No. 11-393

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *et al.*,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF WESTERN CENTER FOR JOURNALISM SUPPORTING PETITIONERS ON SEVERABILITY

GARY G. KREEP
Counsel of Record
UNITED STATES JUSTICE FOUNDATION
932 D Street, Suite 3
Ramona, CA 92065
(760) 788-6624
usjf@usjf.com

Attorneys for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

Founded in 1991 by Joseph Farah and James H. Smith, the Western Center for Journalism has been sponsoring investigative journalism for over eighteen years.

Today, the Center is led by columnist and veteran broadcaster Floyd Brown. The Western Center for Journalism is a vigorous watchdog that keeps a check on government abuse and the media. The Center believes strongly in open public debate. It also believes that informed public debate requires quality journalism and reporting.

The Center is working to provide quality journalism and reporting by exposing bias and falsehoods in the mainstream media, so that accurate information on important issues will be available to the public. The Western Center for Journalism website covers a wide variety of topics, from media bias, to media industry news, to articles about online news sources and the impact of "Citizen Journalists".

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1. It is hereby certified that the parties have consented to the filing of this brief; no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and; no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

In addition, the Center trains individuals to become "Citizen Journalists" and bloggers. These individuals are provided with technical training and practical advice on quality reporting and commentary.

The issue of whether the Federal government may constitutionally mandate that its citizens purchase health insurance is of great concern to *Amicus*, because, if the Federal government can mandate the purchase of one particular good or service, then it could mandate that its citizens must purchase any number of goods and/or services, thus compelling its citizens to commit specific acts, and take specified actions, contrary to their freedoms, contrary to their best interests, and contrary to their Constitutional right to pursue life, liberty, and the pursuit of happiness according to their own desires.

In addition, the issue of whether such legislation may be signed into law by an occupant of the White House who may not be Constitutionally eligible to serve as President of the United States is of great concern to *Amicus*. The current occupant of the Oval Office was not be required to conclusively prove his birth status, and, if individuals who are not Constitutionally eligible to serve as President are, nonetheless, elected to that post, simply because of their popularity, and there are no clear guidelines regarding proof of birth status as it pertains to eligibility to run for and serve in various elected positions, then the people of the United States will be made subject to laws that were never properly signed into law by a sitting President of the United States.

STATEMENT OF THE CASE

Barack Obama, on March 23, 2010, signed the legislation entitled "The Patient Protection and Affordable Health Care Act" (hereinafter referred to as "OBAMACARE"). Soon after, the underlying case was brought against Kathleen Sebelius, Secretary of Health and Human Services, by the National Federation of Independent Business on March 23, 2010, seeking to nullify OBAMACARE as unconstitutional due to the individual mandate.

Shortly after this case was filed, the United States District Court hearing the matter granted summary judgment as follows: (1) to the federal government on the plaintiffs' claim that the Act's expansion of Medicaid is unconstitutional; and (2) to the plaintiffs on their claim that the Act's individual mandate—that individuals purchase and continuously maintain health insurance from private, government approved companies —is unconstitutional.

The District Court concluded that the individual mandate exceeded congressional authority under Article I of the U. S. Constitution, because it was not enacted pursuant to Congress's tax power, and it exceeded Congress's power under the Interstate Commerce Clause and the Necessary and Proper Clause. The District Court also concluded that the individual mandate provision was not severable from the rest of the Act, and, therefore, declared the entire Act invalid.

The 11th Circuit Court of Appeals affirmed in part and reversed in part the District Court's ruling, holding that the individual mandate exceeded Congress's enumerated

tax and commerce power and is unconstitutional, but that the individual mandate can be severed from the remainder of the Act's myriad reforms.

Amicus brings the following arguments in support of Petitioner, based, in part, on *Drake, et al. v. Obama, et al.*, 9th Circuit Case No. C062321 (C.D. Cal. filed January 20, 2009), a case currently pending before the U. S. Ninth Circuit Court of Appeals, which addresses issues concerning Barack Hussein Obama's eligibility to serve in the office of President of the United States. In addition, *Amicus* believes that the individual mandate required under OBAMACARE is not Constitutional under the Interstate Commerce Clause, and, because the individual mandate is essential to OBAMACARE as a whole, the entire act is unconstitutional.

SUMMARY OF ARGUMENT

The individual mandate is essential to all other provisions of OBAMACARE. However, the individual mandate is not constitutional, not being within the purview of Congress' authority under the Interstate Commerce Clause. In addition, even if the individual mandate was proper, only a constitutionally eligible, sitting, President of the United States can sign legislation passed by both houses of Congress into law. If Barack Hussein Obama, Jr., is not eligible to serve as President of the United States, pursuant to Article II, Section 1, Clause 5, then, and in that event, OBAMACARE is of no force and effect, never having been lawfully enacted.

ARGUMENT

I. THE INDIVIDUAL MANDATE IS OUTSIDE THE POWER OF CONGRESS TO ENACT

It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Interstate Commerce Clause. If Congress has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting, as was done in OBAMACARE, that compelling the actual transaction is *itself* "commercial and economic in nature, and substantially affects interstate commerce" [*see* "The Patient Protection and Affordable Care Act." Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) § 1501(a)(1) (hereinafter referred to as "Act")], it is not hyperbole to suggest that Congress could do almost anything that it wanted to do, without any constrictions by the U. S. Constitution. It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly, and imposing a nominal tax on all tea sold in America, would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain, for it would be "difficult to perceive any limitation on federal power" (*United States v. Lopez* (1995) 514 U.S. 549, 564), and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended. *See id.* at 592 (quoting Hamilton at the New York Convention that there would be just cause to reject

the Constitution if it would allow the federal government to "penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals") (Thomas, J., concurring). In *Lopez*, the Supreme Court struck down the Gun Free School Zones Act of 1990, after stating that, if the statute were to be upheld, "we are *hard pressed* to posit any *activity* by an individual that Congress is without power to regulate." *See id*. at 564., (emphasis added). If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of Congressional power under the Commerce Clause, it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate.

The U.S. Supreme Court has uniformly and consistently declared that the Interstate Commerce Clause applies to "three broad categories of *activity*." *Lopez*, *supra*, 514 U.S. at 558 (emphasis added); *accord United States v. Morrison* (2000) 529 U.S. 598, 608. The Supreme Court has further described the third category as "the power to regulate those *activities* having a substantial relation to interstate commerce." *Lopez*, *supra*, 514 U.S. at 558-59 (emphasis added); *accord Morrison*, supra, 529 U.S. at 609; *see also Gonzales v. Raich* (2005) 545 U.S. 1, 17; *Perez v. United States* (1971) 402 U.S. 146, 150; *Wickard v. Filburn* (1942) 317 U.S. 111, 124; *United States v. Darby* (1941) 312 U.S. 100, 119-20; *NLRB v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 37. Existing case law thus extends only to those "activities" that have a substantial relationship to, or substantially affect, interstate commerce. Only the U.S. Supreme Court, not Congress, can redefine interstate commerce or expand the concept further. *See* Robert L. Stern, *That Commerce Which Concerns More States*

than One (1934) 47 Harv. L. Rev. 1335, 1363 (stating that the Supreme Court had, at one point in time, only talked about "movement" of goods across state lines under the Commerce Clause, because it was necessary to decide those earlier cases, and there had "been no need for a broader definition" of commerce; going on to opine that "it would seem timely that the Supreme Court" expand the definition, as "the time has now arrived for the [Supreme] Court to cut loose from the 'old' approach and to select the 'new' one").

The Interstate Commerce Clause originally applied to the trade and exchange of goods, as it sought to eliminate trade barriers by and between the states. Over the years, the Clause's reach has been expanded from covering actual interstate commerce (and its channels and instrumentalities) to intrastate activities that substantially affect interstate commerce. It has even been applied to activities that involve the mere consumption of a product (even if there is no legal commercial interstate market for that product). To now hold that Congress may regulate the so-called "economic decision" to not purchase a product or service, in anticipation of future consumption, is a "bridge too far." It is without logical limitation and far exceeds the existing legal boundaries established by Supreme Court precedent.

Finally, Congress has acknowledged, in the Act itself, that the individual mandate is absolutely "essential" to the Act's overarching goal of expanding the availability of affordable health insurance coverage, and protecting individuals with pre-existing medical conditions:

> [I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care. . . the [individual mandate] is *essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.
> Act § 1501(a)(2)(I) (emphasis added).

In other words, the individual mandate is indisputably necessary to OBAMACARE's insurance market reforms, which are, in turn, indisputably necessary to the purpose of OBAMACARE.

Since the individual mandate is unconstitutional under the Commerce Clause, and, because, in the words of Congress, the individual mandate is "essential" to OBAMACARE as a whole, OBAMACARE is wholly invalid, unconstitutional, and unenforceable. For this reason, *Amicus* respectfully request that this Court grant Petitioners' appeal, and overturn OBAMACARE in its entirety.

II. FEDERAL LEGISLATION, TO BECOME LAW, MUST BE SIGNED BY A SITTING PRESIDENT

The underlying action herein is a dispute over the Constitutionality of legislation purportedly signed into law by Barack Obama, acting as President of the United States. However, pursuant to Article I, Section 7, Clause 2, of the U. S. Constitution, legislation passed by both houses of Congress does not become law unless and until it is signed into law by a sitting U.S. President, or both

houses of Congress override a sitting President's veto by a two-thirds vote. If there was no sitting U.S. President when OBAMACARE was purportedly signed into law, then the law was never properly enacted, and it is of no force and effect, being void *ab initio*.

The United States Constitution specifies the legislative process by which a law is enacted:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."
> U.S. Constitution, Article I, Section 7, Clause 2.

Enactment of Federal legislation may not constitutionally be conducted by any other means. ("Under Article I, § 7, cl 2 of Constitution, Congress may legislate only through passage of bill which is approved by both Houses and signed by President." *Central Bank, N.A. v First Interstate Bank, N.A.* (1994) 511 US 164.). Further, a piece of legislation immediately becomes law when the President signs it:

> "Where Congress meets in regular session at time appointed, President may sign bill when Congress is in recess for specified time, but within ten days, Sundays excepted, after it is presented to him; act of Congress having been presented to President while Congress was sitting, and having been signed by him when Congress was in recess for specified time, but within ten days, Sundays excepted, after it was so presented to him, was effectively approved, and immediately became law." *La Abra Silver Mining Co. v United States* (1899) 175 US 423.)

Since a piece of legislation becomes law immediately upon the signature of the President, then there must be an eligible person sitting in the office of President of the United States to sign it. There are two requirements for a person to be eligible to hold the office of President of the United States: (1) having either received a majority of the Electoral College votes, or having succeeded a prior President following his, or her, death or constitutional disability; and (2) meeting the minimum eligibility for the office. The 12th Amendment specifies the election and succession of U.S. Presidents:

> "The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President."
> U.S. Constitution, Amendment 12, Clause 3.

In addition, the three requirements for minimum eligibility for the office of President of the United States are specified in Article II of the United States Constitution:

> "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years,

> and been fourteen Years a Resident within the United States."
> U.S. Constitution, Article II, Section 1, Clause 5.

Here, there is no question as to whether Mr. Obama received the requisite votes from the Electoral College. However, Mr. Obama has not yet verified whether he meets all of the requirements for minimum eligibility, namely whether he is a natural born citizen.

A provision of the U.S. Constitution may not be disregarded by means of a popular vote of the people, as there are specific guidelines for amending the Constitution of the United States. In order to do so, the U.S. Constitution, Article V, requires a two-thirds vote of both houses of Congress and ratification by three-fourths of all State legislatures in the United States (U.S. Constitution, Article V). Even if the people of the United States voted to elect as President a candidate who did not qualify for the position under the U.S. Constitution Article II, Section 1, Clause 5, that vote would not be sufficient to overcome the Constitutional requirements for office and make that candidate eligible for the office. Once a name is placed on a ballot, voters are only concerned with whether they prefer one candidate over another candidate, as it can be rightfully inferred by said voters that the threshold issue of eligibility has already been determined by virtue of the candidate names having been placed on the ballot. Additionally, candidates for the Office of President of the United States are not required to prove their eligibility for the office to the voters at all, and, instead, candidates are tasked with convincing the voters to vote for that particular candidate over the other candidates. Because voters can, and do, vote for candidates that are liked by

the voters, even if those candidates may not be eligible for the position, the voters do not have the power, or the right, to determine the eligibility of a candidate. For the Court to hold otherwise would be to strip all candidates not winning a majority of the votes cast of all political power, as the laws would be based upon the whims of the majority of voters, rather than on the Rule of Law, and, in this case, the requirement of the U. S. Constitution for service in the Office of President of the United States.

Furthermore, contrary to what Mr. Obama's supporters have argued, the Electoral College is not empowered with the authority to determine the eligibility of any candidate for President. In twenty-six States and the District of Columbia, Presidential Electors are prohibited by statute from voting in variance with their pledges, or the votes of a majority of the voters in their State or District, or, if they do, they face civil and/or criminal penalties and fines. The act of determining eligibility is one that requires discretionary authority, so that a candidate found to be ineligible for an office may be removed or precluded from placement on the ballot. However, any discretionary authority of the majority of the States' Presidential Electors has been removed by statute, and the Presidential Electors, instead, perform a ministerial function of casting their votes in accordance with the popular vote of the State that each Elector represents.

Any assertion that the Electoral College has the authority to make any determination of a Presidential candidate's eligibility to serve in the office is unpersuasive, because, while the historical intent of the Electoral College was to allow for such determinations, the modern

majority trend of the States is to limit the duties of the Presidential Electors to the ministerial role of casting a vote for the candidate chosen by the popular vote of their respective States or District. For these reasons, the power to determine and/or exclude a candidate's eligibility is not found within the Electoral College.

Finally, political boards, committees, and panels, in general, such as the United States Congress, are not proper bodies for making determinations of eligibility in this situation, as the U.S. Senate attempted to do in the case of U.S. Senator John McCain's eligibility to serve as President of the United States in 2008 (*see* Senate Resolution 511 (2008)), because of the significant risk of "corrupt and partisan action" (*Irby v. Barrett* (AK, 1942) 163 S.W.2d 512, 514). Matters committed by the Constitution to the non-judicial branches of the Federal Government are political in nature. *Baker v. Carr* (1962) 369 U.S. 186, 211. Thus, the Office of President of the United States is designed to decide political issues. In like manner, the United States Congress is a political body with the power to legislate political matters. In addition to its political powers, Congress has internal rules concerning whether to seat or remove their own members, but these rules do not extend to eligibility of candidates for the Office of President of the United States. Since both the Congress and the President are political bodies, any Congressional authority to determine whether a candidate meets the requirements for the Office of President would be suspect, as the determinations would depend on which political party was in the majority at the time. A related issue was considered by Court in *Irby v. Barrett*, which held:

"If the Chairman and Secretary of the Committee have the right to say that because of the decision of this court petitioners is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the Chairman and Secretary of the Committee? It may be that such power can be conferred upon them by laws of this State or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the State and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of the candidate omitted, to have a holding by the court that the name should not have been omitted." (*Irby v. Barrett* (AK, 1942) 163 S.W.2d 512, 514).

Since the Office of President of the United States is the most powerful position in the country, the risk of "corrupt and partisan action" is great if the authority to determine eligibility is placed in the hands of those who are likely to gain an advantage over opposing political parties. Given this risk, the proper remedy for eligibility disputes is to bring such disputes to the Court for a determination, rather than to Congress or to the Electoral College, and this Court has the power to make determinations of fact and law regarding controversies over the eligibility of an officeholder, with little likelihood of partisan results. For all of these reasons, the issue of a candidate's eligibility is not a political question, this Court may properly make a determination on this issue, and this Court should decide this issue. The issue of the eligibility of Barack Hussein Obama, Jr., substantially impacts on the determination of whether the legislation commonly known as OBAMACARE was ever properly enacted, for, if he is not eligible to serve as President of the United States, OBAMACARE was never properly enacted, and, as a result, it never legally had any force or effect.

CONCLUSION

As discussed above, if one who is acting as President of the United States lacks the minimum requirements of eligibility for the position, then no legislation, such as OBAMACARE, signed by that ineligible purported President is valid or enforceable. In addition, the OBAMACARE "individual mandate" is not a Constitutional expression of Congressional power, and, since the "individual mandate" is essential to the workings of OBAMACARE, the whole Act is, therefore, invalid. For these reasons, *Amicus* respectfully requests that this

Court grant Petitioners' appeal, and find OBAMACARE invalid in its entirety.

Respectfully Submitted,

GARY G. KREEP
Counsel of Record
UNITED STATES JUSTICE FOUNDATION
932 D Street, Suite 3
Ramona, CA 92065
(760) 788-6624
usjf@usjf.com

Attorneys for Amicus Curiae

January 6, 2012

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 6, 1942

FRANK G. SMITH, Justice.

Appellant filed in the court below a petition for a writ of mandamus requiring Joe C. Barrett and Harvey G. Combs, chairman and secretary of the Democratic State Committee, respectively, to certify him as a candidate for the office of state senator from the 28th Senatorial District, of which district Clay county is a part. He alleged that he had been a resident of Clay county for many years; that he is 64 years of age and a qualified elector of that county, and had been all his life a Democrat, and that he is a member of the Democratic Party in Clay county, and that he had complied with all the laws of the state and all the rules of the Democratic Party to become a candidate for the nomination of his party as its candidate for the senate in the district of which Clay county is a part; but notwithstanding these facts the defendants had refused to certify his name as required by the rules of the Democratic Party.

An answer was filed, which did not deny any of these allegations, and averred that defendants had refused to certify petitioner's name because petitioner is legally ineligible to hold the office of state senator by virtue of art. 5, § 9, of the Constitution of 1874, which prohibits any person convicted of the embezzlement of public money or other infamous crime from serving as a member of the General Assembly or from holding any office of trust or profit in this state.

A demurrer was filed to this answer, which was overruled, and petitioner's cause of action was dismissed when he stood on his demurrer, and from that decree is this appeal.

Appellees justify their action by citing the cases of *State, ex rel. Attorney General, v. Irby,* 190 Ark. 786, 81 S.W.2d 419; *Winton v. Irby,* 189 Ark. 906, 75 S.W.2d 656, and *Irby v. Day,* 182 Ark. 595, 32 S.W.2d 157.

The case first above cited was a *quo warranto* proceeding to oust petitioner from the office of county judge of Clay county to which he had been elected, and it was there held that petitioner was ineligible to hold that office because of his conviction in the federal district court of the crime of embezzling post office funds, notwithstanding his unconditional and full pardon for that offense by the President of the United States.

It is urged that it would be a vain and useless proceeding to permit petitioner to be a candidate for an office which he could not fill, if he were elected to it.

We cannot anticipate what action the senate might take in the event petitioner were nominated and then elected senator from the district in which he resides. Section 11 of art. 5 of the Constitution provides that "Each house [of the General Assembly] shall appoint its own officers, and shall be sole judge of the qualifications, returns and elections of its own members."

The last of these Irby cases [190 Ark. 786, 81 S.W.2d 419, 425] was decided by a divided vote of 4 to 3. It is

possible, and within the power of the senate, to adopt the view of the dissenting judges, rather than the opinion of the majority, in that case, in which event petitioner would be eligible to serve as a member of the senate.

It was the opinion of the majority in that case that one convicted, in a federal court, of embezzlement of money belonging to the United States, is ineligible to hold any office of trust or profit within this state notwithstanding the Presidential pardon, since the pardon restored merely his civil rights, as distinguished from his political privileges.

It was the opinion of the majority in that case that the disqualification of petitioner to hold office was no part of the punishment for the crime for which petitioner had been convicted and that, therefore, the pardon could not remove his disqualification for holding office.

It was also the opinion of the majority that it was immaterial that petitioner had not been convicted for a violation of a law of this state, and that a conviction in any jurisdiction barred petitioner from holding office as effectively as a conviction for a violation of the laws of this state would have done.

It was the opinion of the minority that all these holdings were contrary to the great weight of authority. It was said in the minority opinion that "It has been held, upon great consideration, that a conviction and sentence for felony in one of the states and the disabilities arising from the same would not come within the inhibition of

statutory and constitutional provisions of another state and the disqualifications therein denounced. Greenleaf on Evidence, 15th ed., § 376."

It was the opinion also of the minority that the pardon removed, not only the guilt of the one pardoned, but likewise the legal infamy and all other consequences arising out of the conviction, and that it was futile to say that ineligibility to hold office was not a part of the punishment for crimes denounced by § 9 of art. 5 of the Constitution. The concession appears to have been made in the majority opinion that if ineligibility to hold office was a part of the punishment, this ineligibility was removed by the pardon.

The senate has the power to accept either the majority or the minority view, and its action is beyond the power of review by this court, as the senate is the sole judge of the qualification of its members.

But aside from these considerations, we are of the opinion that the chairman and secretary of the state committee acted without authority in refusing to certify petitioner as a candidate. Certainly no law of this state confers that power, and we are cited to no rule of the party conferring it. Certain it is that the chairman and secretary of the state committee are clothed with no judicial power. Their duties are purely ministerial, and in the matter under consideration are defined by § 58 of the Rules of the Party, which reads as follows: "Sec. 58. All candidates for United States senator, representative in Congress and all state and district offices shall file

the prescribed pledge with the secretary of the state committee and all candidates for county and township offices shall file the prescribed pledge with the secretary of the county committee, not later than 12 o'clock noon on the 90th day before the preferential primary election, and all candidates for municipal offices (including candidates for county and city committee-men) shall file their pledges with the secretary of the county committee and the city committee not later than 12 o'clock noon on the 30th day before the preferential primary election.

"The name of any candidate, who shall fail to sign and file said pledge within the time fixed shall not appear on the official ballot in said primary election.

"The chairman and secretary of the state committee shall certify to the various county committees not later than 30 days before the day of the election the names of all candidates who have complied with the rules herein prescribed, and the name of no other candidate for such office shall be printed on the ballots by the county committee."

It was held in the case of *Williamson v. Montgomery,* 185 Ark. 1129, 51 S.W.2d 987, that no one could become a candidate for a party nomination for an office without complying with the rules of the party; but it was also held in that case that where the committee or officer conducting a primary election acted fraudulently or in such an arbitrary manner as to prevent a person who, in good faith, sought to comply with the rules, the courts would require the party officers to comply with the party

rules. There is no intimation here that the chairman and secretary of the committee have acted fraudulently, but we think they have acted without authority conferred either by the laws of this state or the rules of the party.

Rule 58, above quoted, requires the chairman and secretary to certify the names of all candidates "who have complied with the rules herein prescribed." The fact stands undisputed that the petitioner has complied with these rules and, having done so, no duty rests upon, nor is there any power vested in, the chairman and secretary of the committee except to perform the ministerial duty of certifying the names of petitioner and all others who have complied with the party rules.

If it be said—and it is said—that the Supreme Court has decided that petitioner is ineligible to hold a public office, it may be answered that this proceeding is not a contest for an office nor a proceeding to oust one from office. The only question here is whether petitioner has complied with the laws of the state and the party rules sufficiently to become a candidate for office; and the fact is undisputed that he has done so.

If the chairman and secretary of the committee have the right to say that because of the decision of this court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he

is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the chairman and secretary of the committee? It may be that such power can be conferred upon them by laws of this state or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the state and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of the candidate omitted, he have a holding by the court that the name should not have been omitted.

We are cited to only two cases in point, and in view of the fact that this opinion must be rendered within a week after the submission of the cause, if the petitioner is to have redress which will require that he be certified as a candidate, the time has not been afforded for the investigation which otherwise would have been made.

But these two cases are exactly in point and are consonant with our view that the chairman and secretary of the state committee have only a ministerial duty to perform, and have no right to exclude the name of a candidate because, in their opinion, he is ineligible and

could not hold the office, whether that ineligibility arose out of a conviction for a felony or any other cause which would render him ineligible.

The two cases to which we have referred are *Young v. Beckham,* 115 Ky. 246, 72 S.W. 1092, decided by the Court of Appeals of Kentucky, and the case of *Roussel v. Dornier,* 130 La. 367, 57 So. 1007, 39 L. R. A., N. S., 826.

In the first of these cases the facts are so similar and the reasoning so convincing that we quote somewhat extensively from it. The first sentence in the opinion in that case reads as follows: "PAYNTER, J. The purpose of this proceeding is to compel the Democratic Committee to place the name of the appellee, J. C. W. Beckham, on the ballot as a candidate for the office of governor before the Democratic primary election called for May 9, 1903. The question of his eligibility has been raised, and the committee refuses to place his name upon the ballot. The question to be determined from the pleading is whether the governing authority of the party has called a primary election, and, if so, (a) whether the statute authorizes the holding of primary elections to nominate candidates for state offices; (b) whether the committee can refuse to place his name upon the ballot because they think he is ineligible to re-election; (c) whether, by proceeding in mandamus, the committee may be compelled to place his name upon the ballot used at the primary as a candidate for governor."

The opinion does not state upon what ground the committee found Beckham to be ineligible. The facts upon which the committee found Beckham to be ineligible were

not in dispute, as the opinion does not state them. Probably the Democratic State Committee had concluded that a man had aspired to the nomination of their party for the highest office in the state who could not serve if he were nominated and elected. The ground of a candidate's ineligibility would be immaterial. It would be unimportant whether he had been convicted of a felony or was ineligible for some other reason. If he were ineligible, he was ineligible regardless of the cause of the ineligibility.

The Kentucky court did not consider the correctness of the committee's finding that Beckham was ineligible to be a candidate. That question was pretermitted and not even referred to, the opinion being based solely upon the question of the power of the committee to exclude the name of a candidate. In holding that the committee did not have this power it was there said: "We are of the opinion that the committee had no right to raise the question of the appellee's eligibility to re-election to the office of governor. The governing authority of the party has no right to determine who is eligible under the laws of the land to hold offices. It can call primary elections and make proper rules for their government, but has no right to say who is eligible to be a candidate before the primary. The persons who are entitled to vote at the primary are the ones to determine who shall be selected as their candidate for a particular office. If the committee can say who is not eligible to be nominated as party's candidate for office, they can, on the very last day before the ballots are printed, refuse to allow a person's name to go on the ballot upon the pretext that he is ineligible, and thus prevent his name from appearing upon the official ballot. They

could thus destroy one's prospect to be nominated, for the rules of procedure in courts are necessarily such that no adequate relief could be afforded the party complaining, if at all, until after the primary election had been held. If the committee or governing authority has the authority to decide the question as to who is eligible to hold an office or be a candidate before a primary election, then they would have a discretion and judgment to exercise that could not be exercised by a mandamus. The most that could be done by such a writ would be to compel them to act upon the question."

In the second case above cited the Supreme Court of Louisiana, with equal emphasis, denied the right of a party committee to pass upon the eligibility of a candidate for the nomination of that party as its candidate for office. A headnote in that case reads as follows: "1. A Democratic parish committee has no power to pass upon the eligibility of candidates for public office, as they are not charged with judicial functions nor clothed with judicial power." Parish committees in Louisiana correspond with county committees in this state.

We conclude, therefore, that the chairman and secretary of the state committee exceeded their power in refusing to perform the ministerial duty of certifying petitioner as one who had complied with the laws of the state and the rules of the party, as he admittedly has done.

The decree of the court below will, therefore, be reversed, and the cause will be remanded with directions to award the writ of mandamus.

GRIFFIN SMITH, C. J., dissents.

GRIFFIN SMITH, Chief Justice (dissenting).

One of two things is certain: This court either inexcusably wronged W. O. Irby in two of the three cases cited in the majority opinion, or figuratively speaking, it is playing checkers with decisions.

"In *Irby v. Day,* 182 Ark. 595, 32 S.W.2d 157, we expressly held that Irby was disqualified to receive the democratic nomination to public office in this state because of his previous conviction for embezzlement of public funds, therefore, any question as to his conviction resting in a foreign jurisdiction is laid at rest and we shall not again consider it. The sole question here presented for consideration is, Does a pardon by the chief executive restore to Irby all civil rights and political privileges enjoyed by him prior to his conviction?"[1]

The author of the opinion in *Irby v. Day* (the preceding quotation having been taken from *State Ex. Rel. Attorney General v. Irby,* 190 Ark. 786, 81 S.W.2d 419, 420) said: "Appellant's second and last contention for a reversal of the judgment is that the plea did not constitute a defense to the cause of action. The plea was sufficient to show that the appellant was ineligible to hold the office of representative from Clay county, and for that reason had

1. Irby was sentenced February 17, 1922, on a charge of embezzling post office funds. He entered a plea of guilty. February 19, 1931, President Hoover issued a pardon, "the purpose being to restore Irby's civil rights."

no right to contest appellee's certificate of nomination. Section 9 of art. 5 of the constitution of 1874 provides that no person convicted of embezzlement of public money shall be eligible to hold an office of representative in the general assembly." [32 S.U.2d 158]

From what I have been able to ascertain by reading the majority opinion of today, and from discussions in conference, it is not intended that *State Ex Rel. Attorney General v. Irby* be overruled. On the contrary, my understanding is that if the result brings about an impairment of the opinion written by Chief Justice JOHNSON, a majority of the justices did not so intend. In other words, there were not four votes to overrule the former holding. We have, then, reaffirmation of the rule that one convicted of embezzling public money may not hold office, and this status is not altered by pardon.

By circuitous construction the opinion in *State ex rel. Attorney General v. Irby* is bypassed. It is now held that the state committee could not exercise a judicial function by deciding that Irby was not eligible; that the committee's functions were ministerial; that its members must close their vision and their minds to what this court has said on previous occasions—all this because, as it is argued, Irby might be nominated and elected, and under art. 5, § 11, of the constitution, he could be seated.

But where, may it be asked, was the constitution when on November 3, 1930, it was held that appellant was ineligible to hold the office of representative? art. 5, § 11, gives the house of representatives the same power that

it accords the senate in respect of member qualifications. It would seem that the only thing to consider is whether appellant is the same Irby whose status was determined by this court in 1930, and again on April 8, 1935. Since this is admitted , the issue has heretofore been disposed of.

Unless it should be held that the presidential pardon restored appellant's political rights, as well as his civil rights, I do not agree that if elected he can be seated by the senate. Section 11 of art. 5 of the constitution authorizes each house of the general assembly to appoint its officers; and it shall be the sole judge of the qualifications, returns and election of its own members when there has been an election. But this right must be read in connection with art. 5, § 9, and with § 8 of art. 5 when it is applicable. Section 8 provides: "No person who now is or shall be hereafter a collector or holder of public money, nor any assistant or deputy of such holder or collector of public money, shall be eligible to a seat in either house of the general assembly, nor to any office of trust or profit, until he shall have accounted for and paid over all sums for which he may have been liable."

Section 9 is: "No person hereafter convicted of embezzlement of public money . . . shall be eligible to the general assembly or capable of holding any office of trust or profit in this state."

Effect of the majority opinion is to hold that the chairman and secretary of the state committee are guilty of tyrannical conduct, or at least grave indiscretion, in following the law as laid down in the decision of 1930 and 1935.

It is my view that they were justified in believing the court meant what it said. They would have been insensible to a public trust had they ignored *State ex rel. Attorney General v. Irby.* No discretion was exercised; no judicial function was usurped. This court had already made the law. There was more understanding in what they did than would have been the case had they simulated estrangement to the law as it had been written.

APPENDIX B — SENATE RESOLUTION 511— RECOGNIZING THAT JOHN SIDNEY MCCAIN III, IS A NATURAL BORN CITIZEN DATED APRIL 10, 2008

Mrs. McCASKILL (for herself, Mr. Leahy, Mr. Obama, Mr. Coburn, Mrs. Clinton, and Mr. Webb) submitted the following resolution; which was referred to the Committee on the Judiciary:

S. Res. 511

Whereas the Constitution of the United States requires that, to be eligible for the Office of the President, a person must be a "natural born Citizen" of the United States;

Whereas the term "natural born Citizen", as that term appears in Article II, Section 1, is not defined in the Constitution of the United States;

Whereas there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to Americans serving in the military nor to prevent those children from serving as their country's President;

Whereas such limitations would be inconsistent with the purpose and intent of the "natural born Citizen" clause of the Constitution of the United States, as evidenced by the First Congress's own statute defining the term "natural born Citizen";

Whereas the well-being of all citizens of the United States is preserved and enhanced by the men and women

who are assigned to serve our country outside of our national borders;

Whereas previous presidential candidates were born outside of the United States of America and were understood to be eligible to be President; and

Whereas John Sidney McCain, III, was born to American citizens on an American military base in the Panama Canal Zone in 1936:

Now, therefore, be it

Resolved, That John Sidney McCain, III, is a "natural born Citizen" under Article II, Section 1, of the Constitution of the United States.

Mr. LEAHY. Mr. President, today I join Senator CLAIRE MCCASKILL in introducing a resolution to express the common sense of everyone here that Senator MCCAIN is a "natural born Citizen," as the term is used in the Constitution of the United States. Our Constitution contains three requirements for a person to be eligible to be President—the person must have reached the age of 35; must have resided in America for 14 years; and must be a "natural born Citizen" of the United States. Certainly there is no doubt that Senator MCCAIN is of sufficient years on this earth and in this country given that he has been serving in Washington for over 25 years. However, some pundits have raised the question of whether he is a "natural born Citizen" because he was born outside of the official borders of the United States.

Appendix B

JOHN SIDNEY MCCAIN, III, was born to American citizens on an American Naval base in the Panama Canal Zone in 1936. Numerous legal scholars have looked into the purpose and intent of the "natural born Citizen" requirement. As far as I am aware, no one has unearthed any reason to think that the Framers would have wanted to limit the rights of children born to military families stationed abroad or that such a limited view would serve any noble purpose enshrined in our founding document. Based on the understanding of the pertinent sources of constitutional meaning, it is widely believed that if someone is born to American citizens anywhere in the world they are natural born citizens.

It is interesting to note that another previous presidential candidate, George Romney, was also born outside of the United States. He was widely understood to be eligible to be President. Senator Barry Goldwater was born in a U.S. territory that later became the State of Arizona so some even questioned his eligibility. Certainly the millions of Americans who voted for these two Republican candidates believed that they were eligible to assume the office of the President. The same is true today.

Because he was born to American citizens, there is no doubt in my mind that Senator MCCAIN is a natural born citizen. I recently asked Secretary of Homeland Security Michael Chertoff, a former Federal judge, if he had any doubts in his mind. He did not.

I expect that this will be a unanimous resolution of the Senate and I thank the Senator from Missouri for working with me on this.

Appendix B

I ask unanimous consent that the relevant excerpt from the Judiciary Committee hearing where Secretary Chertoff testified be made a part of the RECORD.

EXCERPT OF SECRETARY CHERTOFF TESTIMONY
FROM APRIL 2, 2008

Chairman LEAHY. We will come back to that. I would mention one other thing, if I might, Senator Specter. Let me just ask this: I believe—and we have had some question in this Committee to have a special law passed declaring that Senator McCain, who was born in the Panama Canal, that he meets the constitutional requirement to be President. I fully believe he does. I have never had any question in my mind that he meets our constitutional requirement. You are a former Federal judge. You are the head of the agency that executes Federal immigration law. Do you have any doubt in your mind—I mean, I have none in mine. Do you have any doubt in your mind that he is constitutionally eligible to become President?

Secretary CHERTOFF. My assumption and my understanding is that if you are born of American parents, you are naturally a natural-born American citizen.

Chairman LEAHY. That is mine, too. Thank you.