

DIETRICH'S CASE

THE RECENT DECISION OF THE U. S. CIRCUIT COURT.

AN ABLE DISCUSSION OF SAME

Argument Advanced That the Court's Opinion is Not in Accordance with the Federal Constitution—What the Constitution Provides.

(By Walter Johnson of Nebraska.)
In the case of Charles H. Dietrich as defendant, wherein he was prosecuted as a United States senator for the taking of a bribe, I do not believe that the court has found its opinion according to the federal constitution.

The court has made some assertions, in which they seem to me to be entirely out of accord with this fundamental law.

I have the highest regard for the court and do not believe that they have made their decision as an evasion of the law. But it must be borne in remembrance that we do not all see principles alike. We recall the time when there was elected to the office of governor of the state of Nebraska a person who was not a citizen of the United States but who was foreign born. The supreme court of Nebraska decided that he could not hold the office to which he was elected because he was not a citizen. The decision of the supreme court of Nebraska was founded on the fact that he had not taken certain oaths and that he had not complied with certain statutory laws and therefore was not a citizen.

This case was appealed to the supreme court of the United States and then the court of Nebraska was reversed. The supreme court held that, though he had not complied with statutory laws, oaths and court records, being that he had defended the laws of the government on numerous occasions, he was a citizen. Therefore we have a right to question an honorable court, because those courts are sometimes reversed.

But this is a digression from my subject. Those of us who have made a study of sociology and the fundamental laws of nations understand very clearly that the constitution of the United States is a very great instrument and that probably there has never, either before or since its establishment, been so able a body of men together as those who formulated it. And it must be borne in remembrance that the chairman of that convention was not a lawyer, but a man who thoroughly understood the principles of society.

The constitution was not written in technical terms; but it was written in plain language, and all decisions under this constitution, by the supreme court, have construed it as to its meaning rather than by technical terms.

The constitution was not an original instrument under which were formed thirteen separate states, but the thirteen separate states formulated the constitution as a fundamental law under which those thirteen states might exist, with certain rights reserved.

The first and foremost principle of the constitution was, "All legislative power herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."

This constitution provides that members of the house be chosen every second year; that he shall have attained the age of twenty-five years; that he shall be seven years a citizen of the United States and that he shall be an inhabitant of the state from which he is chosen.

"The senate is composed of two senators from each state, chosen by the legislature thereof, who shall be thirty years of age, nine years a citizen of the United States and an inhabitant of the state from which he is elected; chosen for six years."

The constitution does not designate the time at which a senator's or representative's term of office shall begin or end, therefore this is left entirely for congress to designate; but it does not say that the term of the senator shall be six years and the representative shall be chosen every second year.

Here is the vital issue in the case of Mr. Dietrich: If, as the court holds, Mr. Dietrich was not a senator until December 2, 1901, and he was elected for an unexpired term, as the constitution defines, he has the right to occupy that office until the beginning of the regular session of December, 1905. Also the court holds that Mr. Dietrich could not have been compelled to attend congress before the regular term of December, 1901. If this be true, that the senate could not have compelled Mr. Dietrich to attend an extraordinary session of congress up to the regular session of December, 1901, it then is clearly evident by this decision that he could not have occupied a seat in that body before the regular session, had he preferred to do so. We certainly cannot see any meaning in the constitution to this effect. If this decision be according to the constitution and law we have a clear case now in which Mr. Dietrich may contend that he shall hold office until December, 1905. Certainly the senate or the judiciary would not be bold enough to contend that Mr. Dietrich's term of office shall be abridged.

Does any person suppose that were there to be an extraordinary session of congress between the dates of March 4, 1905, and December, 1905, that the United States senate would countenance the membership of Mr. Dietrich were he not re-elected to that office? Yet this is the import of this decision.

But the court contends that the senate could not compel Mr. Dietrich to attend a session of that body before the regular session of December, 1901.

The constitution provides that one-third of the senators, as nearly as practicable, shall be elected every second year. This in substance defines the length of a session of Congress, though it does not technically do so. But whereas one-third of the membership of that body expires every two years, there is of necessity a new Congress every second year. We all know that the Constitution lays down no rules whereby the Congress is to be governed, except as to the time of convention. One session of the Congress cannot in anywise govern a succeeding session of that body. "Each house may determine the rules of its proceedings," and these rules are in force only through the existence of the session of congress which makes them. If the present session of congress could legislate for the succeeding session, it would be possible to establish a despotism. Hence it is not true that they can. But when a session of congress begins, the first thing in order is the organization, and hence a rule cannot be laid down until that organization is effected. Every member of the senate presents his credentials, and every member has a vote in this organization. You cannot question a member in the organization of either house as to any qualification that he may lack. There is no power that has the right to question any member of congress in the organization of those bodies, outside of those bodies themselves, and they cannot question until their organization is effected. Suppose that some member shall be elected to the senate who is under thirty years of age; this, the constitution does not permit, but in what way could you proceed to correct the error? The judiciary could not proceed with an action, as the senate is the judge of the qualification of its members; and until the senate is duly organized it cannot proceed against one of its members. Every member of the senate before the organization, and in the organization of that body, stands exactly in the same relationship. One member has no power of objection in and before the organization of that body over another member, because no member has the power to pass on the qualifications of another member, and nowhere to place his objections until organization is complete.

Any person elected to either house of congress possesses the same authority as any other member, though his constitutional qualifications may be deficient, and he is a member until the body to which he belongs shall, in organized form, proceed to expel him. There is no such thing as "admission" to either house of congress. The term "admission" presents the power of administration, of which there is no such power over the existence of either house of congress.

If, on the receipt of certain credentials from a state to one of its inhabitants, as a member of the senate, and these credentials empower him to proceed in the organization of that body, and an action of that body is required to expel him, is it not reasonable to adjudge him a member from the very time he accepts those credentials, which empower him to assist in organizing the body to which he is chosen?

The court argues to some length the act of accepting an office. But certainly if Mr. Dietrich had received these credentials, which in fact were an edict of the state of Nebraska, in an official capacity—that these credentials are of far more force, and the acceptance of them, than the oath which is required of him, we do not doubt. In fact, the credentials are the very force of his office. This should be borne in mind, that the making of a United States senator does not belong to congress nor to any power, but the legislature of the state, and the legislature chooses and commissions a person of its own preference as such officer, and at the issue and acceptance of the credentials he is an officer in conformity with those credentials, and when he accepts them, he accepts the responsibility of them, and is a part of the senate, and the office is occupied until he shall resign, or his term of office shall expire, or he shall be excluded from that body. It is not a part of the official capacity of the United States senate to elect or choose its own members, though it does possess the right to choose between contestants for that office, but not to elect from the inhabitants at large. The power of election or choosing the senator belongs entirely to the legislature of the state; and when the state designates one of its own inhabitants as a member of that body, it is the preference of that inhabitant to accept or reject those credentials.

But here is another question which arises in this case. The court has taken the power, or has used the power, of determining the qualifications, and official existence of a member of the senate. I do not understand that this power is in any way given to any court of the United States. The constitution says, "Each house shall be the judge of elections, returns and qualifications of its own members." In this case the court has taken upon itself the power of adjudging or specifying the qualifications of a member of congress and has determined the official capacity of him. It must be borne in remembrance that the senate is a court in itself, and in that court lies the power of construing the constitution as pertaining to its own membership. There is no appeal from its decisions, and no court possesses the power, in the constitution, to intervene in the affairs of that body, relating to its membership. Is not the decision of the court, wherein Chas. H. Dietrich is adjudged not a member of that body, a clear intervention of the powers of that body? The court has taken up a question over which it has no power or authority. If Mr. Dietrich is to answer to

the charge of bribery or other high crime, it must come before the senate if he is charged as a senator. The constitution says "The president, vice president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors." And again it says, "The senate shall have the sole power to try all impeachments." Again it says: "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit; under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law."

According to the constitution, it is an impossibility for any court to pass upon the question of the existence of membership in either house of congress. The constitution plainly lays down these things. If it were possible for a court to determine the membership of those bodies, it would be possible through them to invalidate every law of the land. It would also be possible to disorganize the very existence of the organization of those bodies. It would be possible to remove from office any member of those bodies and place any contestant in the office, whom they saw fit. But these are not questions belonging to the judicial branch of the government. Congress possesses all these rights and from that body there is no appeal. The senate possesses the right to question the number of votes which any of its members may have received in the respective legislatures; also the process of taking those votes; the returns, and to question into every detail concerning their election. But these questions belong to those bodies exclusively, and concerning them no court has the right to interpose.

Whenever the courts undertake to determine the beginning of, or the ending of, a term of the senate and house of representatives, it infringes on the question which belongs only to those bodies to decide. If Mr. Dietrich is to be arraigned as a United States senator, he must be arraigned before the senate. But no penalty can be attached by the senate, except a removal from office and a hindrance from holding any office under the United States.

The courts have no right to say that a senator cannot hold any office under the United States. Thus it is seen that the power of the court and the power of the senate does not overlap, or their powers do not conflict. The senate may impeach, on the charges of "treason, bribery, or other high crimes, and misdemeanors." But it cannot impose a penalty except those related in the constitution, over which the courts cannot exercise authority. But the courts may, after impeachment, indict, and the person so convicted by the senate is "subject to trial, judgment, and punishment, according to law."

The question of being placed in jeopardy more than once, cannot be applied in this case. More than this, if the court has been in error in the case, Mr. Dietrich has not yet been in jeopardy, because he has recourse to the courts that his case has been in error.

If Mr. Dietrich shall be indicted for any charge at all by the courts, he must be indicted without regard to the office which he holds. The law under which he was indicted, was a usurpation of power on the part of the congress which made that law, because they were giving away a power which belonged to all future congresses, and were surrendering a part of the constitution. One congress cannot legislate for another congress relating to those questions which belong to the existing congress. In this law, the past congress has merged its own rights into that of the judiciary. Now, if there is any danger which imperils this government, it is the act of merging the powers of the three respective branches. The founders of this republic were wise indeed. Where the powers of the senate as a court end, the powers of the judiciary begin. Hence the senate cannot apply penalties in case of impeachment, but that is left for the court to do.

It appears to me, that the case of Mr. Dietrich was an error from beginning to end. But in conclusion I might recall an assertion of the court which is evident misconstruction. The court says, "Under the laws of the United States, there are no crimes, save those that are declared by congress. By the common law of England, which has become the law of most of our states, offenses known and recognized at common law have become offenses here. But under the distinct and separate government of the United States, as contradicting, unshaken from state government, there is no common law crime; there are none save those that are prescribed by congress." Now, if there was ever an assertion that can be disproved, it is a part of this statement, "There are none save those that are prescribed by congress." The constitution prescribed and established crime before there was a congress or before that body ever convened. The constitution establishes or prescribes "treason, bribery, or other high crimes and misdemeanors," and provides a penalty so far as official capacity may be concerned, but further than that, the senate cannot impose penalty. The constitution goes so far as to define the very acts of treason. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies; giving them aid and comfort." Certainly this is a crime "prescribed," "pre" meaning before, and "scribed" a thing reduced to writing.

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