

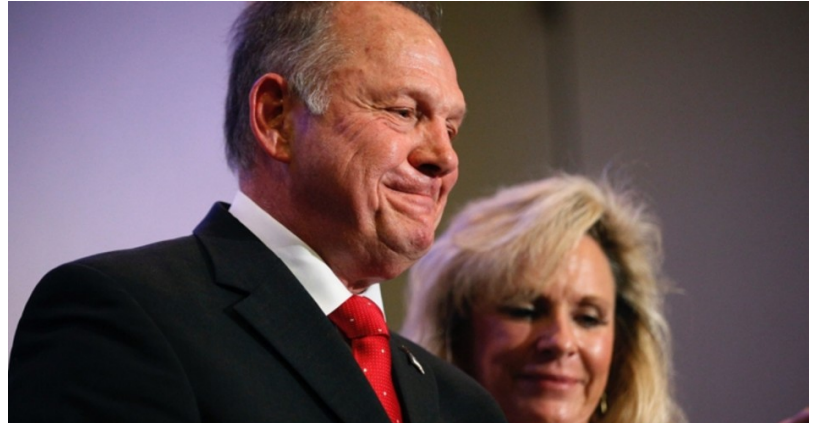


Written by [Steve Byas](#) on November 17, 2017

## Are Threats to Refuse to Seat Moore Unconstitutional?

“The definition of the right of suffrage is very justly regarded as a fundamental article of republican government,” wrote James Madison in *The Federalist*, No. 52.

Yet the threats emanating out of the U.S. Senate to not allow Roy Moore to be seated should he win the Senate race in Alabama pose a serious threat to our republican form of government, particularly its federal character. If Moore is duly elected by the people of Alabama, and senators refuse to seat him, a huge step has been taken in transforming our form of government from a republic, or rule by law, into an oligarchy, or the rule by the few.



This has nothing to do with what one thinks of Roy Moore’s politics or the serious allegations that have been lodged against him.

The argument made by those who would deny Moore a seat is really about denying the voters of Alabama the right to elect the person of their choosing to represent them in the Senate. Proponents of the position that the Senate should be able to deny the franchise to Alabamians rests on their dubious interpretation of Article I, Section 5 of the U.S. Constitution.

“Each house shall be the judge of the elections, returns and qualifications of its own members,” and “[Each house may] punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member,” are the two relevant passages.

If the Senate were to deny the seat to the person who wins the election in Alabama, they would not be judging the election returns, they would be instead telling the voters of Alabama they do not like their choice. The purpose of giving each house the right to judge election returns is clearly in case there is a dispute as to who actually won the election. No reasonable person can interpret that portion of the Constitution to say that the framers, including Madison, intended for the Senate to rule on the merits of the person the people of a state chose.

So what were the framers concerned about?

In *The Federalist*, No. 59, Alexander Hamilton argued for why a house of Congress should have this power to judge election returns. In this article, Hamilton explained that it would stop any “conspiracy to prevent an election.” Certainly, the state of Alabama is holding an election to fill the vacancy left by Senator Jeff Sessions when he left the Senate to become attorney general.

In *The Federalist*, No. 60, Hamilton said the purpose of the provision was not intended to “promote the election of some favorite class of men in exclusion of others.” Clearly, denial of the post to Moore would indeed be promoting the Senate leadership’s “favorite” over a person they did not want, even before the ugly accusations against Moore surfaced.



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The other argument used to give the Senate the power to simply deny Moore the seat is that the Constitution gives each house the right to determine the “qualifications” of its members. Actually, the required qualifications to be a member of the House or Senate are explicitly stated in the Constitution. For the Senate, Article I, Section 3 says, “No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.”

Writing in *The Federalist*, No. 52, Madison alludes to the qualifications for membership in Congress found in Article I, Section 3, adding, “Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.”

Note that Madison says nothing about any additional qualifications other than those found in the Constitution. Moore has clearly been a U.S. citizen for nine years, is at least 30 years old, and he certainly lives in Alabama.

The 17th Amendment altered the method of electing senators. Originally, the Constitution gave that power to the respective state legislatures, but during the “progressive era,” in which more popular elections was advocated, this was changed to direct popular vote, making it an identical process to choosing members of the House of Representatives. According to the amendment, senators were to be elected by the people of the state they would represent.

No indication whatsoever was given that the present membership of the U.S. Senate would be given the authority to deny seating a person who has been duly elected by the people of his state, and who has met the qualifications, as stipulated in the Constitution.

Allowing the Senate to refuse to seat a person who meets the qualifications and has been fairly elected is a dangerous idea. While some might argue that Moore, if guilty of the allegations made against him, is unfit to serve, one must ask the obvious question: Is that not a decision for the people of Alabama to make?

Finally, some might argue that Moore could be expelled by two-thirds vote for “disorderly behavior.” After all, they contend that seeking a romantic relationship with teenaged girls, even it occurred 40 years ago, is an example of “disorderly behavior.” The history of Congress, however, indicates that their standards have never been all that high. In the past, the House of Representatives refused to oust members who had proven, not merely alleged, sexual relationships with minor pages; the Senate refused to oust a member (Ted Kennedy) who left a young woman for over nine hours to drown in a car; and the Senate did not expel a member (Robert Byrd) who had been a kleagle (recruiter) for the racist Ku Klux Klan!

The truth of the matter is that Majority Leader Mitch McConnell simply does not like Moore’s political views. Of course, I don’t like the views of Nancy Pelosi, and a large number of other members of Congress. But I should not be allowed to dictate to the people of those districts and states what person they send to Congress. And neither should McConnell, or any of the other 99 members of the Senate.

The only people who should have that choice are the qualified voters of the state of Alabama. McConnell has as much right to express his opinion about Moore as anyone else, but neither he nor any other member of the Senate holds any right to deny the people of Alabama their right to choose whatever person who meets the constitutional requirements they want to select to represent them in the Senate.

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