Buffalo Law Review

Volume 19 | Number 1 Article 9

10-1-1969

Constitutional Law—Exclusion of Congressman-Elect Who Met All Constitutional Qualifications Deemed Unconstitutional.

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RECENT CASES

CONSTITUTIONAL LAW—EXCLUSION OF CONGRESSMAN-ELECT WHO MET ALL CONSTITUTIONAL QUALIFICATIONS DEEMED UNCONSTITUTIONAL.

During the 89th Congress, a Special House Subcommittee investigated the expenditures of the Committee on Education and Labor, of which Adam Clayton Powell, Jr., was chairman. The Subcommittee found that Powell had deceived the House regarding travel expenses and that there was strong evidence showing Powell had directed illegal salary payments to his wife. No action was taken during the 89th Congress. However, before the 90th Congress was convened, Democratic members-elect voted to remove Powell from his position as Chairman of the Education and Labor Committee. When the 90th Congress convened in January, 1967, Powell was asked to step aside while the oath was administered to others. The House resolved that the Speaker appoint a Select Committee to determine Powell's eligibility. Powell was invited to testify before the Committee as to his qualifications, his involvement in contempt proceedings arising from a civil suit in New York, and the alleged official misconduct. Powell testified only as to his eligibility under the standing constitutional qualifications: age, citizenship and residency. Throughout the hearings, he maintained that the standing qualifications are the sole requirements for membership and that a member cannot be punished or expelled until he is seated. The Committee found that Powell met the standing qualifications but reported that he was in contempt of the courts of New York, had wrongfully used House funds and had made false expense reports of foreign trips. The Committee recommended that Powell be seated but that he be censured, fined $40,000 and deprived of his seniority. The House debated this proposed resolution and voted 222 to 202 against bringing it to a vote. An amendment was proposed calling instead for Powell's exclusion. The Speaker ruled that a majority vote, as opposed to the two-thirds vote required for expulsion, would be sufficient to pass the exclusion resolution. The amendment was passed 248 to 176; and the amended resolution was adopted by a vote of 307 to 116, thus excluding Powell and declaring his seat vacant. Powell and thirteen voters of the 18th Congressional District of New York brought suit in the District Court for the District of Columbia naming as defendants five members of the House and three House employees, directly involved in carrying out the House resolution; the Clerk, who refused to administer the oath; the Sargeant-at-Arms, who refused to pay Powell his salary; and the Doorkeeper, who threatened to deny Powell admission to the Chamber. Powell and his constituents requested three remedies: an injunction against the House and its employees to prevent them from carrying out their unconstitutional action; a writ of mandamus ordering that the House employees perform the services to which Powell was entitled; and a declaratory judgment that Powell's exclusion was unconstitutional. The district court dismissed the complaint for want of subject-matter jurisdic-

tion.[1] The Court of Appeals affirmed, holding that there was subject-matter jurisdiction, but that the "political question" doctrine rendered the case non-justiciable.[2] The Supreme Court granted certiorari.[3] When the case was heard by the Supreme Court, the 90th Congress had terminated, and Powell, re-elected as Congressman, had been seated in the 91st Congress. The Court affirmed the dismissal against the five Congressmen but reversed as against the three legislative employees. The Court remanded the questions of salary, fines and seniority to the District Court. *Held,* the House is without power to exclude a duly-elected member who satisfies the standing constitutional requirements. *Powell v. McCormack,* 395 U.S. 486 (1969).

Powell was a case of first impression. Although both Houses of Congress have sporadically excluded members-elect who met the standing requirements,[4] no case has been brought to the Supreme Court.[5] The only case of legislative exclusion considered by the Court on its merits[6] was *Bond v. Floyd,*[7] decided on first amendment grounds. The question of standing qualifications did not arise in *Bond* since the Legislature purported to judge only the sincerity with which Bond intended to comply with the standing oath requirement. Furthermore, *Bond* was not complicated by the "political question" doctrine which has no application when a state action is challenged.[8] *Bond* stands for the proposition that a state legislator cannot be excluded for exercising a constitutional right. *Powell,* on the other hand, holds that the House can only exclude a member-elect if he fails to meet the standing requirements.[9] Both cases fall within a broad area treated extensively by the Court in recent years, protection of the franchise.[10] Closely related to the right to effectively participate

1. Powell v. McCormack, 266 F.Supp. 354 (D.D.C. 1967) (however, the court's reasoning more strongly suggests a lack of justiciability based on the political question doctrine).
2. Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968).
3. Powell v. McCormack, 393 U.S. 949 (1968).
4. Comment, *Exclusion of a Member-Elect by a House of Congress,* 42 N.Y.U.L. REV. 716, 721-23 (1967); Comment, *Legislative Exclusion: Julian Bond and Adam Clayton Powell,* 35 U. CHI. L. REV. 151, 156-58 (1967).
5. 35 U. CHI. L. REV., *supra* note 4, at 152. Most state courts that have considered the problem of legislative exclusion have concluded that their state constitutions give broad exclusionary powers to the legislature; a few, however, have restricted the legislature to consideration of the standing requirements. A comprehensive list of state cases can be found, *id.* 159-60, n.61.
6. The Court dismissed Alejandrino v. Quezon, 271 U.S. 528 (1925), involving a legislative expulsion, as moot.
7. 385 U.S. 116 (1966). Bond had been excluded from the Georgia Legislature for statements against American military involvement in Vietnam. The Supreme Court held that the action of the legislature constituted interference with Bond's freedom of speech. Although Powell's support of the Black Power movement may have given the House additional impetus to exclude him, this aspect did not figure significantly in the case and was not even mentioned in the Court's opinion.
8. Baker v. Carr, 369 U.S. 186, 210 (1962).
9. There may be more than three: article I, § 6 states that a federal office holder is ineligible to be a member of either House; the fourteenth amendment prohibits seating a member-elect who has violated any previous oath to support the United States; and article VI, § 3 requires the taking of an oath to support the Constitution. Bond's exclusion was based on a Georgia analogue to the oath requirement.
10. *Baker v. Carr* marked an end to the Court's former policy of abstention on voting

in elections[11] is the right, claimed by Powell's constituents, to be represented by one's duly elected representative.

In *Bond*, the Court commented directly on the constitutional provision at issue in *Powell*:

> Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views. At the Constitutional Convention of 1787, Madison opposed a proposal to give to Congress power to establish qualifications in general. . . . Hamilton agreed with Madison that: 'The qualifications of the persons who may choose or be chosen . . . are *defined and fixed in the Constitution*; *and are unalterable by the Legislature* . . . . .'[12]

While *Powell* presented an original issue of American federal constitutional interpretation, there is a significant English precedent. John Wilkes, a member of Parliament, was expelled in 1764 for seditious libel[13] and later sentenced to prison by the courts. After his release, Wilkes was thrice elected to Parliament and each time declared ineligible.[14] Arguing that Parliament could only judge those qualifications fixed by law, Wilkes was finally seated in 1782 when the House of Commons voided its prior exclusions, declaring them "subversive of the Rights of the Whole Body of Electors of this Kingdom."[15] When the American Constitution was written, English law was thus fixed by the House of Commons' repudiation of any claim to judge other than standing qualifications.[16] Wilkes, a strong libertarian, was very popular in the colonies, and the memory of his case was still vivid during the Convention Debates five years later in 1787.[17] Although a legislative interpretation of English law made prior to the adoption of the Constitution cannot, of course, serve as binding precedent in an issue of constitutional interpretation, it strongly illuminates the words of the Framers.[18]

The pivotal issue in *Powell* is justiciability; the Court of Appeals found

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malapportionment cases by holding that a justiciable issue was presented and remanding the case for consideration. Gray v. Sanders, 372 U.S. 368, 381 (1963), initiated the 'one man, one vote' doctrine in statewide primaries for United States Senators and state officials; Reynolds v. Sims, 377 U.S. 533 (1964), extended the principle to apportionment of seats in state legislatures.

11. "As long as ours is a representative form of government, and our legislatures are those instruments of government elected by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

12. Bond v. Floyd, 385 U.S. 116, 135-36, n.13 (1966) (emphasis added).

13. 15 Parl. Hist. Eng. 1393 (1764), *cited in* Powell v. McCormack, 395 U.S. 486, 527 (1969).

14. 11 L. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 207-15 (1956).

15. 22 Parl. Hist. Eng. 1411 (1782).

16. English law remains the same today. *See* MAY'S PARLIAMENTARY PRACTICE 105-08 (1964).

17. R. POSTGATE, THAT DEVIL WILKES 171-74 (1929).

18. *See generally* C. WARREN, THE MAKING OF THE CONSTITUTION 420-22, 424 (1928).

that although it had subject-matter jurisdiction, certain elements of the case rendered it non-justiciable. Subject-matter jurisdiction arises from the court's authority to hear a case;[19] justiciability involves the discretion of the court to exercise or refuse to exercise its jurisdiction. One aspect of justiciability, the political question doctrine,[20] arises from a conflict between two disparate doctrines, separation of powers among co-equal branches and judicial interpretation of the Constitution as enunciated in *Marbury v. Madison*.[21] It has been variously understood as arising solely as a matter of constitutional interpretation,[22] i.e., that the Constitution, by committing authority to another branch of government, precludes judicial review; or as a doctrine judicially created to avoid unseemly, unsuitable or politically dangerous conflict with a coordinate branch; or as a judicial doctrine acknowledging the courts' functional inability to deal with certain issues.[23] Formulation of a doctrine of judicial reticence indicates the courts' awareness of the anti-majoritarian nature of judicial review and reflects respect for the opinion of the people as it is expressed by their elected representatives.[24] The doctrine was comprehensively defined and delimited in *Baker v. Carr*.[25] Two problem areas were definitively resolved: the political question doctrine applies only to prospective conflicts between coordinate branches of the federal government and has no applicability to state-federal conflicts;[26] the doctrine should be most sparingly invoked when constitutionally protected individual rights are involved.[27] The *Baker v. Carr* test proposes six criteria; a finding that any one is "inextricable from the case at bar" requires a finding of non-justiciability. A "textually demonstrable constitutional commitment of the issue to a coordinate [branch]"[28] precludes judicial review. In *Powell*, a finding on this issue for

19. In a federal issue controversy such as *Powell*, the requirements of subject matter jurisdiction are: (1) that the case be a "case or controversy" within the meaning of article III § 1; (2) that it arise under the Constitution, laws or treaties of the United States, article III § 1; and (3) that the federal court be granted jurisdiction by an act of Congress.

20. The two terms are sometimes used interchangeably although justiciability, as defined in *Baker v. Carr* at 198 and 217, is a broader concept, involving the necessity of legal principles, standards and remedies with which to resolve the controversy as well as the problem of coexistence with coordinate branches of government.

21. 5 U.S. (1 Cranch) 137 (1804).

22. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2-10 (1959).

23. *See* Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966) and Comment, *Expulsion of a Member-Elect by a House of Congress*, 42 N.Y.U.L. REV. 716, 726 (1967).

24. Sharpf, *supra* note 23, at 588; McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUSTON L. REV. 364-65 (1966).

25. 369 U.S. 186, 217 (1962).

26. "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Id.* at 210.

27. "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed [the apportionment cases] show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." *Id.* at 217.

28. *Id.*

the purpose of evaluating the case's justiciability is simultaneously a resolution of the conflicting constitutional interpretations which gave rise to the *Powell* case. The second criterion requires that the court have "judicially discoverable and manageable standards for resolving"[29] the controversy.

Powell presents a problem of remedies arising from the possible application of the Speech or Debate clause[30] as a bar to suitable relief. Issuance of mandamus against legislators or their employees has never been considered by the Court. Actions for damages have been allowed against legislative employees but no actions arising from legislative activities have ever been allowed against federal or state legislators.[31] The third basis for evaluation is the "impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."[32] This standard encompasses the doctrines of primary jurisdiction and ripeness which refer primarily to review of administrative agency decisions. It is clearly inapplicable to the instant case since no initial policy decision is necessary nor could a policy decision be made elsewhere since it is the court's function to adjudicate clearly defined issues requiring constitutional interpretation. The next test, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government,"[33] requires refinement before it is applied. Whenever a court, in the course of settling a controversy, finds a legislative action unconstitutional, it is expressing a certain measure of disrespect for a coordinate branch. However, most such cases, as distinguished from *Powell*, do not involve the legislature as a defendant. A constitutional interpretation in itself cannot be considered to express disrespect; however the desirability of avoiding direct confrontation with a coordinate branch may limit the range of available remedies. The two final criteria, "an unusual need for unquestioning adherence to a political decision already made" and the "potentiality of embarrassment from multifarious pronouncements by various departments on one question," were intended to cover the field of foreign

29. *Id.* Strictly speaking, the requirement applies to all controversies and transcends the narrow bounds of the political question doctrine.

30. U.S. CONST. art I, § 6. "The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session . . . *and for any Speech or Debate in either House, they shall not be questioned in any other place.*" (Emphasis added.) This clause is interpreted in Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application . . . to resolutions offered . . . and to the act of voting. . . . In short, to things generally done in a session of the House by one of its members in relation to the business before it.

31. *Id.* at 205; Dombrowski v. Eastland, 387 U.S. 82, 85 (1966). In both *Kilbourn* and *Dombrowski*, the Court affirmed dismissals as to the legislators but reversed dismissals as to the legislative employees. Two actions against legislators alone were held to be barred by the Speech or Debate clause United States v. Johnson, 383 U.S. 169 (1966), reversing a criminal conviction, and Tenney v. Brandhove, 341 U.S. 367 (1951), affirming dismissal of a suit for damages.

32. Baker v. Carr, 369 U.S. 186, 217 (1962).

33. *Id.*

relations and are not relevant to this case.[34] No single criterion conclusively commands a finding of non-justiciability; the only basis for such a finding would seem to be the unavailability of a remedy which would be both suitable for Powell and not unduly disrespectful to the House, a combination of the second and fourth elements.

The Court reached a consideration of the constitutional issue and concluded that the standing qualifications are exclusive qualifications and the only grounds upon which a member can be denied his seat. The Court found the case was not rendered moot by Powell's seating in the 91st Congress; the salary claim was sufficient to maintain the suit.[35] The Court found it unnecessary to rule on the immunity of elected representatives under the Speech or Debate clause since their presence was not essential to maintaining this suit. The Court affirmed the district court decision insofar as it had dismissed the suit against House members; however, the Court ruled that a suit could be maintained against House employees without violating the spirit of the Speech or Debate clause.[36] The respondents contended that the resolution was in essence an *expulsion* rather than an *exclusion* and should hence be evaluated according to the constitutional provision for expulsion.[37] Arguing that the two-thirds vote required for expulsion was in fact obtained for the final resolution, the respondents sought to avoid a court interpretation of the exclusion clause, "Each House shall be the Judge of the . . . Qualifications of its own Members."[38] The Court analyzed the history of the Select Committee's original resolution for punishment rather than exclusion, the subsequent amendments for exclusion, and the pattern of voting, and concluded that although it was impossible to determine with certainty, it was unlikely that the two-thirds vote required for expulsion would have been forthcoming had the issue been expulsion.[39] The Court therefore treated the resolution as an action

34. *Id. See* 35 U. CHI. L. REV. *supra* note 4, at 162 n.83.

35. Although one remaining live issue is generally sufficient to sustain an action, the only case in point, Alejandrino v. Quezon, 271 U.S. 528 (1926), was dismissed as moot after Alejandrino, an appointed member of the Philippine Legislature, had been reseated and only his claim to 'emoluments' remained. The Court distinguished *Alejandrino* on the grounds that Alejandrino had failed to amply plead his salary claim and the Declaratory Judgment Act had not yet been passed, allowing the Court no alternative to coercive relief. A further distinction, not articulated by the Court, arises from Alejandrino's status as an appointed rather than an elected member; protection of the franchise was not at issue.

36. The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. . . . Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves.

Powell v. McCormack, 395 U.S. 486, 505 (1969).

37. U.S. CONST. art. I, § 5, clause 2. "Each House may . . . punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a member."

38. U.S. CONST. art. I, § 5, clause 1.

39. The Select Committee's recommendation for seating and punishment was defeated by a slight margin, 220 to 200. The subsequent amendments to exclude Powell were passed by less than a two-thirds majority after the Speaker had ruled that the vote was for exclusion and only a majority would be necessary to pass the amended resolution. Faced

governed by the exclusion clause. The respondents then asserted that the case was non-justiciable because an appropriate remedy could not be fashioned and because the Constitution allocates to the House all adjudicative power to determine a member's qualifications. They argued that coercive relief against officers of the House is precluded by the Speech or Debate clause. The Court declined to rule on this question since a declaratory judgment, non-coercive relief, had been requested and could be granted.[40] The Court recognized that a consideration of the textual commitment to the House involved a decision on the basic issue presented by the case, the scope of the House's judging power. The Court examined the pre-convention precedents as well as the Constitutional Convention debates to discover the intention of the Framers and found preponderant evidence to support Powell's restricted interpretation of the House grounds for exclusion. The Court found further that the broad interpretation of Congressional power urged by the respondents would effectively nullify the expulsion clause. If a member could be excluded for any reason by a simple majority vote, the two-thirds vote required for expulsion would be a meaningless requirement. Chief Justice Warren, speaking for the Court, expressed a firm conviction regarding the Framer's intentions, but said that had the issue been evenly weighted on both sides, the Court would have favored a narrow interpretation of the House's exclusionary power, not so much to protect the rights of the Representative as to insure the rights of the electorate. Justice Douglas, in his concurring opinion, more strongly emphasized this aspect of the decision.

> At root of all these cases, however, is the basic integrity of the electoral process. Today we proclaim the principle of 'one man, one vote'. When that principle is followed and the electors choose a person

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with the certainty that the resolution would muster a majority vote and the conviction that Powell deserved punishment, many representatives who had originally favored the lesser punishment suggested by the Select Committee cast their votes for the amended resolution for exclusion. Had a two-thirds vote been required, Congressmen favoring lesser punishment or harboring doubts as to the constitutionality of such an exclusion, would not have supported the resolution but instead would have used their voting power to secure a compromise. *See* Powell v. McCormack, 395 U.S. 486, 510-11 (1969).

40. The Court did not set any guidelines for further proceedings nor did it suggest how or from whom Powell could recover his salary. Although the Court did not treat the issue of coercive relief against House employees, it did remand the case to the district court to enter the declaratory judgment and consider issuance of a writ of mandamus, a coercive remedy, to compel the release of Powell's back salary. *Id.* at 551. Since the case was dismissed below on the grounds of non-justiciability, the issue of coercive relief was not currently before the Court. *Id.* at 501-02 n.16. While the Court's practice of remanding those issues that were not initially treated below may be generally sound, it does not seem appropriate to the legal issues of this case. Prerequisite to a finding of justiciability is the existence of an appropriate remedy. If there is ultimately no judicial remedy by which Powell can recover his salary, the case will retrospectively have shown itself to be non-justiciable. However, the declaratory judgment, as inconclusive as it appears, may prove a sound resolution for all parties to this controversy, Powell, the House and the Court. Powell may need no more than a declaratory judgment either because he only wanted vindication and has no interest in pressing his salary claim or because the judgment will enable him to reach an out of court settlement with the House. The Court's issuance of a declaratory judgment avoids a confrontation between the Court and the House while allowing the Court to make a timely constitutional interpretation.

> who is repulsive to the Establishment in Congress, by what Constitutional authority can that group of electors be disenfranchised?[41]

The Court parenthetically touched several issues none of which were essential to this litigation but which may intimate future decisions just as a careful reading of the apportionment cases[42] and *Bond*[43] seem, at least in hindsight, to have pre-ordained the outcome of *Powell*. In the *Powell* opinion, the Court's speculations and asides, taken as a whole, indicate an ever growing concern with the voters' right of free political expression and a correspondingly narrowing view of the prerogatives and immunities of the legislature. After dismissing the complaint against the House members but allowing it against House employees, the Court carefully left open the issue of legislators' immunity.[44] The Court explained without comment, Powell's argument that the Court should draw a distinction between declaratory relief sought against members of Congress and an action for damages or criminal prosecution.[45] The Court's gratuitous inclusion of this argument together with its subsequent treatment of legislative immunity in terms of social utility rather than traditional privilege suggest that the Court may allow certain actions against legislators in the future. The Court identifies two sound reasons for legislative immunity: insurance of freedom of expression and action for individual legislators[46] and prevention of impediments to the legislative process.[47] Since a legislator incurs no personal liability from a declaratory judgment, so long as he heeds it in his future conduct,[48] and since a legislator must even now file to dismiss and argue the issue of immunity[49] and would probably prepare a defense on the merits should he not prevail on the issue of immunity, it does not seem that the legislator's freedom of action or the legislative process would be greatly impeded by such an action, particularly if the legislator were not required to personally appear in court.[50] While considering the question of whether two-thirds of the House members would have cast

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41. *Id.* at 553.
42. *See supra* note 10.
43. Bond v. Floyd, 385 U.S. 116 (1966).
44. *See* Powell v. McCormack, 395 U.S. 486, 506 n.26 (1969).
Given a disposition of this issue, we need not decide whether under the Speech or Debate clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available.
45. *Id.* at 500 n.18.
46. "Legislative immunity does not, of course, bar all judicial review of legislative acts. . . . It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Id.* at 503.
47. "The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks." *Id.* at 505.
48. Nor would he be liable for a coercive remedy such as mandamus or injunction unless he were to disobey the court.
49. Powell v. McCormack, 395 U.S. 486, 505 n.25 (1969).
50. "Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves." *Id.* at 505.

affirmative votes for the resolution had they considered it a resolution to expel rather than to exclude, the Court examined the House's power under the Expulsion clause[51] to punish a member for misconduct in a prior session. The Court surveyed House history and documents which convincingly assert that the House neither has nor should have the power to punish or expel members for misconduct occurring prior to the current session:

> Your committee are of the opinion that the House of Representatives has no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. This is a purely legislative body, and entirely unsuited for the trial crimes. . . . [T]he Constitution authorizes 'each House to determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.' This power is evidently given to enable each house to exercise its constitutional function of legislation unobstructed. It cannot vest in Congress jurisdiction to try a member for an offense committed before his election; for such offense a member, like any other citizen, is amenable to the courts alone.[52]

The Court makes no comment on the correctness of this interpretation but its inclusion, supported by two persuasive documents,[53] and the resemblance of the reasoning in the House document to the reasoning in the Court's discussion of the Speech and Debate clause is too close to be without implication. The Expulsion clause, like the Speech or Debate clause, was designed to protect the legislative process. Since offenses committed before election or in a previous session are unlikely to interfere with the passage of legislation in a current session, there seems to be no sound justification for retrospective punishment. The Court appears to be formulating a narrow concept of the legitimate uses of legislative immunity and punishment of individual legislators. Since a basic constitutional right, the right of the electorate to free political expression, is involved in excluding and expelling legislators, the courts may further impose the requirement that the legislature bear the burden of showing that there are no other available means to achieve orderly, uninterrupted legislative progress.[54] *Powell* holds that the House's exclusionary power is restricted to the standing requirements. If in the future the Court interprets the Expulsion clause[55] to permit punishment and expulsion only for behavior occurring within the current session, the House's power to take action against one of its members will be severely limited. If Powell treats the Court's comments as an invitation to secure

51. *See supra* note 37.

52. H.R. REP. *No.* 815, 44th Cong., 1st Sess., 2 (1876); Powell v. McCormack, 395 U.S. 486, 509 n.29 (1969).

53. Powell v. McCormack, 395 U.S. 486, 509 (1969).

54. The court in effect, allocated that burden to Congress in *Powell.* "Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and in extreme cases, to expel a member with the concurrence of two-thirds." *Id.* at 548.

55. *See supra* note 37.

judicial review of his fines and loss of seniority,[56] both of which were based on misdeeds of a prior session, we may have the answer in the near future. As Powell's constituents were deprived of their political voice by the House's refusal to seat him, so they are still deprived of earned political power by Powell's loss of seniority.[57]

Speculation on possible future Court decisions may be futile at this point since two new justices have been appointed, one of them as Chief Justice. In this respect *Powell* offers another vein for speculation. Warren Burger, then Chief Judge of the District of Columbia Court of Appeals, now Chief Justice of the United States, wrote a comprehensive opinion in dismissing Powell's claim at the appellate level. A comparative reading of Chief Justice Warren's Supreme Court opinion and Burger's appellate opinion[58] reveals a divergence of opinion on the functions and role of the federal courts, which may indicate the Court's future direction. Both judges found that the claim satisfied federal jurisdictional requirements: it arose under the Constitution, was a case or controversy and was included within a statutory grant of jurisdiction.

Justiciability was the pivotal issue. Should the Court employ its discretionary powers to exercise or to decline jurisdiction? Applying the same test, Berger and Warren reached opposite conclusions. Burger elected not to base his opinion on the "textual commitment to a coordinate branch" aspect of justiciability but he did comment upon it. Using the text of *Baker v. Carr,* Burger narrowed Warren's test by suggesting that so long as a textual commitment to the House *in some measure* could be found, the Court should not define the extent of the commitment.[59] Although Burger did not rely on a textual commitment to the House, he found that it would have been an adequate basis for a finding of non-justiciability had he not discovered more compelling grounds for the same conclusion.[60] The next criterion of the *Baker v. Carr*[61] test requires "judicially discoverable and manageable standards for resolving" the issue. Burger found

56. Powell's loss of the chairmanship of the Education and Labor Committee is not open to challenge since the Democratic members voted him out.

57. It is of course possible that the Court will not afford the same legal protection to earned political power as it has to the right of constituents to have their duly elected representative seated.

58. Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968).

59. This interpretation was arrived at through the use of italics, footnote and innuendo. In the opinion Burger stated on page 594:

> On its face, section 5 commits the power to judge qualifications to the House *in some* measure.[38]

Footnote 38 read:

> Deciding whether a matter has *in any measure* been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation. . . Baker v. Carr, supra at 211, 82 S. Ct. at 706 (emphasis added).

The opinion then continued:

> [I]t is clear that a general power of judging has been committed to the House. If other factors, now to be considered, render the claims inappropriate for consideration, we need not rely on what seems to be a textual commitment.

60. *Id.*

61. 369 U.S. 186, 217 (1962).

this requirement to be inextricably bound with two other criteria, "the impossibility of the court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government" and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[62] Burger thought that coercive relief would certainly exhibit a lack of respect for the House and would create an embarrassing situation for the government. He rejects declaratory relief as inappropriate because the case was not an archetypal prospective controversy, and declaratory relief would not automatically terminate the conflict. Although the posture of the case was different then than it was when the Supreme Court heard it, the 90th Congress not having yet expired, the same objections obtained to the Supreme Court's grant of declaratory relief. Powell's claim to his salary requires further steps as his claim to his seat would have, had Burger granted declaratory relief. Burger, having found that only coercive relief would be adequate protection for the rights asserted and that coercive relief would express disrespect for a co-ordinate branch, concluded that *Baker v. Carr* rendered the case non-justiciable. Warren, having settled on declaratory relief, easily dismissed the issue of disrespect by pointing out that respect for coordinate branches does not abridge the Court's historic function of declaring legislative actions unconstitutional. Implicit in both judges' use of the *Baker v. Carr* test is a complex of value judgments.[63] Warren placed great value on the rights of voters, on free and effectual political expression, and a correspondingly low value on the privileges of government insofar as they are not functionally justifiable. The House's interest in maintaining its dignity and reputation is briefly mentioned at the very end of the opinion and appears to have had very little bearing on the Court's decision.[64] Burger saw the citizen's right to political expression through representative government as limited to the right to choose his representative, but not extending so far as to see him properly seated in the legislature.[65] Burger recognized the direction the Supreme Court might take on appeal but did not let it control his decision.

> . . . lurking in the language of the Court in *Bond* can be detected some hint of a possible relationship between first amendment rights to

62. *Id.* at 217.

63. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH, 39 (1962).

64. Powell v. McCormack, 395 U.S. 486, 548-49 (1969). A more ample discussion of the relative value of official dignity is found in The New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964):

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. . . . Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. . . . If judges are to be treated as 'men of fortitude, able to thrive in a hearty climate . . . surely the same must be true of other government officials. . . .'

65. Powell v. McCormack, 395 F.2d 577, 497 (D.C. Cir. 1968).

> political expression and the related rights of voters to have their views articulated for them in Congress.[66]

Burger chose instead to maximize the government's dignity and the harmony of the coordinate branches.

> . . . if we view the risk of conflicting pronouncements by the House and the courts . . . the potential for embarrassment is obvious. A judicial mandate to seat Mr. Powell would in effect be a command to the Speaker to administer the oath contrary to the terms of House Resolution 278.[67]

Judge Burger concluded his opinion by affirming the concept of independent coordinate branches of government, reflecting that it is all for the best that some wrongs are without remedy and ultimately assigning a less than equal role to the Court.

> Conflicts between our co-equal federal branches are not merely unseemly but often destructive of important values.[68]
>
> That each branch may occasionally make errors for which there may be no effective remedy is one of the prices we pay for this independence, this separateness, of each co-equal branch and for the desired supremacy of each within its own assigned sphere . . . .
>
> That courts cannot *compel* the acts appellants would have us order in this case recedes into relative insignificance alongside the blow to representative government were judges either so rash or so sure of their infallibility as to think they should command an elected co-equal branch in these circumstances.[69]

What were "these circumstances" as the Warren Court saw them? The members of the 18th Congressional District of New York were deprived of their first amendment right to free political expression because the House acted in violation of the Constitution and refused to seat their duly-elected representative. The Court's remedy for Powell may have been less than optimal in terms of certainty of execution. However, coming to terms with the situation seems preferable to ignoring it entirely. The doctrine of non-justiciability, unlike other techniques of judicial avoidance, once applied precludes any future court determination of the issue.[70] It cannot be argued that a better case, i.e., one within the *Bond* mold, could have been considered at a subsequent date had *Powell* been declared non-justiciable, because violation of a basic constitutional right, the first amendment right of Powell's co-plaintiffs, his electors, was alleged and accepted by the Court. Although there could have been a more attractive plaintiff, there could not have been a better case. The decision of the Supreme Court in *Powell* was supported by eight justices. It is difficult to estimate at this time

66. *Id.* at 598.
67. *Id.*
68. *Id.* at 604. The *values* are not enumerated; *unseemliness* seems to be the point.
69. *Id.* at 605.
70. Scharpf, *supra* note 23, at 538.

how profound or lasting an influence Warren had on the Court; nor is it now possible to separate Warren's influence from the independent consensus of the remainder of the Court. If there is a marked change in the Court's direction, it will probably be evidenced more by the Court's use of the doctrine of justiciability to abstain from decision than by judicial pronouncements on the issues that come before it.

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