—to refrain from sidestepping this duty merely because the framing of judicial relief presents large difficulties,[4] and to take cognizance of a case seeking declaratory relief even where an injunction cannot properly be obtained.[5] By strict logic the same approach should apply when there is a hypothesis of justiciability or at least a disinclination to enter a ruling of non-justiciability. Yet there have been instances when the courts have bypassed crucial jurisdictional issues and disposed of cases on the merits.[6] I think the spirit of those cases also justifies the course I follow—of deciding the merits on one key point and yet refraining, in the exercise of discretion, a full adjudication on the merits.

The key point, to me, is that Congressman Powell erred in his assumption that his satisfaction of the Constitutional requirements (of residence, citizenship and age) meant that he had to be seated, and that grounds justifying expulsion could only be applied to those who had already been seated. My ruling on the merits of this Constitutional issue leads to the conclusion that the House had legislative jurisdiction to consider and appraise the activities and fitness of appellant Powell at the time he presented his credentials. It is not a full adjudication of the merits of the claim of appellant Powell that he was wronged. It does not necessarily mean either that the House acted properly when it failed to heed the ground rule of a ⅔ vote put forward by Congressman Curtis as the assumption of his motion to exclude, or that a court considering a different prayer for relief would be disabled from saying so upon a full consideration of Powell's case on its merits.

The case before us presents problems of confrontation with a coordinate branch and of molding relief. These are considerations that lead a court in some instances to find non-justiciability of the issue for any court.[7] They may also properly be invoked, I think, as backdrop and perspective

[4] Wesberry v. Sanders, 376 U.S. 1 (1964).

[5] Zwickler v. Koota, 389 U.S. 241 (1967).

[6] *See, e.g.,* Secretary of Agriculture v. Central Riog Ref. Co., 338 U.S. 604, 619-20 (1950); Ex Parte Bakelite Corp., 279 U.S. 438, 448 (1929).

[7] Baker v. Carr, 369 U.S. 186 (1962).

for a ruling to decline to provide a full adjudication on the merits, even assuming justiciability. My reasoning is that the confrontations would likely have evolved in a quite different way if appellant Powell had recognized a power to exclude on grounds of misconduct (albeit on ⅔ vote) and had conducted himself on this premise from the start. Hence I do not think it mandatory for a court to consider and determine the constitutional issue as he has chosen to frame it, from an erroneous premise; and specifically, I think it proper to refrain from a full determination of the merits in a case where petitioner is seeking an extraordinary remedy yet has failed to invoke to the fullest extent the remedies and procedures available within the legislative branch.

Filed July 30, 1968. Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,897 September Term, 1967

ADAM CLAYTON POWELL, JR., et al., *Appellants,*

v.

JOHN McCORMACK, Speaker of the House of Representatives, et al., *Appellees*

Before: Burger, Circuit Judge, in Chambers.

ORDER

It is ordered, *sua sponte,* that the opinion filed herein on February 28, 1968, is amended as follows:

On Page 2, line 2, delete the fourth word "of".

On Page 19, line 8, change "will present" to "presents".

On Page 25, line 11, add "the Constitution" after " 'arises under' ".

On Page 28, lines 10-11, change these lines to read: "characterized his role as partly a diplomatic resident of a 'foreign' state and partly a territorial delegate to Con-"

On Page 28, line 31, add a comma after "then" before "culmi-"

On Page 28, last line, insert "to appear" after "refused".

On Page 32, omit the last sentence of the carry-over paragraph, the sentence that begins "assuming that . . .

On Page 41, line 12, replace "commends itself to consideration" with "merits some comment."

On Page 43, next to the last line, replace "challenged in" with "considered by".

On Page 45, line 6, before "phrased" insert "Chief Judge Sobeloff".

On Page 47, lines 4-5, change these to read: "182, it would seem, although we need not decide, that, however characterized, the Clause would operate as a bar to the maintenance of this suit.[52]"

On Page 52, line 13, change ''could'' to ''might''.

On Page 52, line 20, omit ''thus''.

On Page 53, line 1, replace ''acts sought to be ordered'' with ''acts Appellants would have us order''.

On Page 53, line 3, replace ''they'' with ''judges''.

Filed Feb. 28, 1968. Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA DISTRICT

No. 20,897 September Term, 1967.

Civil 559-67

ADAM CLAYTON POWELL, JR., et al., *Appellants,*

v.

JOHN W. MCCORMACK, Speaker of the House of Representatives, et al., *Appellees*

Appeal from the United States District Court for the District of Columbia.

Before: Burger, McGowan and Leventhal, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is order and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby affirmed.

Per Circuit JUDGE BURGER.

Dated: February 28, 1968.

Separate concurring opinion by Circuit Judge McGowan.

Separate opinion by Circuit Judge Leventhal concurring in the result.

Filed Dec. 2, 1968. Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA DISTRICT

No. 20897

ADAM CLAYTON POWELL, JR., et al., *Appellants,*

v.

JOHN MCCORMACK, et al., *Appellees.*

STIPULATION DESIGNATING SUPPLEMENTAL PORTIONS OF RECORD

The Clerk will please prepare, for transmission to the Clerk of the Supreme Court of the United States for use in *Powell* v. *McCormack,* No. 138, O.T. 1968, the following additional portions of the record in this Court:

1. Docket entries in 20897, United States Court of Appeals for the District of Columbia Circuit;
2. Letter of April 24, 1967, from the clerk to counsel regarding preparation for argument;
3. Appellants' Motion with respect to Order of the Court dated April 27th (filed May 4, 1967);
4. Appellees' Response to Motion with respect to Order of the Court of April 27th (filed May 9, 1967);
5. Per Curiam Order dated May 10, 1967, regarding provisions of the Order of April 27, 1967, etc.;
6. Appellants' Motion to File Petition for Writ of Certiorari in Lieu of Brief Pursuant to Order of May 10, 1967 (filed June 2, 1967);
7. Appellees' Memorandum with respect to Appellants' Motion to File Petition for Writ of Certiorari in Lieu of Brief (filed June 9, 1967);
8. Per Curiam Order of the Court dated June 19, 1967;
9. Appellants' Motion for Leave to File, Time Having Expired, Motion for Extension of Time to File Brief (filed June 21, 1967);
10. Order entered June 27, 1967;
11. Appellants' Motion for Leave to File Brief, Time Having Expired (filed July 10, 1967);

12. Order entered July 12, 1967;
13. Letter from counsel designating record for use on certiorari filed May 28, 1968; and
14. Order per Judge Burger amending Opinion filed on February 28, 1968 (filed July 30, 1968).
15. This designation.
16. Clerk's certificate.

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December 2, 1968