiated the recent Berne conference, at which the moderates tried to revive the Second International, and called for a reconstituted international open to

the Communists of Russia and Germany but closed to those who had co-operated with bourgeois parties during the war. The minority report of the committee on international relations recommended that the Socialist party join the Third (Moscow) International which met in March, 1919, under the auspices of the Russian Communist party.

The matter of the American party's allegiance to the Third International at present awaits the referendum vote of the rank and file. To date it has not joined the Third International, although the Assembly committee claimed that by expressing solidarity with the Russian Soviet Republic they had in fact ratified the manifesto of the Third International. Beyond a doubt in the mind of the writer, the Socialist party spiritually inclines to the principles enunciated by the Moscow International, which repudiated the "narrow-mindedness, opportunism and revolutionary impotence" of those moderate leaders who are trying to reconstruct international socialism along pre-war lines. Many orthodox Socialists believe that the Third International renounced parliamentary activity although this is denied by some present officials of the party. Its manifesto, however, did introduce a new term, namely the dictatorship of the proletariat. The proletarian state, it asserts, is like every state an organ of suppression but after the opposition of the bourgeoisie is broken, it is gradually absorbed into the working groups; the proletarian dictatorship then disappears and finally the state dies and there is no more class distinction. This is the philosophy of syndicalism and the American socialism of to-day has been strongly influenced by it. The leaders seem to accept the general strike as a political weapon, but it is doubtful if a single person of influence

in the party approves the more violent methods of syndicalism or accepts other means than political action.

THE LEFT

But there are parties in the United States which do advocate violence and bloody war. American socialism has recently undergone a schism with the result that two groups have broken off from the parent party and have formed the Communist party, composed largely of the seven Slavic federations which had helped to make up the older party, and the Communist Labor party respectively. These last two hold frankly to an ultra-revolutionary platform including the dictatorship of the proletariat. They also eagerly accepted the pronouncements of the Moscow International. The platforms of both assert that the class struggle is essentially a political struggle, but ultimate hope seems to rest in the "mass strike," the use of parliamentarism being "only of secondary importance."

Yet when all is said and done there remains a fundamental difference between the Socialists and the Communists. The Socialist party yet accepts parliamentary action as the effective and desirable means of waging the class struggle, while the Communists have repudiated political methods in favor of the dictatorship of the proletariat. In the number of dues paying members, the two Communist parties exceed the Socialist party; and it must be clear to all that if the elected representatives of the latter are denied seats in our legislatures, the Socialists will desert to the Communists who are bent upon duplicating in the United States recent Russian experience. The New York Assembly, in company with large groups of citizens, has confused the programs of the two parties.

CAN THE LEGISLATURE EXCLUDE ALL
SOCIALISTS?

It is still a matter of debate whether a representative body in judging of the eligibility of members can impose qualifications in addition to those appearing in the constitution. The federal constitution reads: "Each House shall be the judge of the elections, returns and qualifications of its own members," and "Each House may . . . with the concurrence of two-thirds expel a member." Similar provisions occur in most state constitutions although the New York constitution omits mention of the power to expel. Under the doctrine of inherent powers this is a prerogative to be exercised by a simple majority. In the lower house of congress well established precedent holds that a member once admitted to a seat cannot be expelled unless for misconduct subsequent to his election or for offenses which did not become known until after his election. This is the power of self protection which would be normally applied when a member is guilty of continued contempt or physical obstruction of proceedings. A person's pre-election qualifications to a seat in congress must be questioned, if at all, before the member is sworn in, and on this question a simple majority has power to act. On the other hand, so distinguished a lawyer as Senator Knox argued forcefully before the senate in the Smoot case that a legislative body had no power at all to add to the constitutional qualification of members but that expulsion by two-thirds vote could occur for any cause which affects a member as such. The two-thirds vote he compared to the unanimous decision required in jury trials, the purpose of both being to throw adequate protection about the accused. This was the theory followed by the senate in 1862 in the famous case of

Benjamin Stark, senator-elect from Oregon, whose loyalty to the Union was in doubt. Stark, however, having been admitted to the senate, the motion to expel him failed.

Throughout the Civil War and reconstruction period, the power of congress to exclude regularly elected members on grounds of disloyalty was debated at great length. Numerous representatives from the border states whose loyalty to the north was in doubt appeared for admission. In the Stark case, Senator Harris of New York reported for the judiciary committee as follows: "I do not understand that it is competent for the senate . . . to attempt to punish a man for crime or misbehavior antecedent to his election. If this were so the constitution ought to be amended so as to read that the legislature of a state . . . shall elect . . . a senator subject to the advice and consent of the senate." During this period the majority in congress believed more or less firmly that loyalty to the Union was a qualification for membership in addition to age, residence and citizenship as required by the constitution. The test oath act was passed in 1862 and subsequent action was based on it. However, it appears from the debates that the legality of extra-constitutional qualification was always in doubt and that this was one reason for the third section of the fourteenth amendment. One purpose was to keep out the southern Democrats, and congress did not feel that the doctrine of inherent powers was equal to the task. Furthermore, the cases of members excluded for disloyalty to the Union did not exceed half a dozen. The established doctrine was that unless it could be shown that the member had given aid to the rebellion by overt acts he could not be denied his seat. Of course, numerous members from southern

states who engaged in active warfare against the Union or committed open acts of hostility to the government were expelled. The senate refused, however, to expel Senator Powell of Kentucky, who had publicly urged neutrality for his state and had commended the governor for refusal to furnish troops to the north.

Congress has claimed the right to exclude persons guilty of crime, notably the crimes of bribery and polygamy. The crime must be one, however, which affects a person's capacity to act as a member. Members have also been expelled for bribery, the evidence of which came to light after the oath was administered, but it has been usual for the guilty person to resign and thus end proceedings against him. The recent Berger case involved criminal conviction for disloyalty.

THE TWO MAIN CHARGES

Disregarding certain trivial accusations in the brief against the five Socialists as irrelevant, the material charges in conformity with American precedent exemplified in congressional practice may be boiled down to two. Were the suspended members guilty of disloyalty to the United States or were they guilty of crime, namely of conspiring to overthrow the government by force? It would seem as if the criminal law is adequate to dispose of both charges and that a legislature should not undertake to punish a group or party which cannot be shown to be a criminal conspiracy. The Socialist party falls short of this. Failing to show that the accused are guilty of crime, personal disloyalty must be proved against them; it will not do to accuse a whole party of disloyalty if the members cannot be reached under the espionage law. True, congress during the Civil War held that disloyalty sufficient to

disqualify for membership in that body might fall short of treason, yet it must be overt and open and have given aid and comfort to the enemy. And this power to exclude was only claimed at a time of armed rebellion in the midst of actual hostilities. As a mere matter of precedent the action of congress in 1862 cannot be stretched to cover the brief of the judiciary committee of the New York Assembly. That the leading members are not sure of their ground if the accused were tried in the courts is indicated by their repudiation throughout the hearings of the plan to bring criminal charges against them.

ETHICS—OR LAW?

It is the belief of the present writer that the mere legal irresponsibility of the legislature in matters of privilege in no sense destroys its high moral and political responsibility. Representative government is at bottom a question of ethics and as an institution must be shot through with the spirit of common counsel. This involves the recognition of small and at times personally offensive minorities. In their zeal to scourge heretics, legislatures must remember that democracy is a continual concession to heresy. The fact that the legislature in determining the qualification of members is not subject to judicial review does not mean that it is uncontrolled. In determining the rights of members and of constituencies it must adhere to the great and leading principles of judicial fairness; the spirit and intent of the constitution is binding on the legislature as on any department of government. Especially must this be observed since the same body must usually act as both judge and jury. And a distinguished constitutional lawyer has noted that the abuses of power by Parliament in this connection

marked the worst period of its dependence and corruption.

The early precedents permitting an elected body to take issue with the honest will of the electors grew up before the representative nature of Parliament was established. Members of Parliament looked upon themselves as officers of government, as they yet possess legally the plenitude of sovereignty. Strict legal theory in England has never accepted the doctrine that power emanates from the people. There the privilege of electing representatives was a conceded and not an inherent right. The prerogatives of members, therefore, gave them rights against their constituents, as well as against the crown. A member *persona non grata* to the majority might be expelled, which was quite consistent with the close corporation conception of Parliament. Indeed on this ground some members of congress in 1867 favored the expulsion of certain others who, although their loyalty could not be impugned, had opposed the administration during the Civil War. But neither congress nor a state assembly is a club or debating society to pass on the eligibility of members. Burke condemned this tendency in the English Parliament: "If the habit prevails of going beyond the law and superseding the judicature, of carrying offenses real or supposed into legislative bodies who shall establish themselves into courts of criminal equity, all the evils of the Star Chamber are revived." Criminal equity he describes as a monster in jurisprudence and consists in a liberal construction in determining offenses and a discretionary power in punishing them. "The true end and purpose of that House of Parliament which entertains such a jurisdiction will be destroyed by it."

As pointed out by counsel for the Socialists, under the wide jurisdiction

claimed as a matter of right by the New York assembly, a strong and determined minority could take advantage of their momentary control of the house when some of the majority were at dinner or out playing poker and upon some fancied charge expel sufficient of the majority to place the minority in command.

But more serious implications have been discovered by Father Ryan, a sturdy opponent of socialism. "I see quite clearly," he writes, "that if the five Socialist representatives are expelled from the New York Assembly on the ground that they belong to and avow loyalty to an organization which the autocratic majority regards as 'inimical to the best interests of the state of New York,' a bigoted majority, in, say, the legislature of Georgia, may use the action as a precedent to keep out of that body regularly elected members who belong to the Catholic church." Religious intolerance survives, and the Jesuit doctrine that the civil power is only the secular arm of the church or the syllabus of errors, issued by the Pope in 1864, forbidding anyone to argue that civil law ought to prevail in a contest between church and state, the publication of most of which was forbidden in France, might still provide the occasion for summoning the aid of the state in opposition to a minority religion. Even the senate committee which reported on Smoot's right to his seat held that his membership in a religious hierarchy that united church and state contrary to the spirit of the constitution was a reason for vacating his seat.

CONCLUSIONS

Our beloved institutions of representative government will not stand tampering with. The alternative to-day is pure republican government or vio-

lence. As shown above, best American precedent permits of no qualifications for membership in a representative body in addition to those stipulated by the constitution, except the tests of loyalty or freedom from crime. During the turbulent days of the Civil War, even this power was in doubt and congress refused to exclude regularly elected members unless their disloyal acts had been overt and open. Mere sympathy with the rebellion or want of active support of the government were not sufficient. In the words of a congressional committee of 1867: "We believe that in our government the right of representation is so sacred that no man who has been duly elected by the legal voters should be refused a seat on grounds of personal disloyalty unless it has been proved that he has been guilty of such open acts of disloyalty that he cannot honestly and truly take the oath." If this is good American doctrine, what about the rights of representatives elected by a party

which is but vaguely charged as disloyal? During the hearings before the judiciary committee, Assemblyman Evans, a Democratic member who had campaigned against the Socialists in their home districts, read into the record a dissenting statement which contains some good politics, "The duty and power to disqualify for elective office rests with the people and not with the Assembly. To maintain our form of government we must rely absolutely on the electorate—the majority of the electorate—to send to the assembly men who from our viewpoint are loyal and clean, and we must trust that the majority of the electorate will never fail in this respect. If in that respect the majority of the electorate ever fail, then our government must fail. There is no other alternative." As our president, Mr. Charles E. Hughes, wrote Speaker Sweet, "Is it not clear that the government cannot be saved at the cost of its own principles?"